

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLORADO**

In re:)	
)	Chapter 15
NILEX USA INC.)	Case No. 22-14719
)	
Debtor in Foreign Proceeding.)	

**PETITION FOR RECOGNITION AS FOREIGN MAIN PROCEEDING
PURSUANT TO SECTIONS 1515 AND 1517 OF THE UNITED STATES
BANKRUPTCY CODE AND RELATED RELIEF**

KSV Restructuring Inc. (“**KSV**”), in its capacity as Proposal Trustee (the “**Proposal Trustee**”) and authorized foreign representative of Nilex USA Inc. (together with Nilex Inc. the “**Nilex Debtors**”) in the proceeding (the “**Canadian Nilex USA Proceeding**”¹), commenced by the filing of a notice of intention to make a proposal (an “**NOI**”) pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”) on November 24, 2022 and currently pending in the Court of King’s Bench of Alberta, Canada (the “**Alberta Court**”) by and through its undersigned counsel, Lewis Roca Rothgerber Christie LLP, respectfully files the official form petition and this petition (together, the “**Petition**”) pursuant to section 1515 of title 11 of the United States Code (the “**Bankruptcy Code**”) seeking entry of an order recognizing the Canadian Nilex USA Proceeding as a foreign main proceeding pursuant to section 1517 of the Bankruptcy Code, thereby granting related relief pursuant to section 1520 of the Bankruptcy Code and additional relief pursuant to section 1521 of the Bankruptcy Code. In the alternative, should the Court fail to recognize the Canadian Nilex USA Proceeding as a foreign main proceeding (either in whole or in part), the Proposal Trustee seeks recognition of the Canadian

¹ The Canadian Nilex USA Proceeding, together with similar proceedings commenced by Nilex Inc. on October 27, 2022 are collectively referred to herein as the “**Canadian Proceedings**.”

Nilex USA Proceeding as a foreign nonmain proceeding, as defined in section 1502(b) of the Bankruptcy Code, and seeks additional relief available under section 1521 of the Bankruptcy Code.

JURISDICTION AND VENUE

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and (b) and 1334(a) and (b) and 11 U.S.C. §§ 109 and 1501 of the Bankruptcy Code. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P). Venue is proper in this district pursuant to 28 U.S.C. § 1410(1).

BACKGROUND²

Nilex USA is seeking protection under chapter 15 of the Bankruptcy Code. The principal purpose of these proceedings, along with the Canadian Proceedings is to: (a) create a stabilized environment to allow the Nilex Debtors to complete the transaction identified in the sale process commenced prior to these proceedings (the “**Sale Process**”) by Nilex Inc. (“Nilex Canada”), which was carried out by an investment banker it retained Valitas Capital Partners (“**Valitas**”), in respect of the assets of the Nilex Debtors and approved by the Alberta Court on November 8, 2022, which going concern transaction is in the best interests of the Nilex Debtors and their stakeholders; and (b) if appropriate, file a proposal in the Canadian Proceedings for the benefit of the creditors of the Nilex Debtors.

² A copy of the Declaration of Robert Kofman, a Managing Director of KSV, in support of: (I) Petition for Recognition as a Foreign Main Proceeding; (II) Motion for Order to Show Cause With Temporary Restraining Order and Preliminary Injunctive Relief; and (III) Motion for Order Approving Sale of Assets Free and Clear of Liens, Claims and Interests and Granting Related Relief (the “**Kofman Declaration**”) is filed simultaneously herewith. The facts stated in this Petition are supported by the Kofman Declaration.

I. The Structure and General Operations of the Nilex Debtors.

Nilex Canada is a corporation formed under the laws of Alberta, Canada with its headquarters and principal place of business located in Edmonton, Alberta, Canada. Nilex Canada has been operating in the geosynthetics industry providing civil environmental products and technologies since 1977. The Nilex Debtors provide environmental solutions that are used in road building, erosion and sediment control, water management and containment. The Nilex Debtors also offer conversion and fabrication options, along with customization of standard products to site and project-specific requirements. Nilex Canada leases its head office in Edmonton and also operates from leased premises in Calgary, Saskatoon, Surrey and Toronto. Nilex Canada presently has approximately 70 full-time employees and 44 seasonal employees. Nilex Canada is the 100% shareholder of Nilex USA, which operates from leased premises in Utah and Colorado. Nilex USA has approximately eight full-time employees.

Canadian Imperial Bank of Commerce (“**CIBC**”) is the Nilex Debtors’ senior secured lender. As of October 17, 2022, CIBC was owed approximately \$13.42 million by the Nilex Debtors.³ PEF 2010 Nilex Investment Limited Partnership (“**Fulcrum**”) has been Nilex Canada’s controlling shareholder since 2013. Fulcrum is also a secured creditor of Nilex Canada. Fulcrum has contractually subordinated the amounts owed to it by Nilex Canada to CIBC. As of August 31, 2022, Fulcrum was owed approximately \$33.8 million by Nilex Canada. CIBC has and is continuing to provide funding to Nilex Canada for the benefit of the Nilex Debtors during the Canadian Proceedings. CIBC’s post-filing advances are secured against the assets of the

³ Unless otherwise noted herein, all currency references are to U.S. dollars. Currently, the exchange rate is 1.33 Canadian dollars for each U.S. dollar.

Nilex Debtors pursuant to a Court-approved lender's priority charge authorized in the Canadian Proceedings.

