

Clerk's stamp:

COURT FILE NUMBER 24-2878531
 COURT COURT OF KING'S BENCH OF ALBERTA
 JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE NOTICE OF INTENTION TO
 MAKE A PROPOSAL UNDER SECTION 50.4(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, c B-3,
 AS AMENDED

APPLICANTS NILEX INC. and NILEX USA INC.

DOCUMENT **APPLICATION (interim distribution)**

ADDRESS FOR SERVICE AND
 CONTACT INFORMATION OF
 PARTY FILING THIS
 DOCUMENT

BLAKE, CASSELS & GRAYDON LLP
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 File Ref.: 99580/8

NOTICE TO RESPONDENTS

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the judge.

To do so, you must be in Court when the application is heard as shown below:

Date	December 13, 2022
Time	3:00 p.m.
Where	Edmonton, Alberta (via Webex)
Before Whom	The Honourable Justice J.T. Neilson

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. The Applicants, Nilex Inc. ("**Nilex**") and Nilex USA Inc. ("**Nilex USA**", and together with Nilex, the "**Companies**") seek an interim distribution order substantially in the form attached hereto as Schedule "**A**":
 - (a) abridging the time for service of this application and the supporting materials, if necessary, and deeming service thereof to be good and sufficient;
 - (b) authorizing KSV Restructuring Inc. (the "**Proposal Trustee**") in its capacity as proposal trustee of the Companies (as defined below) to make an interim distribution or distributions to PEF 2010 Nilex Investment Limited Partnership ("**Fulcrum**") as described in the third report of the Proposal Trustee dated December 7, 2022 (the "**Third Report**");
 - (c) declaring that Nilex meets the criteria prescribed by section 3.2 of the Wage Earner Protection Program Regulations, SOR/2008-22 ("**WEPPR**"), such that former employees are entitled to receive payments under the Wage Earner Protection Program Act, SC 2005, c 47, ("**WEPPA**");
 - (d) approving and ratifying the Proposal Trustee's actions, conduct, and activities as set out in the First Report of the Proposal Trustee dated October 31, 2022 (the "**First Report**"), the Second Report of the Proposal Trustee dated November 21, 2022 (the "**Second Report**"), and the Third Report; and
 - (e) such further and other relief as counsel may request and this Honourable Court may deem appropriate.

Grounds for making this application:*Background*

2. On October 27, 2022, Nilex filed a notice of intention ("**NOI**") to make a proposal under section 50.4(1) of the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") and KSV Restructuring Inc. was appointed Proposal Trustee (the "**Nilex NOI Proceeding**"). On

November 24, 2022, Nilex USA Inc. (together with Nilex, the "**Companies**") filed an NOI under section 50.4(1) of the BIA and KSV Restructuring Inc. was appointed Proposal Trustee.

1. As set out in the Second Report, the Companies' senior secured creditor, the Canadian Imperial Bank of Commerce ("**CIBC**"), and the Companies entered into a credit agreement dated June 1, 2018 (the "**Credit Agreement**"). As of December 6, 2022, the Companies owe CIBC approximately \$12.3 million. Of this amount, approximately \$4.2 million is secured by the Lender Priority Charge (as defined in the November 8 Order, defined below) and approximately \$8.1 million is secured by the security granted to CIBC by the Companies prior to the commencement of the Nilex NOI Proceeding.
3. Fulcrum is also a secured creditor of Nilex. Nilex and its predecessors have granted general security agreements in favour of Fulcrum giving Fulcrum security over all present and after acquired personal property of the Company. As of November 30, 2022, Nilex owes Fulcrum approximately \$45.1 million plus interest and costs, which continue to accrue.
4. The Companies, CIBC, and Fulcrum entered into a subordination and postponement agreement, whereby, among other things, Fulcrum agreed to subordinate the priority of its secured indebtedness owing to it by the Companies to the indebtedness owing to CIBC by the Companies.
5. On November 8, 2022, the Honourable Justice J.S. Little of the Court of King's Bench of Alberta (the "**Court**") granted an Order (the "**November 8 Order**") approving, among other things, certain priority charges, including a Lender Priority Charge (as defined in the November 8 Order), and a sale process as described in the First Report.
6. On November 28, 2022, the Honourable Justice Hollins of the Court granted an order (the "**SAVO**") approving the purchase and sale transaction (the "**Transaction**") described in the Second Report, and an order (the "**November 28 Distribution Order**"), authorizing, among other things, the Proposal Trustee to make an interim distribution or interim distributions to CIBC, from proceeds of sale resulting from the Transaction up to the full amount of the Companies' indebtedness to CIBC as set out in the Second Report, subject to the retention of amounts for any priority claims.

