

UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLORADO

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

**EX PARTE MOTION FOR ORDER TO SHOW CAUSE WITH
TEMPORARY RESTRAINING ORDER AND, AFTER NOTICE AND
A HEARING, PRELIMINARY INJUNCTIVE RELIEF, PURSUANT
TO SECTIONS 105(a) AND 1519 OF THE BANKRUPTCY CODE**

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 this motion (the “**Motion**”) pursuant to sections 105(a) and 1519 of title 11 of the United States Code (the “**Bankruptcy Code**”) for entry of an order to show cause with temporary restraining order substantially in the form attached hereto, and scheduling a hearing on the Proposal Trustee’s request for a preliminary injunction (the “**Preliminary Injunction Hearing**”).

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.**”

PRELIMINARY STATEMENT

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.

Accordingly, the Proposal Trustee files this Motion, pursuant to Sections 105(a) and 1519 of the Bankruptcy Code, to temporarily enjoin creditors from taking any actions against Nilex USA, its assets and the Proposal Trustee. The Proposal Trustee believes the granting of the relief sought in this Application will assure an economical, expeditious, and equitable administration of Nilex USA’s estate. Without such relief, Nilex USA will be exposed to an imminent risk of litigation and other actions against the estate, its assets and the Proposal Trustee, as Foreign Representative, which would result in a “race to the courthouse” among creditors and other parties-in-interest. The Proposal Trustee submits that such actions would result in a disruption of the Sale Process and in immediate and irreparable harm and loss to Nilex USA and would cause substantial damage to efforts to collect and realize on the business and assets of Nilex USA for the benefit of its stakeholders for which there is no adequate remedy at law.

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

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. They 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, CIBC was owed approximately \$13.42 million by the Nilex Debtors.³

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) Application 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 Motion are supported by the Kofman Declaration.

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 Nilex Debtors pursuant to a Court-approved lender 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 they 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

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.

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 for the ten-months ending October 31, 2022, of approximately \$4.4 million.⁵ A summary of Nilex USA's assets as of October 31, 2022, is as follows:⁶

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. The vast majority of these unsecured creditors, by number, are located in the United States. Nilex Canada is by far Nilex USA's largest creditor, representing approximately 87% of all of Nilex USA's unsecured debt.

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

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.

⁶ Excluding off-balance sheet liabilities, including amounts owing to CIBC, certain employee claims and amounts owing for real property and equipment leases.

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, throughout 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 Proceedings.

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.

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 Proceedings 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 Proceedings 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. 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**”). 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 Proceedings 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.

IX. The Chapter 15 Cases.

Concurrently with filing this Application, the Proposal Trustee filed the Petition in order to recognize the Canadian Nilex USA Proceeding as a foreign main proceeding. By filing the Petition, the Proposal Trustee wishes to obtain relief in substantially the same form provided in the Canadian Nilex USA Proceeding and allow for the proper and necessary communication and coordination between the Canadian Nilex USA Proceeding and this case to ensure the orderly, fair and efficient restructuring or liquidation of the Nilex Debtors.

RELIEF REQUESTED

The Proposal Trustee hereby respectfully requests: (i) the immediate entry of a temporary restraining order (the “TRO”): (a) staying execution against Nilex USA’s assets; (b) prohibiting all persons from commencing or continuing any litigation or any other proceeding, including, without limitation, appeals, mediation, or any other judicial, quasi-judicial, administrative or regulatory action, proceeding or process whatsoever, or taking any other actions against or involving Nilex USA, the Proposal Trustee (in its capacity as foreign representative of the Nilex

Debtors) or Nilex USA's property in the United States (the "Property"); and (ii) scheduling the Preliminary Injunction Hearing. Such relief will ensure that, *inter alia*, the Property will not be improperly attached, disposed of, or otherwise withheld by creditors or other parties.

BASIS FOR RELIEF REQUESTED

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)).

Section 1519 of the Bankruptcy Code allows a representative petitioning for recognition of a foreign proceeding to obtain interim relief, including:

- (1) staying execution against the debtor's assets;
- (2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and
- (3) any relief referred to in paragraph (3), (4) or (7) of section 1521(a).

11 U.S.C. § 1519(a).

The Proposal Trustee submits that the relief permitted under section 1519 and requested herein is necessary to ensure an economical, expeditious and equitable administration of the Nilex Debtors' estates. The absence of such relief will leave Nilex USA vulnerable in the United States to litigation and other actions by creditors or other parties against Nilex USA, its property and the Proposal Trustee to enforce their respective rights. Should parties-in-interest take such actions against Nilex USA, the certain result would be immediate and irreparable injury, loss and damage to the Nilex Debtors and their restructuring efforts, for which there is no adequate remedy at law.