II. Business Operations and Financial Performance of the Nilex Debtors.

Headquartered in Edmonton, Alberta with operations in Canada and the United States, the Nilex Debtors are providers of environmental solutions that are used in road building, erosion and sediment control, water management and containment. As set forth below, due to the COVID-19 pandemic, rising material costs, supply chain issues and slow-downs in the construction industry in those regions of Canada and the United States where the Nilex Debtors conduct operations, the Nilex Debtors have incurred significant and recurring losses for several consecutive years.

Nilex Canada had sales in each of 2020 and 2021 in excess of \$37 million. As of August 31, 2022, it had assets with a book value of approximately \$25 million. As of October 17, 2022, its obligations to CIBC totaled approximately \$13.42 million (the "**CIBC Debt**") and its obligations to Fulcrum totaled, as of August 31, 2022, approximately \$33.8 million. As of the NOI filing date of October 27, 2022, Nilex Canada owed its 232 unsecured creditors \$9.17 million.⁴

Nilex USA's business is less significant than Nilex Canada's business, with sales of approximately \$4.4 million for the ten-months ending October 31, 2022.⁵

⁴ This amount excludes certain off-balance sheet obligations, including amounts that may be owing for terminated leases and to terminated employees.

⁵ Excluding off-balance sheet liabilities, including amounts owing to CIBC, certain employee claims and amounts owing for real property and equipment leases.

A summary of Nilex USA's assets as of October 31, 2022, is as follows:

<u>Description</u>	<u>Book Value (\$000s)</u>
Inventory	1,222
Accounts receivable	543
Cash	469
Fixed Assets	42
Other Assets	20
Total	2,296

As described further below, Nilex USA is a borrower under the credit agreement with CIBC, which is secured by all of Nilex USA's assets. Nilex USA has approximately 50 unsecured creditors with claims totaling approximately \$607,000 as of November 24, 2022 (being the date of its NOI filing), excluding amounts owed to its largest creditor, Nilex Canada, which total over \$4 million and which represents over 87% of Nilex USA's unsecured debt. The vast majority of Nilex USA's unsecured creditors, by number, are located in the United States, except for Nilex Canada.

III. The Credit Agreement.

Nilex Canada and Nilex USA, as borrowers, and CIBC, as lender, entered into a Credit Agreement dated June 1, 2018, whereby CIBC made available to the Nilex Debtors a revolving credit facility and term loan (as amended, the "**Credit Agreement**"). The obligations under the Credit Agreement are secured pursuant to, among other things, a general security agreement among Nilex Canada, Nilex USA and CIBC dated June 1, 2018. Nilex Canada's primary bank account is with CIBC. The Nilex Debtors operate a centralized cash management system wherein accounts receivable collections are paid into accounts, including blocked accounts, with CIBC and applied to the CIBC loan facilities (the "**Cash Management System**"). The Nilex Debtors are continuing and expect to continue to use the existing Cash Management System, including

the bank accounts and arrangements presently in place with CIBC, as authorized by the Alberta Court in the Canadian Proceedings. Absent the Forbearance Agreement (defined below), CIBC is not required to continue to advance any further credit facilities to the Nilex Debtors.

IV. Events Leading to the Commencement of the Canadian Proceeding.

The Nilex Debtors have incurred losses for several consecutive years. Losses have continued in recent years due to the Covid-19 pandemic, rising material costs, supply chain issues and slowdowns in the construction industry. The revenues of the Nilex Debtors are seasonal. Winter is its slowest season, with revenues gradually increasing in the spring and peaking in the summer months.

Factors outside of the Nilex Debtors' control have caused liquidity challenges. Given the seasonality of their business, the Nilex Debtors were facing a liquidity crisis in October 2022 which led to the commencement of the Canadian Proceedings. In particular, the Nilex Debtors' reduced revenues during the slower winter months, rising storage costs, rising inventory costs, high operating expenses, increasing low-cost competition, decreased customer capital spending due to the COVID-19 pandemic, and increased debt servicing costs resulted in serious liquidity challenges and a default under the Credit Agreement.

V. The Proposed Sale.

A. The Sale Process.

On October 6, 2021, Nilex Canada retained Valitas to conduct a sale process (the "**Sale Process**") for the business and assets of the Nilex Debtors. A summary of the Sale Process to-date is provided below:

- the Sale Process offered for sale the Nilex Debtors' business and assets;

- Valitas compiled a comprehensive list of over 400 prospective purchasers based on geography and industry;
- Valitas selected 16 of the prospective purchasers as strong acquisition candidates based on, *inter alia*, strategic fit. Nine of these parties confirmed their interest in the opportunity; and
- nine prospective purchasers, plus three additional strategic parties, performed due diligence, including reviewing the confidential information memorandum prepared by Valitas and information made available in a virtual data room. A subset of the prospective purchasers also conducted site visits and attended management meetings.

Valitas initially requested that prospective purchasers submit non-binding letters of intent in March 2022; however, none of the offers received were acceptable to the Nilex Debtors. At the time, the Nilex Debtors forecasted improved results for the balance of 2022 and believed that going back to prospective purchasers later in the year would result in a higher purchase price based on the forecasted improved results. Ultimately, the forecasted results did not materialize.

In August 2022, Valitas re-engaged with prospective purchasers and since that time has facilitated their due diligence. Valitas provided interested parties with a template term sheet to be used as the basis for submitting non-binding letters of intent. Several non-binding letters of intent were submitted in late September 2022.

