

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLORADO**

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

**PROPOSAL TRUSTEE’S MOTION FOR ENTRY OF AN ORDER APPROVING
INTERIM DISTRIBUTION OF SALE PROCEEDS TO SECURED CREDITOR AND
GRANTING RELATED RELIEF**

KSV Restructuring Inc. (“KSV”), in its capacity as Proposal Trustee (the “Proposal Trustee”) and authorized foreign representative of Nilex USA Inc. (“Nilex USA”) (together with Nilex Inc. (as defined below), 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, hereby files this motion (the “U.S. Distribution Motion”) seeking an order recognizing an Order (interim distribution) (the “Distribution Order”) entered in the Canadian Proceedings authorizing an interim distribution and further distributions of sale proceeds of Nilex USA to secured creditor PEF 2010 Nilex Investment Limited Partnership (“Fulcrum”) up to the amount of the Assigned Debt (as defined below) . In support of the U.S. Distribution Motion, KSV states as follows:

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.”

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. § 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).

INTRODUCTION

The Proposal Trustee seeks recognition of the Distribution Order entered in the Canadian Proceedings authorizing an interim distribution and further distributions to Fulcrum of the proceeds of the sale of Nilex USA's assets up to the amount of the Assigned Debt.

BACKGROUND

1. On October 27, 2022, Nilex Canada filed a notice of intention ("NOI") to make a proposal under section 50.4(1) of the BIA and KSV Restructuring Inc. was appointed Proposal Trustee. On November 24, 2022, Nilex USA filed its NOI under section 50.4(1) of the BIA and KSV Restructuring Inc. was appointed Proposal Trustee.

2. On December 2, 2022, the Proposal Trustee filed a Chapter 15 petition on behalf of Nilex USA (the "Petition"). [ECF No. 1]

3. In conjunction with the Petition, the Proposal Trustee, as the foreign representative, also filed a Petition for Recognition as Foreign Main Proceeding Pursuant to Sections 1515 and 1517 of the Bankruptcy Code and Related Relief. [ECF No. 8] On January 10, 2023, the Court entered its Order Granting Recognition as a Foreign Main Proceeding and Related Relief. [ECF Nos. 34 and 36]

4. On December 2, 2022, the Proposal Trustee filed its Motion Pursuant to Sections 105(a), 363, 1501, 1520 and 1521 of the Bankruptcy Code and Rules 2002, 6004 and 9013, for Entry of an Order Approving Sale of Assets Free and Clear of Liens, Claims and Interests and

Granting Related Relief (the “U.S. Sale Motion”). [ECF No. 15] Thereafter, on January 10, 2023, the Court entered its Order approving the U.S. Sale Motion. [ECF Nos. 35 and 37]

A. Distribution From the Sale Proceeds

5. On December 7, 2022, in the Canadian Proceedings, the Proposal Trustee filed his Third Report of the Proposal Trustee (the “Third Report”), a copy of which is attached hereto as **Exhibit A**. The Third Report was filed in conjunction with the Nilex Debtors’ Application (interim distribution) (the “Interim Distribution Application”), a copy of which is attached hereto as **Exhibit B**.

6. Pursuant to the Interim Distribution Application, the Nilex Debtors sought authority for the Proposal Trustee to make distributions to Fulcrum of the proceeds of the assets of Nilex USA up to the amount of the Assigned Debt. In support of the Interim Distribution Application and as set forth in the Third Report, the Proposal Trustee represented the following to the Alberta Court:

(a) The Nilex Debtors’ senior secured creditor, the Canadian Imperial Bank of Commerce (“CIBC”), and the Nilex Debtors entered into a credit agreement dated June 1, 2018 (the “Credit Agreement”). As of December 6, 2022, the Nilex Debtors owed CIBC approximately \$12.3 million. Of this amount, approximately \$8.1 million was secured by the security granted to CIBC by the Nilex Debtors prior to the commencement of the Canadian Proceedings and approximately \$4.1 million was also secured by the Lender Priority Charge (as defined in the November 8 Order, defined below);

(b) Fulcrum is also a secured creditor of the Nilex Debtors. Nilex Canada and their predecessors have granted general security agreements in favor of Fulcrum giving Fulcrum security interests over all present and after acquired personal property of Nilex Canada. As of November 30, 2022, Nilex Canada owed Fulcrum approximately \$45.1 million plus interest and costs, which continue to accrue. As well, on December 7, 2022, CIBC entered into an assignment agreement (the “Assignment Agreement”) with Fulcrum wherein CIBC, subject to certain conditions (which have now been fulfilled) assigned: (a) CIBC’s right and interest in \$3,000,000 of the loans owed by the Nilex Debtors to CIBC under the Credit Agreement (the “Assigned Debt”); and (b) any security interest granted to CIBC pursuant to the security documents more particularly described in the Assignment Agreement to secure obligations under the Assigned Debt to Fulcrum;

(c) Nilex Canada, CIBC, and Fulcrum had, prior to the Canadian Proceedings, 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 Nilex Canada to the indebtedness owing to CIBC by the Nilex Canada;

(d) On November 8, 2022, the Alberta 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;

(e) On November 28, 2022, the Alberta Court granted an order 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 Nilex Debtors’ indebtedness to CIBC as set out in the Second Report, subject to the retention of amounts for any priority claims;

(f) The Proposal Trustee's independent counsel in Canada and the United States have opined that CIBC’s security over the assets of Nilex Debtors is valid and enforceable, subject to the customary assumptions and qualifications;

(g) The Nilex Debtors are 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;

(h) Before making any distributions to Fulcrum, the Proposal Trustee will retain from the proceeds of the Transaction a reserve sufficient to fund in full: (a) any amounts that may be covered by the Charges (other than the Lender Priority Charge); (b) potential post-closing purchase price adjustments to be calculated in accordance with the APA; and (c) the remaining costs of these proceedings, including the costs of the Chapter 15 proceeding and the fees of Nilex Debtors’ investment banker, Valitas Capital Partners (“Valitas”); and

(i) 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.

Third Report, pp 4-6.

7. On December 13, 2022, the Alberta Court entered the Distribution Order, approving the Interim Distribution Application and granting authority to the Proposal Trustee to make the distributions to Fulcrum. The Nilex USA sale proceeds will be less than amount of the Assigned Debt. A copy of the Distribution Order is attached as **Exhibit C**.

RELIEF REQUESTED

8. By and through this Motion, the Proposal Trustee seeks recognition of the Alberta Court's Distribution Order authorizing distributions to Fulcrum. Accordingly, the Proposal Trustee requests this Court's grant of comity and cooperation in the form of its recognition of the Distribution Order issued by the Alberta Court in the Canadian Proceedings which authorizes an interim distribution, and further distributions, to Fulcrum from the proceeds of Nilex USA's assets up to the amount of the Assigned Debt.