The Ancillary Order entered in the Canadian Proceeding protects Nilex USA and its assets from actions of creditors during the critical early stages of the NOI proceedings and its realization process. The Ancillary Order and papers submitted in conjunction therewith, established that Nilex USA is currently insolvent and unable to pay its debts as they become due. The Proposal Trustee, as Foreign Representative, is concerned that these facts may cause creditors to seek prejudgment attachments and other remedies against Nilex USA and its assets in the United States. Indeed, Nilex USA holds substantial assets in the United States, including equipment used in its business operations and accounts receivable. Until the Petition can be heard by this Court, these substantial assets are largely unprotected from creditors, and will remain as such unless the TRO is entered. Litigation relating to such actions would distract Nilex USA and the Proposal Trustee from the restructuring efforts in the Canadian Proceeding, particularly completion of the Transaction, and disrupt this case as well. Accordingly, the relief requested herein will allow Nilex USA and the Proposal Trustee to focus on the orderly restructuring of the Nilex Debtors' business in the Canadian Proceeding for completing the transaction identified by the Sale Process, for which a motion for approval has been filed.

The Proposal Trustee also believes that there is a substantial likelihood that it will be successful in establishing that the Canadian Proceeding is a foreign main proceeding because: (i) the Canadian Proceeding is a foreign proceeding, as defined in the Bankruptcy Code; (ii) the Proposal Trustee is a proper and authorized foreign representative as defined in the Bankruptcy Code; and (iii) Canada is the center of Nilex USA's main interests.⁷

The relief requested herein will not cause undue hardship to any party in interest, or at least any hardship is outweighed by the benefits of the relief requested. Indeed, the entry of the TRO would benefit Nilex USA's creditors by ensuring an equitable and orderly distribution of assets and will prevent the "race to the courthouse" that could ensue if the relief requested herein is not entered. *See In re Basis Yield Alpha Fund (Master)*, Case No. 07-12762 (Bankr. S.D.N.Y.) (stating that failing to issue a restraining order against creditors could, *inter alia*, "undermine the Foreign Representative's efforts to achieve an equitable result for the benefit of all of the Foreign Debtor's creditors.").

Furthermore, the Court in the Canadian Nilex USA Proceeding respectfully requests that the United States' courts aid and recognize the Ancillary Order and to make such orders and provide such assistance as necessary to give effect to the Ancillary Order. *See* Kofman Declaration, Exhibit 2, ¶ 13. The Proposal Trustee believes that the entry of the TRO and preliminary injunction are necessary to accommodate this request.

The relief requested herein has been granted in other Chapter 15 cases, and is therefore appropriate in these cases. *See e.g., In re North America Steamships Ltd.*, Case No. 06-13077 (Bankr. S.D.N.Y.) (granting similar relief after finding that: (i) the foreign representative established a substantial likelihood of success in establishing that the debtor is subject to a

⁷ As further support for the substantial likelihood of the Petition's success, the Proposal Trustee references and incorporates the Petition.

foreign main proceeding; and (ii) the debtor's assets were subject to attack and piecemeal dissipation which would result in immediate and irreparable harm for which the debtor would have no adequate remedy at law); *see also In re Hollinger Inc., et al.*, Case No. 07-11029 (Bankr. D. Del.); *In re Bear Stearns High-Grade Structured Credit Strat. Master Fund, Ltd.*, Case No. 07-12383 (Bankr. S.D.N.Y.); *In re Afinsa Bienes Tangibles S.A.*, Case No. 07-10675 (Bankr. S.D.N.Y.); *In re Hatteras Reinsurance Ltd.*, Case No. 06-11304 (Bankr. S.D.N.Y.).

REQUEST FOR WAIVER OF BANKRUPTCY RULE 7065(c)

The Proposal Trustee respectfully requests that Rule 7065(c) of the Federal Rules of Bankruptcy Procedure, incorporating Rule 65(c) of the Federal Rules of Civil Procedure, be waived. Security for the TRO is unnecessary in this matter, as the TRO will merely temporarily extend the reaches of the Ancillary Order, and will therefore only subject parties-in-interest to the same restraints imposed in the Canadian Nilex USA Proceeding.

HEARING DATE AND NOTICE

The Proposal Trustee also respectfully requests that this Court set the date and time for the Preliminary Injunction Hearing and a hearing on the Petition (the "Hearing Dates"). If no objections to this Motion are filed by the date ordered for such objections, the Proposal Trustee requests that the Court enter the proposed order granting the preliminary injunction without a hearing.

The Proposal Trustee proposes that once the Hearing Dates have been scheduled by the Court, notice will be given as reasonable and appropriate under the circumstances in the Canadian Proceeding and in the United States and in accordance with Bankruptcy Rule 2002(q) and other applicable rules. Specifically, the Proposal Trustee proposes serving appropriate notice of the Hearing Dates, copies of the Motion, TRO, Petition and related documents upon all

parties-in-interest that are entitled to notice within five days of the entry of the TRO. The Proposal Trustee believes that such notice and service is reasonable and proper under the circumstances and no other or further notice is necessary or appropriate.

The Proposal Trustee shall serve notice of this Motion on the Office of the United States Trustee through the Court's ECF filing system. Due to the harm that could result to Nilex USA before adverse parties can be heard in opposition to the TRO, the Proposal Trustee believes that no further notice is required under the circumstances.

CONCLUSION

For the foregoing reasons, the Proposal Trustee respectfully requests that this Court:

- (i) enter an order granting a temporary restraining order substantially in the form attached hereto;
- (ii) schedule the Preliminary Injunction Hearing; and (iii) grant such other and further relief as this Court deems just and proper.

Dated: December 2, 2022.

Respectfully Submitted,

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

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