On or around October 8, 2022, Valitas sent interested parties a process letter, which set out the Sale Process timelines (the “**Process Letter**”). The Process Letter, specified that, *inter alia*:

- interested parties were required to submit binding offers by no later than 3:00 pm (Mountain Time) on November 8, 2022 (the “**Bid Deadline**”) in the form of a template asset purchase agreement which was uploaded to the data room; and
- the Nilex Debtors’ objective was to enter into a binding agreement of purchase and sale (the “**APA**”) by no later than November 15, 2022.

The Sale Process timelines and milestones were, in part, a product of negotiations between the Nilex Debtors and CIBC pursuant to which CIBC agreed to fund these proceedings. The timelines and milestones were set out in a Forbearance Agreement dated October 17, 2022 (the “**Forbearance Agreement**”) between the Nilex Debtors and CIBC, which considered that the Sale Process had been ongoing for several months. Funding under the Forbearance Agreement was tied, *inter alia*, to the Nilex Debtors advancing the Sale Process in accordance with the agreed timelines and milestones in the Forbearance Agreement.

B. The Sale Process Results.

A summary of the Sale Process results is as follows:

- four going-concern offers were submitted;
- from the Bid Deadline until November 18, 2022, the Nilex Debtors, with the assistance of Valitas, the Proposal Trustee, the Nilex Debtors’ legal counsel and the Proposal Trustee’s legal counsel, worked with Terrafix Geosynthetics Inc. and Hanes Companies, Inc. (the “**Purchasers**”) and their legal counsel to finalize the terms of the APA; and
- the APA was executed on November 18, 2022.

C. The Sale Terms.

A summary of the APA is as follows:

Description	Canadian Transaction	US Transaction
Purchaser	Terrafix Geosynthetics Inc. (the “Canadian Purchaser”)	Hanes Companies, Inc. (the “US Purchaser”)
Purchased Assets	Substantially all assets of the Nilex Debtors.	
Purchase Price	The Purchase Price has been sealed pending further order of the Alberta Court.	
Deposit	The Purchasers have paid a deposit representing approximately 13% of the Purchase Price, which is being held in the Proposal Trustee’s trust account.	
Adjustment Mechanism	The estimated Purchase Price for the both the Canadian Transaction and the US Transaction is based on an Interim Statement of Adjustments. Within 60 days following Closing of each transaction, the applicable Vendor is to provide a Final Statement of Adjustments. The difference between the Interim Statement of Adjustments and the Final Statement of Adjustments shall be paid promptly by the applicable Vendor/Purchaser, which amount shall accrue interest at the Prime	

Description	Canadian Transaction	US Transaction
	Rate plus 1%.	
Locations	The Canadian Purchaser will assume the leases for Nilex Canada’s premises in Edmonton, Calgary and BC. The leases for Nilex Canada’s premises in Ontario and Saskatchewan will not be assumed by the Purchaser. Nilex Canada may continue to occupy the Ontario and Saskatchewan locations for up to six months in accordance with the Transition Services Agreement (“TSA”).	The leases for both US locations will not be assumed by the US Purchaser. The premises can be occupied by Nilex USA for a period of up to six months in accordance with the TSA.
Employees	<p>The Purchasers intend to offer employment to the vast majority of Nilex Canada’s employees in Canada and four of the eight Nilex USA employees. Certain of the employees who are not offered employment by the Purchasers will be offered the opportunity to provide transition services to the Purchasers pursuant to the TSA.</p> <p>All wages and vacation pay accrued to the Effective Date are for the account of the Nilex Debtors. Following closing, all wages and vacation pay accruing in respect of Transferred Employees will be for the account of the Purchasers from and after the Effective Date, as will wages and vacation pay for Transition Employees pursuant to the TSA, albeit Transition Employees will remain employees of Nilex Canada or Nilex USA. Payroll and benefits for any non-Transferred Employees and non-Transition Employees will remain the obligation of Nilex Canada or Nilex USA following the Effective Date.</p>	
Representations and Warranties	Consistent with the terms of a standard insolvency transaction, i.e., on an “as is, where is” basis, with limited representations and warranties.	
Closing	Subject to Alberta Court approval, (obtained on November 28, 2022), closing of the Canadian Transaction is contemplated to occur on or before December 16, 2022. The Outside Date is February 28, 2023.	Closing of the US Transaction is contemplated to occur promptly following US Court approval. The Outside Date is February 28, 2023.
Material Conditions	The only material condition precedent to the Canadian Transaction is Alberta Court approval (which has happened). The closing of the Canadian Transaction is not subject to US Court approval and/or completion of the US Transaction.	The only material condition precedent to the US Transaction is approval of the Canadian transaction by the Alberta Court and the US Court.

D. Transition Services Agreement.

Pursuant to the APA, the execution of the TSA by the Nilex Debtors and the Purchasers is a condition to closing of the Canadian Transaction and the US Transaction. The purpose of the TSA is for the Nilex Debtors to maintain in good standing, during these proceedings, certain

contracts and real property lease agreements until those locations can be vacated, at which time those leases are intended to be disclaimed by the Nilex Debtors. Also pursuant to the TSA, certain employees will remain employees of the Nilex Debtors during the transition period, but will provide assistance to the Purchasers as it relates to transition issues. As part of the TSA, the Purchasers are required to fund any costs incurred by the Nilex Debtors in providing the Transition Services (as defined in the TSA). The TSA also requires that the Purchasers fund a deposit equal to one month of the estimated transition costs. The TSA has a term of up to six months.