BASIS FOR RELIEF REQUESTED

9. Section 1509(b) of the Bankruptcy Code provides that:

If the Court grants recognition under Section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter –

...

- (2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and
- (3) a court in the United States *shall* grant comity or cooperation to the foreign representative.

11 U.S.C. § 1509(b)(2)-(b)(3) (emphasis added). Here, the Proposal Trustee has been designated as the foreign representative for Nilex USA. Therefore, the Proposal Trustee seeks comity and cooperation in the form of recognition of the Distribution Order.

10. While the language set forth in Section 1509(b)(3) is mandatory, it is subject to any limitations the Court may impose, consistent with the policy of Chapter 15. However, the public policy exception should be "narrowly interpreted" and is restricted to "the most fundamental policies of the United States." *In re Ephedra Prod. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006).

11. In considering whether to grant relief, it is not necessary that the result achieved in a foreign bankruptcy proceeding be identical to that which would be had in the United States. It is sufficient if the result is “comparable.” *In re Schimmelpenninck*, 183 F.3d 147, 364 (5th Cir. 1999); *Overseas Inns S.A.P.A. v. United States*, 911 F.2d 1146, 1148 (5th Cir. 1990). The framework for analyzing requests for comity or assistance in Chapter 15 proceedings was analyzed by the Fifth Circuit in *In the Matter of Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1056 (5th Cir. 2012), as follows:

First, because Section 1521 lists specific forms of relief, a court should initially consider whether the relief requested falls under one of these explicit provisions. Other courts have held that, where the requested relief is explicitly provided for under Section 1521, it is necessary to consider Section 1507. Second, if Section 1521(a)(1)-(7) & (b) does not list the requested relief, a court should decide whether it can be considered “appropriate relief” under Section 1521(a). This in turn requires consideration of whether such relief has previously been provided under Section 304. Third, only if the requested relief appears to go beyond the relief previously available under Section 304 or currently provided for under United States law, should a court consider Section 1507. This approach recognizes that relief under Section 1507 “is in nature more extraordinary” than that provided under Section 1521, as a result of which “the test for granting the relief is more rigorous.” It also acknowledges that, while Section 1507’s broad grant of assistance is intended to be a “catchall,” it cannot be used to circumvent restrictions present in other parts of Chapter 15, nor to provide relief otherwise available under other provisions.

(citations omitted).

12. While authorization of an interim distribution is not specifically enumerated in Section 1521(a)(1)-(7), the payment of an interim distribution does fall within the language of “any additional relief” contained in Section 1521(a)(7). Here, the Proposal Trustee seeks authority to make an interim distribution on the claim of Fulcrum, and potentially further distributions to Fulcrum. A review of reported decisions in the United States reveals that interim distributions are commonly authorized by bankruptcy courts under a variety of contexts. *See, e.g., In re Poseidon Concepts Corp., et al.*, United States Bankruptcy Court for the District of Colorado, Case No. 13-

15893-HRT (Chapter 15 case); *In re Energy Coop., Inc.*, 173 B.R. 363, 372-373 (N.D. Ill. 1994) (“the Trustee’s motion for an interim distribution of 20% to general unsecured creditors is granted.”); *In re Griffin Trading Co.*, 270 B.R. 883, 904 (N.D. Ill. 2001) (“The trustee may make an interim distribution”); *In re Field*, 226 B.R. 178, 185 (Bankr. D.S. Car. 1998) (“The trustee may, at his discretion, propose an interim distribution to other creditors.”); *In re Inspire Ins. Solutions, Inc.*, 2006 WL 6508275 *5 (Bankr. N.D. Tex. May 18, 2006) (unpublished disposition) (“the Court therefore finds that it is appropriate to authorize the Trustee to make interim distributions”); *In re Industrial Office Bldg. Corp.*, 171 F.2d 890, 893 (3d Cir. 1949) (“we cannot say that the court below abused its discretion in authorizing the interim distribution.”).

13. Also, as reflected in the Third Report, the Proposal Trustee has carefully analyzed the status of Fulcrum as a secured creditor of the Nilex Debtors. The Proposal Trustee has obtained opinions from independent counsel in Canada and the United States confirming that CIBC has a properly perfected security interest in the assets of the Nilex Debtors. *See Third Report*, p. 5. The Proposal Trustee has further carefully analyzed potential claims which may take priority over the lien interests asserted by Fulcrum as assignee of CIBC. *Id.*

14. Under these circumstances, including the fact that the proposed interim distribution has previously been authorized and approved by the Alberta Court, the Proposal Trustee asserts that the proposed distribution, and future distributions, falls within the spirit, purpose and intent of Chapter 15 and requests the Court grant the U.S. Distribution Motion.

NOTICE OF THIS MOTION

Notice of this U.S. Distribution Motion is being served on all creditors, interested parties and the United States Trustee pursuant to FED. R. BANKR. P. 2002(a)(2) and Local Bankruptcy Rule 9013-1.

WHEREFORE, the Proposal Trustee respectfully requests that the Court enter its Order authorizing the proposed interim distribution to Fulcrum from the Sale Proceeds, and requests such other and further relief as is appropriate.

Dated: February 16, 2023.

Respectfully submitted,

LEWIS ROCA ROTHGERBER CHRISTIE LLP

s/ Brent R. Cohen

Brent R. Cohen, No. 11297

Chad S. Caby, No. 30927

1601 Nineteenth Street, Suite 1000

Denver, CO 80202

Phone: 303.623.9000

Fax: 303.623.9222

E-mail: bcohen@lewisroca.com
ccaby@lewisroca.com

*Attorneys for KSV Restructuring Inc., as
Proposal Trustee and authorized Foreign
Representative of Nilex USA Inc.*



Clerk's stamp:

COURT/ESTATE FILE NUMBER 24-2878531
 COURT COURT OF KING'S BENCH OF ALBERTA
 JUDICIAL CENTRE CALGARY

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 **THIRD REPORT OF THE PROPOSAL TRUSTEE**
December 7, 2022

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Proposal Trustee
 KSV Restructuring Inc.
 150 King Street West, Suite 2308
 Toronto, ON, M5H 1J9

Attn: Bobby Kofman / David Sieradzki
 Telephone: 416-932-6228
 Email: bkofman@ksvadvisory.com / dsieradzki@ksvadvisory.com

Proposal Trustee's Counsel
 Cassels Brock & Blackwell LLP
 Suite 3810, Bankers Hall West
 888 – 3rd Street S.W.
 Calgary, AB T2P 5C5

Attn: Jane Dietrich / Danielle Marechal
 Telephone: 403-351-2922
 E-mail: jdietrich@cassels.com / dmarechal@cassels.com