7. The parties to the Transaction anticipate closing the sale of the Canadian assets and operations by mid-December, 2022, and closing the sale of the US assets and operations in January 2023, subject to recognition of the SAVO by the United States Bankruptcy Court, District of Colorado.

Distributions to Fulcrum

8. Nilex is seeking an order authorizing one or more distributions to Fulcrum of proceeds of sale resulting from the Transaction, notwithstanding CIBC has not been repaid in full.
9. The Proposal Trustee's independent counsel, Cassels, Brock & Blackwell LLP, has opined that Fulcrum's security over the assets of Nilex is valid and enforceable, subject to the customary assumptions and qualifications.
10. On December 7, 2022, CIBC entered into a lender assignment agreement (the "**Assignment Agreement**") with the Companies and Fulcrum wherein CIBC has consented, subject to certain conditions, to the proposed distribution to Fulcrum, notwithstanding CIBC has not been repaid in full, to facilitate the assignment of CIBC's right, interest and benefit in and to (a) \$3,000,000 of the loans owing by the Companies to CIBC under the Credit Agreement (the "**Assigned Debt**"), which Assigned Debt shall not include any portion of the BCAP Loan (as defined in the Credit Agreement); and (b) the benefit of any security granted to CIBC pursuant to the security documents more particularly described in the Assignment Agreement to the extent securing obligations under the Assigned Debt to Fulcrum.
11. The interim distribution or distributions to Fulcrum are just and appropriate. The Applicants believe that the creditors will not suffer any material prejudice as a result.

WEPPA

12. In connection with closing of the Transaction, certain employees of Nilex will be terminated. These employees will be paid outstanding wages and vacation pay upon termination, but will not receive any payments for termination pay or severance.
13. Section 3.2 of the WEPPR provides that for the purposes of section 5(5) of the WEPPA a court may determine, in respect of proceedings under Division I of Part III of the BIA,

that a former employer meets the criteria prescribed by the regulation where the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind-down operations.

14. Nilex and the Proposal Trustee are of the view that it is appropriate for the Court to make a declaration that Nilex is a former employer such that employees whose employment has been or may be terminated are entitled to payments in accordance with the WEPPA, particularly in respect of termination and severance pay, which will not be paid by Nilex and which will not be assumed by the purchaser pursuant to the terms of the Transaction.

Material or evidence to be relied on:

15. The Applicants intend to rely upon the following materials:
 - (a) the First Allen Affidavit, the Second Allen Affidavit, and the Third Allen Affidavit, filed;
 - (b) the First Report and the Second Report, filed;
 - (c) the Third Report, to be filed; and
 - (d) such further and other materials as counsel may advise and this Honourable Court may permit.

Applicable Rules:

16. The Applicants will rely upon and refer to the Alberta *Rules of Court* during the making of the Application.

Applicable Acts and Regulations:

17. The Applicants will rely upon and refer to the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended, during the making of the Application.
18. Such further and other Acts and Regulations as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

19. None.

How the Application is proposed to be heard or considered:

20. Virtually, at an application via WebEx before the Honourable Justice J.T. Neilson

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the Applicants what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to Applicants.

Schedule "A"

Form of Interim Distribution Order

(see attached)

COURT FILE NUMBER 24-2878531

Clerk's Stamp

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, c B-3, AS AMENDED

APPLICANTS NILEX INC. and NILEX USA INC.