VI. Default Under the CIBC Credit Agreement.

The Credit Agreement provides that the CIBC Debt becomes immediately due and payable on the occurrence of an Event of Default (as defined in the Credit Agreement). The Nilex Debtors are in default under the Credit Agreement and, accordingly, on September 15, 2022, CIBC issued a Notice of Intention to Enforce Security pursuant to section 244 of the BIA. On October 17, 2022, CIBC and the Nilex Debtors entered into the Forbearance Agreement, which among other things, allows the Nilex Debtors, subject to the terms and conditions of the Forbearance Agreement, to continue to access the credit facilities under the Credit Agreement and to continue to use the Cash Management System to meet working capital requirements while the Nilex Debtors carry out the Sale Process and the Canadian Proceedings. CIBC has also agreed to temporarily forbear from enforcing its rights, subject to the terms and conditions of the Forbearance Agreement. Pursuant to the Forbearance Agreement, CIBC will apply the Nilex Debtors' post-filing receipts against their pre-filing indebtedness and new advances by CIBC to the Nilex Debtors during the Canadian Proceeding are to be secured by the Lender Priority Charge (as defined below).

As a result of the CIBC defaults and other issues, Nilex Canada decided to initiate restructuring proceedings by filing an NOI on October 27, 2022, while Nilex USA filed an NOI on November 24, 2022. The NOI filings were intended to provide the Nilex Debtors with the stability required to complete the Sale Process and the going concern transaction identified therein in the near term. The Sale Process was approved by the Alberta Court on November 8, 2022 and on November 28, 2022, the Alberta Court, among other things, approved the transaction contemplated by the APA described above. A motion seeking recognition of the order of the Alberta Court, among other things, approving a sale of the Nilex USA assets, has been filed herewith.

VII. The Canadian Proceedings.

The BIA governs the NOI process in Canada which includes the appointment of a Proposal Trustee. The BIA is a federal statute that governs a number of different insolvency proceedings to which individuals and corporations are subject, including bankruptcies, receiverships, and proposals proceedings. An NOI commences a proceeding under the BIA that allows financially troubled corporations the opportunity to restructure their affairs. It is often the first stage of a debtor in possession restructuring process under the BIA, which allows a company to restructure its financial affairs through a formal proposal to creditors (similar to filing a plan of arrangement and compromise). The NOI proceeding and eventual proposal provides an opportunity for a company to avoid forced liquidation in bankruptcy, permits an insolvent company to sell assets, subject to court approval, and allows creditors to receive compensation for amounts owing to them.

A Proposal Trustee is an independent licensed insolvency trustee who is appointed by the “Official Receiver” (which is a representative of the Office of the Superintendent in Bankruptcy

in Canada) to assist the company with the filing of its NOI and/or proposal and to monitor the debtor company's ongoing operations during the NOI proceeding. The Proposal Trustee's duties include monitoring the ongoing financial and other activities of a debtor company, reporting to the court on any major events that might impact the viability of the company, assisting the company in the preparation of its proposal, notifying the creditors of any meetings of creditors and tabulating the votes at these meetings.

On October 27, 2022, Nilex Canada filed its NOI with the Official Receiver under section 50.4(1) of the BIA. The NOI was filed in consultation with the Nilex Debtors' professional advisors in order to try to restructure or sell the Nilex Debtors as a going concern for the benefit of their stakeholders after it was determined that a transaction for the Nilex Debtors could not be completed outside of a formal restructuring proceeding. Once the Official Receiver accepted Nilex Canada's NOI filing, it issued a Certificate of Filing of a Notice of Intention to Make Proposal ("**Certificate**") triggering a statutory stay of proceedings, as set out in the BIA, for an initial 30 days (often referred to as the "**Initial Stay Period**") to enable Nilex Canada to take steps to prepare and file a proposal. The Certificate designated KSV as the Licensed Insolvency Trustee for Nilex Canada. The Initial Stay Period is subject to extension upon application to the Court for additional periods, not exceeding 45 days for any individual extension, to a maximum of five months following the Initial Stay Period, to allow Nilex Canada to file a proposal.

On October 31, 2022, Nilex Canada filed in the Canadian Proceeding an Application (approving extension of time to file a proposal, an administration charge, and other relief) (the "**Application**"). The Application sought, *inter alia*, a 45-day extension of the initial 30-day deadline to file a Proposal, a grant of certain charges (as described below), approval of continued use of Nilex Canada's cash management system, expansion of the statutory stay of proceedings,

and approval of the on-going Sale Process. After a hearing held on November 8, 2022, the Alberta Court granted the Application and entered its Order (approving extension of time to file a proposal, administration charge, and other relief) (the “**Proposal Order**”). *See* Kofman Declaration, Exhibit 1. Pursuant to the Proposal Order, among other things, the Alberta Court extended the Initial Stay Period to January 10, 2022.

As specified in the Proposal Order, the following four charges (the “**Charges**”) were granted against the property of Nilex Canada, with priority over all other secured claims:

- An Administrative Charge for the benefit of the Nilex Debtors’ professionals, not to exceed an aggregate amount of \$350,000 (CAN). *Id.* at ¶¶ 6 and 7;
- A Lender Priority Charge, not to exceed an aggregate principal amount of \$20,000,000 (CAN), plus interest, fees and expenses, as security for any advances made under the Credit Agreement after the filing of the NOI. *Id.* at ¶¶ 11 and 12;⁶
- A “D&O Charge” for purposes of indemnifying directors and officers against obligations and liabilities that they may incur in their role as directors and officers after the filing of the NOI, not to exceed an aggregate amount of \$925,000 (CAN). *Id.* at ¶¶ 15 and 16;
- A “KERP Charge” pursuant to an approved key employee retention plan, not to exceed an aggregate amount of \$800,000 (CAN). *Id.* at ¶¶ 18, 19 and 20.