File Ref.: 50505-7



**Third Report to Court of
KSV Restructuring Inc.
as Proposal Trustee of
Nilex Inc. and Nilex USA Inc.**

December 7, 2022

Contents		Page
1.0	Introduction	1
1.1	Purposes of this Report.....	2
1.2	Currency	3
1.3	Restrictions	3
1.4	Court Materials	3
2.0	Background	3
3.0	The Transaction	4
4.0	Proposed Distributions to Fulcrum.....	4
5.0	WEPPA	6
6.0	Overview of Proposal Trustee’s Activities	6
7.0	Conclusion and Recommendation	7

Appendices

Appendix	Tab
Certificates of Filing.....	A
First Report to Court dated October 31, 2022 (without appendices).....	B
Second Report to Court dated November 21, 2022 (without appendices).....	C



Court File No.: 24-2878531

COURT OF KING'S BENCH OF ALBERTA

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

**THIRD REPORT OF KSV RESTRUCTURING INC.
AS PROPOSAL TRUSTEE OF
NILEX INC. AND NILEX USA INC.**

DECEMBER 7, 2022

1.0 Introduction

1. This report ("Report") is filed by KSV Restructuring Inc. ("KSV"), in its capacity as proposal trustee (the "Proposal Trustee") in connection with Notices of Intention to Make a Proposal ("NOI") filed pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") on October 27, 2022 by Nilex Inc. ("Nilex Canada") and on November 24, 2022 by Nilex USA Inc. ("Nilex USA", and together with Nilex Canada, the "Nilex Debtors"). Copies of the certificates of filing issued by the Office of the Superintendent of Bankruptcy are provided in Appendix "A".
2. Pursuant to an order of the Court of King's Bench of Alberta (the "Court") granted on November 28, 2022 (the "Ancillary Order"), among other things, the Nilex Debtors' NOI proceedings were procedurally consolidated.
3. Also pursuant to the Ancillary Order, the Proposal Trustee was appointed as foreign representative (the "Foreign Representative") for the purpose of commencing recognition proceedings in the United States Court for the District of Colorado (the "US Court") pursuant to chapter 15 ("Chapter 15") of title 11 of the United States Code, 11 U.S.C. §§ 101-1532. On December 2, 2022, the Proposal Trustee, as Foreign Representative, filed a petition for US Court recognition of Nilex USA's NOI proceedings as a foreign main proceeding.
4. Pursuant to another order of the Court granted on November 28, 2022 (the "SAVO"), the Court approved a sale (the "Transaction") of the Nilex Debtors' business and assets pursuant to an Asset Purchase Agreement (the "APA") dated November 18, 2022 between the Nilex Debtors and Terrafix Geosynthetics Inc. (the "Canadian Purchaser") and Hanes Companies, Inc. (the "US Purchaser") (jointly, the Canadian Purchaser and the US Purchaser are defined as the "Purchasers").

5. The principal purposes of this proceeding at this time are to:
 - a) create a stabilized environment to allow the Nilex Debtors to complete the Transaction;
 - b) make distributions to the Nilex Debtors' secured creditors, as discussed herein; and
 - c) provide the Nilex Debtors the opportunity to file a proposal to creditors pursuant to the provisions of the BIA ("Proposal").

1.1 Purposes of this Report

1. The purposes of this Report are to:
 - a) provide background information about the Nilex Debtors, the Transaction and these proceedings;
 - b) set out the basis for the Proposal Trustee's recommendation that it be authorized to make one or more distributions to PEF 2010 Nilex Investment Limited Partnership ("Fulcrum"), up to the full amount of the secured indebtedness owing to Fulcrum, from the proceeds generated by the Transaction, which distributions are in addition to distributions to be made by the Proposal Trustee to Canadian Imperial Bank of Commerce ("CIBC"), the Nilex Debtors' senior secured creditor, as previously authorized by the Ancillary Order;
 - c) provide an overview of the Proposal Trustee's activities over the course of these proceedings; and
 - d) recommend that the Court grant an order, among other things:
 - i. authorizing the Proposal Trustee to make distributions to Fulcrum, as detailed herein;
 - ii. declaring that Nilex Canada 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"); and
 - iii. 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 this Third Report. A copy of the First Report and the Second Report, both without appendices, are attached as Appendices "B" and "C", respectively.

1.2 Currency

1. Unless otherwise noted, all currency references in this Report are to Canadian dollars.

1.3 Restrictions

1. In preparing this Report, the Proposal Trustee has relied upon unaudited financial information prepared by the Nilex Debtors' representatives, the books and records of the Nilex Debtors and discussions with the Nilex Debtors' advisors and representatives. The Proposal Trustee has not performed an audit or otherwise attempted to verify the accuracy or completeness of the financial information relied on in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the Chartered Professional Accountants of Canada Handbook and, accordingly, the Proposal Trustee expresses no opinion or other form of assurance contemplated under the CAS in respect of such information. Any party wishing to place reliance on the financial information should perform its own diligence.
2. The Proposal Trustee accepts no responsibility for any reliance placed by any third party on the Nilex Debtors' financial information presented herein. Future oriented financial information relied upon in this Report is based upon the Nilex Debtors' assumptions regarding future events; actual results achieved may vary from this information and these variations may be material.

1.4 Court Materials

1. Court materials filed in these proceedings are available on the Proposal Trustee's website at: <https://www.ksvadvisory.com/experience/case/nilex-inc>.

2.0 Background

1. Nilex Canada has been operating in the geosynthetics industry providing civil environmental products and technologies since 1977. Nilex Canada provides environmental solutions that are used in road building, erosion and sediment control, water management and containment. Nilex Canada also offers conversion and fabrication options, customization of standard products to site and project-specific requirements.
2. Fulcrum has been Nilex Canada's controlling shareholder since 2013. Nilex Canada's registered office is in Calgary. Nilex Canada leases its head office premises in Edmonton. It also operates from four other leased premises in Calgary, Saskatoon, Surrey and Toronto.
3. Nilex Canada is the 100% shareholder of Nilex USA, which operates from leased premises in Utah and Colorado. Both Nilex Debtors have been and continue to be operating in the normal course during these proceedings.
4. As set out in Section 4 of this Report, CIBC and Fulcrum are the principal secured creditors of the Nilex Debtors. Pursuant to an agreement dated June 1, 2018, Fulcrum subordinated its debt to CIBC.

5. Additional background information about the Nilex Debtors and these proceedings was included in the Affidavits of Jeff Allen, the Company's Vice President, Finance, sworn October 31, 2022, November 21, 2022 and December 7, 2022, the First Report and the Second Report.