DOCUMENT **ORDER (interim distribution)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

BLAKE, CASSELS & GRAYDON LLP

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Fax No.: 403-260-9700
File Ref: 99580/8

DATE ON WHICH ORDER WAS PRONOUNCED: December 13, 2022

LOCATION OF HEARING: Edmonton, Alberta (via Webex)

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Justice J.T. Neilson

UPON THE APPLICATION by Nilex Inc. ("**Nilex**") and Nilex USA Inc. ("**Nilex USA**", and together with Nilex, the "**Companies**") for an order, among other things, (a) authorizing KSV Restructuring Inc. (the "**Proposal Trustee**") to make an interim distribution or distributions to PEF 2010 Nilex Investment Limited Partnership ("**Fulcrum**"); (b) declaring that the *Wage Earner Protection Program Act (Canada)*, SC 2005, c. 47, s.1 ("**WEPPA**") applies to the terminated employees of Nilex; and (c) ratifying and approving the actions, conduct, and activities of the Proposal Trustee as set out in the first report of the Proposal Trustee dated October 31, 2022, the second report of the Proposal Trustee dated November 21, 2022, and the third report of the Proposal Trustee dated December 7, 2022 (the "**Third Report**");

AND UPON HAVING READ the Application by Companies, the Affidavit of Jeff Allen sworn on December 7, 2022 (the “**Third Allen Affidavit**”), and the Third Report;

AND UPON HAVING READ the Affidavit of Service [●] sworn [●], 2022, and such other material in the pleadings and proceedings as deemed necessary;

AND UPON HEARING the submissions of counsel for the Companies, the Proposal Trustee, CIBC and such other counsel in attendance;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. Service of this Application and supporting materials is hereby abridged, if necessary, and the Application is properly returnable today and any requirement for service of the Application upon any party not served is hereby dispensed with.

INTERIM DISTRIBUTION

2. The Proposal Trustee is hereby authorized, at such time as it determines appropriate, to make an interim distribution or distributions on behalf of the Companies to Fulcrum of proceeds of sale resulting from the sale of the assets or business of Nilex up to the full amount of the Nilex’s indebtedness to Fulcrum, as set out in the Third Report, and an interim distribution or distributions of the proceeds of sale resulting from the sale of the assets or business of Nilex USA, up to the amount of the Assigned Debt (as defined in the Third Allen Affidavit), subject to the retention of amounts for any priority claims. Such interim distribution or distributions shall be free and clear of all claims and encumbrances and shall be binding on any trustee in bankruptcy or receiver that may be appointed in respect of the Companies and shall not be void or voidable by creditors of the Companies, nor shall any such interim distribution or distributions constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall any such interim distribution or distributions constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

WAGE EARNER PROTECTION PROGRAM ACT

3. Pursuant to section 5(5) of the WEPPA, Nilex and its employees whose employment has been or may be terminated in these proceedings meet the criteria prescribed by section 3.2 of the Wage Earner Protection Program Regulations, SOR/2008-222, and Nilex is a former employer all of whose employees in Canada that have been or may be terminated during the pendency of these proceedings are individuals to whom the WEPPA applies as of their respective termination dates.

PROPOSAL TRUSTEE'S ACTIVITIES

4. The actions, conduct, and activities of the Proposal Trustee as set out in the first report of the Proposal Trustee dated October 31, 2022, the second report of the Proposal Trustee dated November 21, 2022, and the Third Report are hereby ratified and approved, provided that only the Proposal Trustee shall be entitled to rely on or utilize such approval.

SERVICE OF ORDER

5. Service of this Order shall be deemed good and sufficient:
 - (i) by serving same on the persons who were served with notice of this Application and any other parties attending or represented at the hearing of the Application; and
 - (ii) by posting a copy of this Order on the Proposal Trustee's website at:
<https://www.ksvadvisory.com/experience/case/nilex-inc.>
6. Service of this Order on any other person is hereby dispensed with.
7. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.