CIBC is a party to the Canadian Proceedings and did not object to the forgoing charges.

On November 24, 2022, Nilex USA filed its NOI with the Official Receiver under section 50.4(1) of the BIA. The NOI was filed in consultation with Nilex Debtors’ professional advisors for the primary purpose of completing the transaction that resulted from the Sale Process. As with Nilex Canada, once accepted by the Official Receiver, a certificate was issued thereby triggering a statutory Stay Period for an initial 30-days (the “**Nilex USA Initial Stay Period**”).

⁶ The Lender Priority Charge secures all new advances made by CIBC under the Credit Agreement made after the filing of the NOI, while post-filing receipts are first used to pay down the debt that was owed to CIBC as of the filing date.

The Certificate designated KSV as the Licensed Insolvency Trustee for Nilex USA. The Nilex USA Initial Stay Period is subject to extension upon application to the Court, as discussed in detail earlier.

On November 21, 2022, Nilex Canada filed in the Canadian Proceeding an application (sale approval and vesting order, procedural consolidation and ancillary relief) (the “**Second Application**”). Among other things, the Second Application sought orders from the Alberta Court (a) extending the time to file a proposal for the Nilex Debtors to and including February 7, 2022 (thereby extending the Nilex USA Initial Stay Period); (b) extending to Nilex USA certain relief granted to Nilex Canada in the Proposal Order, including the granting of the Charges over the assets and property of Nilex USA and expanding the statutory stay of proceedings; (c) procedurally (but not substantively) consolidating the Nilex Canada and Nilex USA NOI proceedings; (d) approving the purchase and sale transaction (the “**Transaction**”) contemplated in the asset purchase agreement dated November 18, 2022 between the Nilex Debtors as vendors and the Purchasers; (e) authorizing the Proposal Trustee to act as foreign representative in respect of the Nilex Debtors, or either one of them, for the purpose of having the Canadian Proceedings recognized in the United States of America; and (f) authorizing the Proposal Trustee to make an interim distribution or distributions to CIBC. After a hearing held on November 28, 2022, the Alberta Court granted the relief requested in the Application, entering certain Orders including an Order (procedural consolidation and ancillary relief) (“**Ancillary Order**”). *See* Kofman Declaration, Exhibit 2. Pursuant to the Ancillary Order, the Alberta Court extended the Nilex USA Initial Stay Period and further extended the Initial Stay Period of Nilex Canada to February 7, 2023. The extension of the Nilex USA Initial Stay Period and the Initial Stay Period for Nilex Canada will continue to prohibit any proceeding or enforcement process against the

Nilex Debtors or their assets. *Id.* at ¶ 3. Further, all rights and remedies of any entity, whether judicial or extra-judicial, are stayed and suspended against the Nilex Debtors and their assets. *Id.*

VIII. The Proposal Trustee's Intended Actions.

The Proposal Trustee intends to continue to monitor the business of the Nilex Debtors and act in accordance with the powers and obligations set forth in the BIA and the orders of the Alberta Court. One of the Orders granted as part of the Second Application on November 28, 2022 was an Order (sale approval and vesting) (the “**Approval and Vesting Order**”). See Kofman Declaration, Exhibit 3. A motion seeking recognition of the Approval and Vesting Order in respect of Nilex USA is being filed simultaneously with this Petition.

RELIEF REQUESTED

The Proposal Trustee, as Foreign Representative, hereby respectfully requests that this Court enter an order pursuant to sections 105, 1507, 1517, 1520 and 1521 of the Bankruptcy Code, substantially in the form of the proposed order attached hereto (the “**Proposed Order**”), providing the following relief:

- Recognition of the Canadian Proceeding as a foreign main proceeding as defined in section 1502(4) of the Bankruptcy Code;
- Granting to the Proposal Trustee the relief afforded under section 1520 of the Bankruptcy Code as is provided by right upon the recognition of the Canadian Proceeding as a foreign main proceeding;
- Granting further additional relief as authorized by section 1521 of the Bankruptcy Code including, without limitation:
 - Staying the commencement or continuation of any action or proceeding concerning the assets, rights, obligations or liabilities of Nilex USA, including any action or proceeding against KSV in its capacity as Proposal Trustee and foreign representative of Nilex USA, to the extent not stayed under section 1520(a) of the Bankruptcy Code;

- Staying execution against the assets of Nilex USA to the extent not stayed under section 1520(a) of the Bankruptcy Code;
- Suspending the right to transfer or otherwise dispose of any assets of Nilex USA to the extent not suspended under section 1520(a) of the Bankruptcy Code by any person or entity other than the Nilex USA unless authorized in writing by the Proposal Trustee or by Order of this Court;
- Providing for the examination of witnesses, the taking of evidence, the production of documents, or the delivery of information concerning the assets, affairs, rights, obligations or liabilities of Nilex USA, and finding that such information is required in the Canadian Proceedings under the law of the United States; and
- Otherwise granting comity to and giving full force and effect to the Canadian Nilex USA Proceeding, specifically the Proposal Order, the Ancillary Order and implementation of the Administrative Charge, Lender Priority Charge, D&O Charge and the KERP Charge; and
- Awarding the Proposal Trustee such other and further relief as this Court deems just and appropriate.