3.0 The Transaction

1. The Transaction was approved pursuant to the SAVO on November 28, 2022. The terms of the APA and the basis for the Proposal Trustee's support for the Transaction were provided in the Second Report, and accordingly, are not repeated in this Report.
2. The Transaction with the Canadian Purchaser is scheduled to close on or around December 16, 2022.
3. The portion of the Transaction for the sale of Nilex USA's assets and business remains subject to US Court approval. As at the date of this Report, a motion seeking recognition of the SAVO as it relates to Nilex USA has been filed with the US Court. A preliminary hearing is currently scheduled with the US Court for the morning of Friday, December 9, 2022 at which time, among other things, it is expected the substantive hearing for recognition will be scheduled. Subject to US Court approval, the Transaction with the US Purchaser is expected to be completed around mid-January, 2023.
4. Pursuant to a sealing order of the Court granted on November 28, 2022, the purchase price under the Transaction remains sealed pending the earlier of termination of the Transition Services Agreement between the Nilex Debtors and the Purchasers (the "TSA"), or further order of the Court; however, it is expected that the purchase price will be sufficient to repay CIBC in full and for Fulcrum to have a partial recovery on its secured advances to Nilex Canada.

4.0 Proposed Distributions to Fulcrum

1. CIBC is the Nilex Debtors' senior secured creditor. As of December 6, 2022, CIBC was owed approximately \$12.3 million, comprised of approximately \$9.8 million under its revolving loan facility (the "Revolving Facility") and approximately \$2.5 million under the business credit availability program ("BCAP"). Approximately \$8.1 million of the amount owing is secured by the security granted to CIBC by the Nilex Debtors prior to Nilex Canada filing its NOI and an additional approximate amount of \$4.1 million is also secured by the Lender Priority Charge (as described below). Interest and costs continue to accrue on both facilities.
2. Pursuant to the Ancillary Order, the Proposal Trustee was authorized to make distributions to CIBC from the proceeds generated from the Transaction, up to the amount of the secured indebtedness owing to CIBC. Accordingly, upon closing of the Transaction with the Canadian Purchaser, which is scheduled to be on or around December 16, 2022, the Proposal Trustee is authorized to make distributions to repay up to the full amount of the Nilex Debtors' indebtedness owing to CIBC.

3. On December 7, 2022, CIBC assigned to Fulcrum \$3 million of the amounts owed by the Nilex Debtors to CIBC under the Revolving Facility (the “Assigned Amount”). Fulcrum is presently owed approximately \$48 million plus interest and costs, which continue to accrue, on a secured basis, including the Assigned Amount secured by the assets of both Nilex Debtors.
4. As described in the First Report, Cassels Brock & Blackwell LLP (“CBB”), the Proposal Trustee’s legal counsel, provided opinions to the Proposal Trustee that, subject to customary qualifications and assumptions, the security granted by Nilex Canada to both CIBC and Fulcrum prior to the Proposal Proceedings, was valid and enforceable.¹ The Proposal Trustee has also been advised by its independent US Counsel, Lewis Roca Rothgerber Christie LLP, that it has reviewed the security granted by Nilex USA to CIBC and similarly advised that it is valid and enforceable.
5. Any equipment lessors with security interests in certain leased assets will either have their agreements assumed by the Purchasers under the Transaction, or the assets subject to their security will be returned to the applicable lessor. The Proposal Trustee is not aware of any other secured creditors of the Nilex Debtors or any claim that ranks or may rank in priority to CIBC and Fulcrum, other than the amounts secured under the Court-approved charges (collectively, the “Charges”), which are summarized as follows²:
 - a) Administration Charge (\$350,000);
 - b) Lender Priority Charge securing CIBC’s post-filing advances up to an aggregate principal amount of \$20 million, plus interest, fees and expenses;
 - c) D&O Charge (\$925,000); and
 - d) KERP Charge (\$800,000).
6. Pursuant to an order of the Court granted November 8, 2022 and the Ancillary Order, the obligations covered by the Charges are secured against the property of both Nilex Debtors. A motion for recognition of the Ancillary Order as it relates to the Charges over the property of Nilex USA has been filed in the US Court.
7. Before making any distributions to CIBC or Fulcrum, the Proposal Trustee will retain from the proceeds of the Transaction a reserve sufficient to fund in full: (a) any amounts that may be covered by the Charges (other than the Lender Priority Charge); (b) potential post-closing purchase price adjustments to be calculated in accordance with the APA; and (c) the remaining costs of these proceedings, including the costs of the Chapter 15 proceeding and the fees of Nilex Debtors’ investment banker, Valitas Capital Partners (“Valitas”).

¹ The CBB opinions addressed the laws of Alberta, British Columbia and Ontario and noted that the security was also registered in Saskatchewan.

² The charges are as defined in the order of the Honorable Justice J.S. Little granted by the Court on November 8, 2022.

8. Based on the foregoing, the Proposal Trustee recommends that the Court grant an order authorizing the Proposal Trustee to make distributions to Fulcrum, of both the proceeds generated from the Transaction in respect of the assets or business of Nilex USA, up to the Assigned Amount, and from the proceeds generated from the Transaction in respect of the assets or business of Nilex Canada, up to the total amount of the secured indebtedness owing to Fulcrum.

5.0 WEPPA

1. As a result of the Transaction, the Nilex Debtors have terminated or will shortly terminate the employment of all employees except those retained pursuant to the TSA between the Nilex Debtors and the Purchasers for the purpose of winding down the Nilex Debtors' business and effecting the orderly transfer of the business to the Purchasers. All terminated employees have been paid, or will be paid, their full wages and vacation pay but will not be paid any termination and severance pay. Nilex Canada would like to assist its employees to be able to forthwith file claims under WEPPA for unpaid termination and severance pay.
2. Section 5(1) of the WEPPA provides that an individual is eligible to receive payment under the WEPPA if, among other things, (i) the individual is owed eligible wages by a former employer; (ii) the former employer is subject to proceedings under Division I of Part III of the BIA; and (iii) a court determines under subsection 5(5) that the criteria prescribed by the regulation are met.
3. Section 5(5) of the WEPPA provides that on application by any person in proceedings under Division I of Part III of the BIA, a court may determine that a former employee meets the criteria prescribed by WEPPR. Section 3.2 of the WEPPR provides that "a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations".
4. In the Proposal Trustee's view, it is appropriate for the Court to grant this relief as the employment of the employees of Nilex Canada that are not transferred to the Purchaser has been terminated or will shortly be terminated by Nilex Canada except for those retained pursuant to the TSA, all of whom are assisting with the wind-down of the Nilex Debtors' business and the transition of the business to the Purchasers. Granting this relief will enable terminated employees to access their statutory entitlements with respect to unpaid termination and severance pay.

6.0 Overview of Proposal Trustee's Activities

1. The Proposal Trustee's activities since the commencement of these proceedings include the following:
 - assisting the Nilex Debtors to prepare for these proceedings, including developing a communication plan for major stakeholders and to formulate a key employee retention plan;
 - working with the Nilex Debtors and Valitas to complete the sale process until the bid deadline of November 8, 2022 and reviewing the offers submitted on that date;

- working with the Nilex Debtors, Fulcrum and Valitas over the course of the sale process, including in connection with the APA, TSA and other Transaction documents;
- assisting the Nilex Debtors to prepare budget-to-actual cash flow analyses prior to those schedules being submitted to CIBC on a weekly basis;
- reviewing and commenting on the Court materials filed in these proceedings, and corresponding with legal counsel to the Nilex Debtors, the Proposal Trustee and CIBC in respect thereof;
- working with the Nilex Debtors on various operational and financial issues, including to address vendor supply issues and in respect of steps taken by certain judgement creditors to garnish accounts receivable;
- drafting the First Report, the Second Report and this Report;
- assisting the Nilex Debtors to prepare cash flow forecasts filed with the Court and the Office of the Superintendent of Bankruptcy;
- assisting the Nilex Debtors to have their Canadian restructuring proceedings recognized by the US Court under Chapter 15 of the US Code; and
- working with the Nilex Debtors and legal counsel to have the Court issue an order recognizing Nilex Canada's ability to assist its employees to file WEPPA claims.

7.0 Conclusion and Recommendation

1. Based on the foregoing, the Proposal Trustee respectfully recommends that this Honourable Court grant the relief being sought by the Nilex Debtors.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

**KSV RESTRUCTURING INC.
IN ITS CAPACITY AS TRUSTEE *IN RE* THE PROPOSAL OF
NILEX INC. AND NILEX USA INC.
AND NOT IN ITS PERSONAL CAPACITY**

Appendix “A”



Industry Canada
Office of the Superintendent
of Bankruptcy Canada

Industrie Canada
Bureau du surintendant
des faillites Canada

District of Alberta
Division No. 01 - Edmonton
Court No. 24-2878531
Estate No. 24-2878531

In the Matter of the Notice of Intention to make a proposal of:

Nilex Inc.

Insolvent Person

KSV RESTRUCTURING INC.

Licensed Insolvency Trustee

Date of the Notice of Intention:

October 27, 2022

CERTIFICATE OF FILING OF A NOTICE OF INTENTION TO MAKE A PROPOSAL
Subsection 50.4 (1)

I, the undersigned, Official Receiver in and for this bankruptcy district, do hereby certify that the aforementioned insolvent person filed a Notice of Intention to Make a Proposal under subsection 50.4 (1) of the Bankruptcy and Insolvency Act;

Pursuant to subsection 69. (1) of the Act, all proceedings against the aforementioned insolvent person are stayed as of the date of filing of the Notice of Intention.

Date: October 27, 2022, 10:45

E-File/Dépôt Electronique

Official Receiver

Canada Place Building, 9700 Jasper Avenue NW, Suite 725, Edmonton, Alberta, Canada, T5J4C3, (877)376-9902

Canada 



Industry Canada
Office of the Superintendent
of Bankruptcy Canada

Industrie Canada
Bureau du surintendant
des faillites Canada

District of Alberta
Division No. 01 - Edmonton
Court No. 24-2887527
Estate No. 24-2887527

In the Matter of the Notice of Intention to make a proposal of:

Nilex USA Inc.

Insolvent Person

KSV RESTRUCTURING INC.

Licensed Insolvency Trustee

Date of the Notice of Intention:

November 24, 2022

CERTIFICATE OF FILING OF A NOTICE OF INTENTION TO MAKE A PROPOSAL
Subsection 50.4 (1)

I, the undersigned, Official Receiver in and for this bankruptcy district, do hereby certify that the aforementioned insolvent person filed a Notice of Intention to Make a Proposal under subsection 50.4 (1) of the Bankruptcy and Insolvency Act;

Pursuant to subsection 69. (1) of the Act, all proceedings against the aforementioned insolvent person are stayed as of the date of filing of the Notice of Intention.

Date: November 24, 2022, 10:03

E-File/Dépôt Electronique

Official Receiver

Canada Place Building, 9700 Jasper Avenue NW, Suite 725, Edmonton, Alberta, Canada, T5J4C3, (877)376-9902

Canada 

Appendix “B”



Clerk's stamp:

COURT/ESTATE FILE NUMBER 24-2878531
 COURT COURT OF KING'S BENCH OF ALBERTA
 JUDICIAL CENTRE CALGARY

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

APPLICANT: NILEX INC.
 DOCUMENT **FIRST REPORT OF THE PROPOSAL TRUSTEE**
October 31, 2022

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
Proposal Trustee
 KSV Restructuring Inc.
 150 King Street West, Suite 2308
 Toronto, ON, M5H 1J9

Attn: Bobby Kofman / David Sieradzki
 Telephone: 416-932-6228
 Email: bkofman@ksvadvisory.com / dsieradzki@ksvadvisory.com

Proposal Trustee's Counsel
 Cassels Brock & Blackwell LLP
 Suite 3810, Bankers Hall West
 888 – 3rd Street S.W.
 Calgary, AB T2P 5C5

Attn: Jane Dietrich / Danielle Marechal
 Telephone: 403-351-2922
 E-mail: jdietrich@cassels.com / dmarechal@cassels.com

File Ref.: 50505-7



**First Report to Court of
KSV Restructuring Inc.
as Proposal Trustee of
Nilex Inc.**

October 31, 2022

Contents		Page
1.0	Introduction	1
1.1	Purposes of this Report.....	1
1.2	Currency	2
1.3	Restrictions	3
1.4	Court Materials	3
1.5	KSV’s Prior Mandate.....	3
2.0	Background	4
2.1	Financial Difficulties	4
2.2	Assets.....	5
2.3	Liabilities	6
2.3.1	CIBC.....	6
2.3.2	Fulcrum.....	6
2.3.3	Other Secured Creditors	7
2.3.4	Unsecured Creditors	7
3.0	Nilex USA.....	7
4.0	Sale Process	8
5.0	Stay of Proceedings	9
6.0	Garnishment Proceedings	9
7.0	KERP	11
7.1	Sealing.....	11
8.0	Cash Flow	12
9.0	Court Ordered Charges	12
9.1	Administration Charge	12
9.2	Lender Priority Charge.....	12
9.3	D&O Charge	13
9.4	KERP Charge	13
9.5	Priority Court Ordered Charges.....	14
10.0	Company’s Request for an Extension.....	14
11.0	Conclusion and Recommendation	14

Appendices

Appendix	Tab
Certificate of Filing	A
Sale Process Letter.....	B
Cash Flow Forecast and Management’s Report on Cash Flow	C
Proposal Trustee’s Report on Cash Flow	D

Confidential Appendices

KERP Terms	1
------------------	---



Court File No.: _____

COURT OF KING'S BENCH OF ALBERTA

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
NILEX INC.
IN THE CITY OF CALGARY, IN THE PROVINCE OF ALBERTA**

**FIRST REPORT OF KSV RESTRUCTURING INC.
AS PROPOSAL TRUSTEE OF
NILEX INC.**

October 31, 2022

1.0 Introduction

1. This report ("Report") is filed by KSV Restructuring Inc. ("KSV"), in its capacity as proposal trustee (the "Proposal Trustee") in connection with a Notice of Intention to Make a Proposal ("NOI") filed on October 27, 2022 (the "Filing Date") by Nilex Inc. (the "Company") pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"). A copy of the certificate of filing issued by the Office of the Superintendent of Bankruptcy is provided in Appendix "A".
2. The principal purpose of this proceeding is to: (a) create a stabilized environment to allow the Company to continue a sale process commenced prior to these proceedings (the "Sale Process") for its business being carried out by Valitas Capital Partners ("Valitas"), an investment banking firm engaged by the Company; (b) provide the Company with the opportunity to complete a going concern transaction that is in the best interests of the Company and its stakeholders; and (c) file a proposal to its creditors.