The Proposal Trustee respectfully submits that the Canadian Nilex USA Proceeding should be recognized as a foreign main proceeding as defined in section 1502(4) of the Bankruptcy Code. If, however, the Court determines the Canadian Proceeding is not a foreign main proceeding (either in whole or in part), the Proposal Trustee seeks recognition of the Canadian Proceeding as a foreign nonmain proceeding, as defined in section 1502(5) of the Bankruptcy Code, and requests that the Court grant the relief requested above pursuant to section 1521 of the Bankruptcy Code.

BASIS FOR RELIEF REQUESTED

I. Statutory Authority.

The rapid increase in cross-border insolvencies over the last decade spawned multiple efforts by insolvency organizations and the international community to devise better legal

frameworks for addressing these cross-border insolvencies. Aaron L. Hammer and Matthew E. McClintock, *Understanding Chapter 15 of the United States Bankruptcy Code: Everything You Need to Know About Cross-Border Insolvency Legislation in the United States*, LAW AND BUSINESS REVIEW OF THE AMERICAS, Spring 2008. In response, Congress enacted Chapter 15 of the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Chapter 15 incorporates the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Law. 11 U.S.C. § 1501(a). It is intended to promote “cooperation between the United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor’s assets; and the facilitation of the rescue of financially troubled businesses.” *In re Oversight & Control Commission of Avanzit, S.A.*, 385 B.R. 525, 532 (Bankr. S.D.N.Y. 2008) (quoting *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund*, 374 B.R. 122, 126 (Bankr. S.D.N.Y. 2007)).

A Chapter 15 case is commenced when a foreign representative files a petition for recognition of a foreign proceeding under 11 U.S.C. § 1515; *Avanzit*, 385 B.R. at 532. The petition must be accompanied by certain documentary evidence, which the court may presume to be authentic. 11 U.S.C. § 1516(b). The Court must grant the request for recognition if it finds:

- (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
- (2) the foreign representative applying for recognition is a person or body; and

(3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a).

A decision or certificate from a foreign court indicating the foreign proceeding is a “foreign proceeding,” as defined in section 101(23) of the Bankruptcy Code, is presumptively correct. 11 U.S.C. § 1516(a). Similarly, a decision or certificate from a foreign court indicating that the foreign representative is a “foreign representative,” as defined in section 101(24), is presumptively correct. *Id.*

II. The Canadian Nilex USA Proceeding is a Pending “Foreign Proceeding.”

“Foreign proceeding” is defined in the Bankruptcy Code as “a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.” 11 U.S.C. § 101(23).

The Canadian Nilex USA Proceeding falls squarely within the definition of “foreign proceeding.” Prior to the passage of Chapter 15, United States courts recognized cases filed under the BIA to be “relating to insolvency.” *See In re Chiang*, 437 B.R. 39 (Bankr. C.D. Calif. 2010). Moreover, since the passage of Chapter 15, cases filed under the BIA have consistently been recognized as “foreign proceedings.” *See, e.g., Order Recognizing Foreign Main Proceeding and Granting Related Relief; In re Ferrex Engineering Ltd.*, United States Bankruptcy Court for the Northern District of New York, Case No. 20-10638, May 22, 2020; *Amended Order Granting Recognition and Relief In Aid of a Foreign Main Proceeding Pursuant to 11 U.S.C. §§ 105(a), 1517, 1520 and 1521; In re Sherson Group Inc.*, United States Bankruptcy Court for the Southern District of New York, Case No. 15-11765, July 27, 2015.

III. The Proposal Trustee Is a “Foreign Representative.”

Section 101(24) of the Bankruptcy Code defines “foreign representative” as “a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding.”

The Proposal Trustee may serve as the “foreign representative” because it constitutes a “person or body.” “Person” is defined under section 101(41) of the Bankruptcy Code to include an individual, partnership or corporation. Because the Proposal Trustee is an incorporated entity, it therefore qualifies as a “person” and can accordingly serve as a “foreign representative.” Moreover, KSV has been recognized in numerous proceedings as a proper “foreign representative.” *See, e.g., In re G.I. Sportz, et al.*, United States Bankruptcy Court for the District of Delaware, Case No. 20-12610; *In re Xchange Technology Group LLC, et al.*, United States Bankruptcy Court for the District of Delaware, Case No. 13-12809; *In re Xentel, Inc., et al.*, United States Bankruptcy Court for the District of Delaware, Case No. 13-10888. Additionally, the Proposal Trustee has been authorized in the Canadian Proceedings to act as the Nilex Debtors’ foreign representative. The Ancillary Order specifically states that:

The Proposal Trustee is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for recognition of this Order (and other orders in the Consolidated Proceeding) and for assistance in carrying out the terms of these orders and the Proposal Trustee is authorized and empowered to act as the Foreign Representative of the Companies, or either one of them, in respect of the Consolidated Proceeding, or either Proceeding, for the purpose of having the Consolidated Proceeding, or either Proceeding, recognized in a jurisdiction outside Canada, including in the United States pursuant to chapter 15 of title 11 of the United States Code, 11 U.S.C. § § 101-1532.

The Court is therefore entitled to presume that the Proposal Trustee is a proper “foreign representative.” *See* 11 U.S.C. § 1516(b).