1.1 Purposes of this Report

1. The purposes of this Report are to:
 - a) provide background information about the Company;
 - b) summarize the basis on which Canadian Imperial Bank of Commerce ("CIBC"), the Company's principal secured creditor and operating lender, has agreed to fund the Company's operations during these proceedings;
 - c) summarize the status of the Sale Process, including the process carried out by Valitas to-date and the future Sale Process timelines;
 - d) provide information concerning a judgement debt in the amount of \$639,000 owing to Ian Wilson ("Wilson"), a former shareholder, and a Garnishee Summons dated July 21, 2022 (the "Garnishment") filed by Hugh Watt ("Watt"), a former shareholder and judgement creditor in the amount of \$410,178.78, directing the Company's customers to pay funds owing to the Company into the Court of King's Bench of Alberta (the "Court");

- e) discuss the relief sought by the Company to have any funds paid into Court pursuant to the Garnishment be released to the Company forthwith and directing all customers who received the Garnishment who have not yet paid any amounts into Court to pay all such amounts to the Company, as well as all future amounts that may become payable by these customers to the Company;
- f) explain why the Proposal Trustee supports the Company's request for an order expanding the scope of the stay of proceedings in these proceedings as it relates to the terms of supply and service to the Company on a basis consistent with the provisions of the model Initial Order in a proceeding under the *Companies' Creditors Arrangement Act* (Canada) (the "CCAA");
- g) summarize a proposed key employee retention plan (the "KERP") for certain of the Company's employees and discuss the Company's request that the terms of the KERP be filed on a confidential basis;
- h) discuss the rationale for the Company seeking approval of the following Court-ordered charges (the "Court-ordered Charges"):
 - i. a charge in the amount of \$350,000 (the "Administration Charge") for the fees and disbursements of the Proposal Trustee, the Proposal Trustee's counsel, Cassels Brock & Blackwell LLP ("CBB"), and the Company's counsel, Blake, Cassels & Graydon LLP ("Blakes");
 - ii. a charge for all post-filing advances (the "Lender Priority Charge") made by CIBC under the Company's existing Credit Agreement dated as of June 1, 2022 (the "CIBC Credit Agreement"), as amended pursuant to the terms of a Forbearance Agreement dated October 17, 2022 (the "Forbearance Agreement");
 - iii. a \$925,000 charge in favour of the directors and officers of the Company (the "D&O Charge"); and
 - iv. a charge in the amount of \$800,000 securing amounts payable under the proposed KERP (the "KERP Charge");
- i) discuss the recommended priority of the Court-ordered Charges;
- j) discuss the Company's request for an extension of the deadline to file a proposal from November 26, 2022 to January 10, 2023;
- k) report on the Company's weekly cash flow projection for the period October 27, 2022 to January 13, 2023 (the "Cash Flow Forecast"); and
- l) recommend that the Court grant the relief sought by the Company.

1.2 Currency

1. Unless otherwise noted, all currency references in this Report are to Canadian dollars.

1.3 Restrictions

1. In preparing this Report, the Proposal Trustee has relied upon unaudited financial information prepared by the Company's representatives, the books and records of the Company and discussions with the Company's representatives. The Proposal Trustee has not performed an audit or otherwise attempted to verify the accuracy or completeness of the financial information relied on in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the Chartered Professional Accountants of Canada Handbook and, accordingly, the Proposal Trustee expresses no opinion or other form of assurance contemplated under the CAS in respect of such information. Any party wishing to place reliance on the financial information should perform its own diligence.
2. The Proposal Trustee accepts no responsibility for any reliance placed by any third party on the Company's financial information presented herein. An examination of the Cash Flow Forecast as outlined in the *Chartered Professional Accountants Canada Handbook* has not been performed. Future oriented financial information relied upon in this Report is based upon the Company's assumptions regarding future events; actual results achieved may vary from this information and these variations may be material.

1.4 Court Materials

1. Court materials filed in these proceedings are available on the Proposal Trustee's website at: <https://www.ksvadvisory.com/experience/case/nilex>.

1.5 KSV's Prior Mandate

1. KSV Advisory Inc. ("KSV Advisory")¹, an affiliate of KSV, was most recently engaged by the Company as its financial advisor pursuant to an engagement letter dated December 20, 2021 (the "Engagement Letter"). KSV's primary role since that time has been to, *inter alia*, liaise with the Company and Valitas on the conduct of the Sale Process. KSV's role prior to July 2022 was very limited. KSV was also previously retained by the Company on a limited basis to provide financial advisory services.
2. The Engagement Letter states that KSV's mandate on behalf of the Company terminates if the Company considered it necessary to commence an insolvency process and if KSV was appointed as the court officer in that process.

¹ KSV Advisory was engaged for this advisory mandate. KSV is a wholly-owned subsidiary of KSV Advisory. KSV holds the firm's trustee license and carries out formal insolvency appointments, while KSV Advisory performs advisory mandates.

2.0 Background

1. Fulcrum Capital Partners Inc. (“Fulcrum”) has been the Company’s controlling shareholder since 2013. The Company has been operating in the geosynthetics industry providing civil environmental products and technologies since 1977. The Company provides environmental solutions that are used in road building, erosion and sediment control, water management and containment. The Company also offers conversion and fabrication options, customization of standard products to site and project-specific requirements.
2. The Company's registered office is in Calgary. The Company leases its head office premises in Edmonton. It also operates from four other leased premises located in each of Calgary, Saskatoon, Surrey and Toronto.
3. The Company is the 100% shareholder of Nilex USA Inc. (“Nilex USA”), which operates from leased offices in Utah and Colorado. Nilex USA is not subject to the Company’s NOI proceedings or any other insolvency process. Nilex USA is continuing to operate in the normal course.
4. The Company presently has approximately 70 full-time employees and 44 seasonal employees, which does not include Nilex USA. The Company’s workforce is not unionized. The Company offers its employees a defined contribution pension plan. The Company is current on its contribution obligations to employees.
5. Additional background information about the Company is included in the Affidavit of Jeff Allen, the Company’s Vice President, Finance, sworn October 31, 2022 (the “Affidavit”) filed in support of the Company’s application returnable November 9, 2022, before the Court.