IV. The Canadian Nilex USA Proceeding Should Be Recognized as a Foreign Main Proceeding Because Canada Is the Location of Nilex USA’s Center of Main Interests.

A foreign proceeding shall be recognized as a “foreign main proceeding” if it is pending in the country where the debtor has the center of its main interests. 11 U.S.C. § 1517(b). The term “center of main interests” (“COMI”) is not defined in the Bankruptcy Code. COMI, however, has been equated with a debtor’s principal place of business. *See Bear Stearns*, 374 B.R. at 129 (citing *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 633-34 (E.D. Calif. 2006)).

In the absence of evidence to the contrary, a debtor’s registered office is presumed to be the debtor’s COMI. 11 U.S.C. § 1516(c); *see also In re Klytie’s Developments, Inc.*, 383 B.R. 773, 780 (Bankr. D. Colo. 2008). Although Nilex USA was incorporated in Colorado, it is abundantly clear that its COMI is located in Alberta, Canada.

Courts have identified five factors that are helpful in determining a debtors’ COMI: (1) the location of those who manage the debtor (which could be the headquarters of a holding company); (2) the location of the debtor; (3) the location of the debtor’s primary assets; (4) the location of the majority of the debtor’s creditors or the majority of creditors affected by the case; and (5) the jurisdiction whose law would apply to most disputes. *See In re Klytie’s Developments, Inc.*, 383 B.R. at 779; *In re SPhinX*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006); *see also ABC Learning*, 445 B.R. at 333.

A. The Location of Those Who Manage Nilex USA.

The first factor, the location of those who manage the debtor, heavily favors Canada as Nilex USA's COMI. Management of each of the Nilex Debtors occurs almost entirely in Edmonton. All executive level and strategic decisions are made in Canada.

Nilex USA cannot operate independently of Nilex Canada. The Nilex Debtors' business is fully integrated. The directors of Nilex USA and Nilex Canada are the same. The senior management team of the Nilex Debtors, including the President and CEO, Vice-President of Finance, Director of Supply Chain, Director of Human Resources, Director of Technical Services (collectively, the "**Management Team**") are all located in Canada. The Management Team develops all corporate strategies for the Nilex Debtors. Additionally, almost all members of the Management Team are residents of Edmonton and perform their duties out of the Edmonton head office. The Management Team reports to a board of directors that effectively controls the Nilex Debtors. All directors of the Nilex Debtors reside in Canada. The only managers of the Nilex Debtors who are not Canadian residents are Alan Strecker (Regional Sales Manager) and Christy Burton (Office Manager), both of whom report to the Sales Director in Canada, who reports to the President and CEO, Trevor Derksen, based in Edmonton.

All capital allocation decisions for the Nilex Debtors are directed by the Management Team and approved by the Management Team. The leaders of the business units in all jurisdictions execute the decisions made by the Management Team in Edmonton. Trevor Derksen, the President and CEO of Nilex Canada, is involved in all major negotiations with large clients regardless of the business entity that serves those clients or the jurisdiction in which their projects are located. The material terms of all major contracts require approval by the Management Team, as do all major spending decisions. Furthermore, most major clients in the

United States are supported by a Sales Manager in Colorado and the Sales Director, who is based in British Columbia.

The Nilex Debtors use the Cash Management System to fund operations. The books and records of the Nilex Debtors are prepared and maintained in Edmonton. Jeff Allen, Vice-President of Finance, has responsibility for the Nilex Debtors' accounting and all administrative oversight. Payroll services for the Nilex Debtors are administered by a payroll professional of Nilex Canada, located in the Edmonton Head Office.

The following policies, procedures, operating manuals and practices are developed, updated and administered in the Edmonton head office and are applied across the Nilex Debtors:

- human resources — including employee policies and procedures, benefits, wellness, confidentiality and privacy policies;
- corporate accounting policies;
- code of ethics;
- corporate standards;
- information and telecommunications policies and procedures;
- marketing and communications policies and procedures; and
- delegation of authority matrix.

The following programs are created and refined in Canada at the Edmonton head office:

- health, safety and environment and quality control functions of the Nilex Debtors;
- all corporate and employee training for all the employees of the Nilex Debtors;
- all training and development programs for operational personnel throughout the Nilex Debtors; and
- all leadership development programs.

Finally, the Proposal Trustee and Foreign Representative, a Canadian entity appointed by a Canadian court, is also based in Canada.

B. The Location of Nilex USA's Business.

The four remaining factors also indicate that Nilex USA's COMI is in Canada. With respect to the location of Nilex USA, the mind and management of Nilex USA is in Edmonton,

Alberta. As to the location of Nilex USA's assets, this factor also favors Canada. The Nilex Debtors utilize the Cash Management System pursuant to which funding is determined and managed from the head office in Alberta. Nilex USA maintains a bank account in Canada and its treasury management function is centralized at the head office in Alberta.

The location of the creditors also favors Canada. The principal secured creditor of the Nilex Debtors is CIBC. The Nilex Debtors are both borrowers under the Credit Agreement, which is governed by Canadian Law:

- the availability of liquidity to the Nilex Debtors under the CIBC facility is derived from combining the net borrowings of Nilex Canada and net cash from Nilex USA against the borrowing base calculated under the Credit Agreement;
- all disbursements paid out by the Nilex Debtors must be signed or electronically released by a member of the treasury team, including the Vice-President of Finance, from the Edmonton office (except for petty cash disbursements); and
- while some cash receipts are deposited at the locations where they are received, they are all reported to the treasury group in the Edmonton office and then administered as part of the Cash Management System.

The Nilex Debtors' obligations under the Credit Agreement are secured pursuant to, among other things, a general security agreement among Nilex Canada, Nilex USA, and CIBC dated June 1, 2018 (the "GSA"). The GSA grants CIBC security over all present and after acquired personal property of the Nilex Debtors. CIBC is the first lien secured creditor of the Nilex Debtors. The only other significant indebtedness of Nilex USA is owed to Nilex Canada pursuant to intercompany transactions.

In addition, Nilex Canada, which is also located in Canada, is Nilex USA's largest unsecured creditor.

The final factor, the jurisdictional law governing most disputes, also points to Canada. As indicated above, Nilex USA's principal creditor relationship is with CIBC. As specified in the Credit Agreement, that relationship is governed by Canadian law.

Based upon the foregoing, the COMI factors conclusively establish Canada as the COMI for Nilex USA. The Proposal Trustee accordingly requests that the Canadian Nilex USA Proceeding be recognized as a foreign main proceeding. *See Klytie's Developments, Inc.*, 383 B.R. at 781 (finding COMI in Canada notwithstanding the fact that two standards – the location of the debtors' creditors and applicable law – yielded inconclusive results).

V. Alternatively, the Canadian Nilex USA Proceeding Should Be Recognized as a Foreign Nonmain Proceeding.

In the event this Court does not recognize the Canadian Nilex USA Proceeding as a foreign main proceeding, the Proposal Trustee submits that the Canadian Nilex USA Proceeding should be recognized as a foreign nonmain proceeding.

The Canadian Nilex USA Proceeding shall be recognized as a foreign nonmain proceeding if Nilex USA has an establishment in Canada. 11 U.S.C. § 1517(b)(2). "Establishment" is defined as any place of operations where the debtor carries out a nontransitory economic activity. 11 U.S.C. § 1502(2). When it is apparent that an entity conducts operations in the country where a foreign proceeding is pending, courts will recognize the proceeding as a foreign nonmain proceeding if foreign main proceeding recognition is denied. *See e.g., SPhinX*, 351 B.R. at 122. Based upon the facts previously set forth, Nilex USA clearly

holds an “establishment” in Canada, and therefore the Proposal Trustee alternatively submits that recognition as a foreign nonmain proceeding is warranted.

In the event that the Court finds that the Canadian Nilex USA Proceeding is a foreign nonmain proceeding, the relief requested herein is still appropriate because the relief is discretionary. *See* 11 U.S.C. § 1521 (“Upon recognition of a foreign proceeding, whether main or nonmain . . . the court may, at the request of the foreign representative, grant any appropriate relief”) The Proposal Trustee submits that the Court should exercise its discretion in this matter to assure an economical, expeditious, and equitable administration of Nilex USA’s estate. Without such relief, Nilex USA will be exposed to the risk of voluminous litigation and other actions against its assets in the United States, which would result in a “race to the courthouse” among creditors and other parties in interest, and thus, threaten the Nilex Debtor’s reorganization efforts. More importantly, the failure to grant relief jeopardizes the proposed sale of Nilex USA’s assets, the culmination of a months-long Sale Process. Without the requested relief, the certainty and value for stakeholders provided for the by the Transaction will most certainly be lost.

VI. Additional Relief Requested Pursuant to 11 U.S.C. § 1521.

The terms of the U.S. Transaction potentially contemplate the assignment and assumption of executory contracts and unexpired leases. It is therefore likely that the Proposal Trustee will request relief under section 365 of the Bankruptcy Code so that Nilex USA can complete the U.S. Transaction. Section 1521(a) provides that:

[U]pon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interest of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

Such additional relief may include the application of section 365 of the Bankruptcy Code. *See In re Bluberi Gaming Technologies, Inc.*, 554 B.R. 841, 845-846 (Bankr. N.D. Ill. 2016); *In re Qimonda AG Bankruptcy Litigation*, 433 B.R. 547, 560 (D. E.D. Va. 2010).

Here, the principal purpose of the filing of Nilex USA's chapter 15 proceeding is to facilitate the consummation of the U.S. Transaction. To the extent the assumption and assignment of executory contracts and unexpired leases are an integral part of the U.S. Transaction, it is appropriate for the Court to include section 365 as part of the relief granted.

HEARING DATE AND NOTICE

The Proposal Trustee respectfully requests that this Court set the date and time for a hearing on the Petition, pursuant to section 1517(a) and (c) of the Bankruptcy Code. If no objections to this Petition are filed by the date ordered for such objections, the Proposal Trustee requests that the Court enter the Proposed Order recognizing the Canadian Nilex USA Proceeding as a foreign main proceeding without a hearing.

The Proposal Trustee proposes that once a hearing date has been scheduled by the Court, notice will be given in accordance with Rule 2002(q) of the Bankruptcy Rules.

CONCLUSION

The Proposal Trustee respectfully requests that this Court recognize the Canadian Nilex USA Proceeding as a foreign main proceeding, and grant the relief requested herein. The Proposal Trustee alternatively requests recognition as a foreign nonmain proceeding, and that the Court grant the relief requested herein.

Dated: December 2, 2022

Respectfully Submitted,

KSV RESTRUCTURING INC.,
as Proposal Trustee and authorized foreign
representative of the Nilex USA Inc.

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