2.1 Financial Difficulties

1. The Company has 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. As a result of these and other issues, the Company decided to initiate restructuring proceedings by filing the NOI. Filing the NOI will provide the Company with the stability it requires to advance the Sale Process, with the objective of completing a going-concern sale in the near term. As discussed in Section 4 below, the Sale Process is at an advanced stage and offers are to be submitted on November 8, 2022.
2. A summary of the Company’s financial results² for its fiscal years ended December 31, 2020 and 2021, and the eight months ended August 31, 2022, is presented in the table below.

² Excludes Nilex USA’s results, which follow the same trend and are not material relative to the Company’s results.

(\$000s)	8 months ended		
	August 31, 2022 (unaudited)	Fiscal 2021 (unaudited)	Fiscal 2020 (unaudited)
Sales	33,956	53,459	50,923
Cost of sales	(25,630)	(40,773)	(39,350)
Gross margin	8,325	12,686	11,573
Net loss	(2,006)	(1,837)	(1,748)
Accumulated Deficit	(41,645)	(39,639)	(37,802)

- As reflected above, the Company has incurred significant and recurring losses since fiscal year 2020. Consistent with the seasonality of the Company's business, operating losses are projected to continue during the fourth quarter of this year and through the first quarter of 2023. The table also reflects that as of August 31, 2022, the Company had an accumulated deficit of approximately \$41.6 million, reflecting a history of recurring losses.
- The Company's business fluctuates according to activity in the construction industry. Accordingly, it generates most of its sales in the warmer April to October period. Sales are significantly lower during the balance of the year.
- The Company is facing a liquidity crisis. Absent the commencement of these proceedings, the Company will soon not have funding available to continue to operate in the normal course. CIBC, the Company's operating lender, has agreed to continue to fund the Company's business and operations in accordance with the terms of the Forbearance Agreement while the Company completes the Sale Process.

2.2 Assets

- Based on the Company's most recent internal financial statements, a summary of the Company's assets as at August 31, 2022 is provided below³.

Description	Book Value (\$000s)
Accounts receivable	12,853
Inventory	10,863
Other assets	300
Fixed assets	851
Intercompany receivable – Nilex USA	5,201 ⁴
Goodwill and intangible assets	3,393
Total	33,461

- Accounts receivable: comprised of amounts owing from customers for completed distribution sales and installation work.
- Inventory: comprised of geotextiles, geogrids, liners, paving products, erosion and sedimentary control products and other related materials.
- Other assets: comprised of deposits and prepaid expenses.

³ The book values presented below exclude Nilex USA as it is not subject to these proceedings.

⁴ See footnote 7.

- Fixed assets: comprised of furniture, factory equipment/racking, leasehold improvements, computer equipment and software.
- Intercompany receivable: the Company is the largest unsecured creditor of Nilex USA, representing approximately 80% of Nilex USA's unsecured creditor obligations.
- Goodwill and intangible assets: includes the Company's intellectual property.

2.3 Liabilities

2.3.1 CIBC

1. CIBC is the Company's operating lender. CIBC is presently owed approximately \$17.85 million, comprised of approximately \$15.35 million under the CIBC Credit Agreement and \$2.5 million under the business credit availability program ("BCAP"). Interest and costs continue to accrue on both facilities.
2. The Company is in default of the CIBC Credit Agreement. On September 15, 2022, CIBC issued a demand and a notice of intention to enforce security under section 244 of the BIA. On October 17, 2022, the Company and CIBC entered into the Forbearance Agreement.
3. The Forbearance Agreement requires that if the Company determines it is necessary to commence an insolvency process: a) CIBC will be treated as an "unaffected creditor" in the Company's NOI proceedings; b) the Sale Process will have the milestones and deadlines detailed in Section 4 of this Report; and c) CIBC will provide funding to the Company, conditional upon, among other things, the Court granting the Lender Priority Charge for any post-filing advances and CIBC's ability to apply post-filing collections against its pre-filing debt.
4. In advance of these proceedings, the Proposal Trustee instructed its legal counsel, CBB, to provide an opinion on the validity and enforceability of CIBC's security. CBB's opinion dated October 29, 2022, which addresses the laws of Alberta, British Columbia and Ontario⁵ provides that, subject to the customary assumptions and qualifications contained therein, the security granted to CIBC is valid and enforceable. A copy of the security opinion can be made available to the Court upon request.
5. The security opinion was prepared prior to these proceedings as the CIBC Credit Agreement and the Company's existing cash management system requires the Company's accounts receivable collections to be swept daily and applied against the CIBC debt. The Forbearance Agreement requires that process to continue during these proceedings, with post-filing receipts against the Company's pre-filing debt.

2.3.2 Fulcrum

1. Fulcrum is also a secured creditor of the Company. Based on the Company's internally prepared balance sheet, Fulcrum was owed approximately \$44.9 million as at August 31, 2022, plus interest and costs which continue to accrue.

⁵ CBB's opinion also notes that CIBC's security is registered in Saskatchewan as well.

2. CBB reviewed Fulcrum's security documents and security registrations and issued an opinion dated October 30, 2022, which addresses the laws of Alberta, British Columbia and Ontario⁶ providing that, subject to the customary assumptions and qualifications contained therein, the security granted to Fulcrum is valid and enforceable. A copy of the security opinion can be made available to the Court upon request.

2.3.3 Other Secured Creditors

1. Searches as of October 28, 2022 of the personal property security registry in Alberta as against the Company also show registrations in favour of certain vehicle financiers, being Element Fleet Management Inc., Foss National Leasing and Leavitt Machinery Canada Inc. Foss National Leasing has also made registrations in the British Columbia and Ontario personal property security registries.

2.3.4 Unsecured Creditors

1. According to the Company's books and records, amounts owing to suppliers and service providers (excluding off-balance sheet obligations, such as employee and landlord claims) at the Filing Date totaled approximately \$12.2 million.
2. The Company's preliminary list of creditors was filed with its NOI statutory documents and is available on the Proposal Trustee's website.

3.0 Nilex USA

1. Nilex USA is not subject to these proceedings nor is it subject to any insolvency proceedings. Nilex USA operates from leased locations in Utah and Colorado. Nilex USA is a much smaller business than the Company. Its sales for the eight-months ending August 31, 2022 were US\$3.55 million. Its summarized balance sheet as at August 31, 2022 is provided below.

Description	Book Value (US\$000s)
Cash	663
Accounts receivable	429
Inventory	1,335
Fixed assets	44
Other assets	40
Total Assets	2,511
Accounts payable	1,090
Intercompany payable – Nilex Inc.	3,962 ⁷
Other current liabilities	122
Long-term debt	2
Total Liabilities	5,175
Equity	2,664
Total Liabilities & Equity	2,511

⁶ CBB's opinion also notes that Fulcrum's security is registered in Saskatchewan as well.

⁷ The difference between this amount and the amount shown in the Company's balance sheet is due to foreign exchange.

2. As evidenced by the table above, the Company is the largest unsecured creditor of Nillex USA. CIBC also has security over the business and assets of Nillex USA.

4.0 Sale Process

1. On October 6, 2021, the Company engaged Valitas to conduct the Sale Process. A summary of the Sale Process to-date is provided below:
 - 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
 - the 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 has also conducted site visits and attended management meetings.
2. 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 Company. At the time, the Company forecasted improved results for the balance of 2022 and the Company 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.
3. 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.
4. On or around October 8, 2022, Valitas sent interested parties a process letter, which sets out the process timelines (the "Process Letter"). The Process Letter, a copy of which is attached as Appendix "B", *inter alia*:
 - a) requires interested parties 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 has been uploaded to the data room (the "Template APA"); and
 - b) indicates that the Company's objective is to enter into a binding agreement of purchase and sale (the "Purchase Agreement") by no later than November 15, 2022.
5. The Proposal Trustee understands that prospective purchasers are performing further due diligence and that Valitas and the Company believe that several offers will be submitted on the Bid Deadline.

6. The Forbearance Agreement establishes the following Sale Process milestones if the Company determined it was necessary to commence an insolvency process.

Milestone	Deadline
Selection of Successful Bidder/Bid Deadline	November 8, 2022
Execution of the Purchase Agreement	November 15, 2022
Sale Approval Order	November 25, 2022
Closing	November 30, 2022

7. The Proposal Trustee believes that it is in the best interest of the Company and its stakeholders to complete the Sale Process and supports the Company's request that the Sale Process be continued in the NOI proceedings according to the timelines above. The Proposal Trustee believes that there is a strong likelihood that a value maximizing transaction can be completed in the near term as a result of the Sale Process, and that the transaction will provide the opportunity to preserve jobs for a significant number of the Company's employees.

5.0 Stay of Proceedings

1. In order to provide the Company with the greatest opportunity to successfully complete a going-concern transaction, the Company needs to operate without disruption during these proceedings. The orderly operation of the business will be facilitated by incorporating into the requested order the enhanced stay provisions from the model Initial Order issued in a CCAA proceeding as they relate to requiring suppliers and service providers to continue to provide goods and services without disruption, provided they are not required to do so on credit. The stay of proceedings under the Initial Order is significantly broader than the statutory stay of proceedings in proposal/NOI processes under the BIA.
2. The relief sought is in the spirit of stabilizing the Company's operations and allowing it the greatest opportunity to preserve normal course operations during the NOI proceedings. Any supply disruptions would impair the Company's ability to continue to operate in the normal course and, potentially, the prospect of completing a going-concern transaction. Accordingly, the Proposal Trustee believes that expanding the scope of the stay of proceedings is appropriate as the continued operation of the Company will assist it to achieve its objectives in these proceedings.

6.0 Garnishment Proceedings

1. Watt is a former shareholder of the Company. He is owed \$410,178.78, plus post-judgment interest. Watt received a judgement for this amount on March 21, 2022 pursuant to an order enforcing an arbitration award.
2. Another former shareholder, Wilson, is owed approximately \$639,000 and received a consent judgement order dated June 2, 2022. As of the date of this Report, the Proposal Trustee does not believe that Wilson has taken any enforcement steps.

3. On July 21, 2022, Watt took steps to recover on his claim by issuing a Garnishee Summons in respect of any amounts to be paid to the Company by five of its customers (the "Garnishee Customers"). The Garnishee Summons was also served on CIBC. Since that time:
 - a) by letter dated August 8, 2022, CIBC's legal counsel responded to Watt advising, *inter alia*, that while the Company maintains bank accounts with CIBC, there are no positive balances available to satisfy the Garnishee claim;
 - b) as at the date of this Report, certain Garnishee Customers, have paid approximately \$681,000 into Court;
 - c) on September 30, 2022, October 7, 2022 and October 21, 2022, the Court issued notices that it would be distributing to Watt and Wilson a portion of the funds that have been paid into Court, subject to receiving objections in connection with the proposed distributions within 15 days; and
 - d) CIBC filed objections to the proposed distributions and, on October 26, 2022, CIBC filed an application seeking a direction to the Clerk of the Court to release and distribute to CIBC the funds that have been paid into Court and any additional funds that may be paid into Court pursuant to the Garnishment.
4. Copies of the above noted notices, CIBC's application and other correspondence are attached to the Affidavit.
5. CIBC takes the position that the amounts owing from the Garnishee Customers to the Company are subject to CIBC's security.
6. As at the date of this Report, the Proposal Trustee understands that the funds paid into Court by the Garnishee Customers total approximately \$681,000. The Proposal Trustee supports the Company's application for an order directing any funds paid into Court pursuant to the Garnishment be released to the Company forthwith and directing that the Garnishee Customers pay to the Company any amounts owing to the Company for the following reasons:
 - a) in light of the commencement of the Company's NOI proceedings, the steps taken by Watt vis-à-vis the Garnishment are stayed;
 - b) the Proposal Trustee understands that the Company's accounts receivable owing from the Garnishee Customers are subject to CIBC's first ranking security interest;
 - c) the relief sought preserves Watt's ability to bring an application in these proceedings asserting entitlement or priority over amounts owing from the Garnishee Customers (or other proceeds available for distribution), or he can respond to a distribution application when such application is brought in these proceedings; and
 - d) the issuance of the Garnishment caused CIBC to place an availability block against the Company's borrowing base (i.e., in an amount equivalent to the total judgement debt owing to Watt and Wilson). The relief sought should facilitate the removal of the availability block and collection of the amounts paid into Court and the accounts receivable subject to the Garnishment will improve the Company's liquidity during these proceedings.

7. The Proposal Trustee understands that the Company will be serving Watt, Wilson and the Garnishee Customers with its application materials in support of the November 9, 2022 application.

7.0 KERP

1. The KERP was developed by the Company, in consultation with KSV. The beneficiaries of the KERP (the “KERP Employees”) are provided in Confidential Appendix “1”. Further details concerning the terms of the KERP are also provided in Confidential Appendix “1”.
2. For certain KERP Employees, a portion of the KERP is to be paid as a “stay bonus”. For other employees, their KERP entitlement is based on the outcome of the SISF and recoveries to CIBC.
3. The Company is seeking approval of the KERP and a corresponding KERP Charge in the amount of \$800,000. The KERP Charge is discussed in greater detail in Section 9.4 below.
4. The KERP Employees have been identified as individuals integral to the ongoing orderly conduct of the operations of the business and the Sale Process. KSV has worked closely with certain of these individuals since first being retained in December 2021. The KERP is intended to incentivize the KERP Employees to assist the Company with its restructuring efforts throughout its restructuring proceedings.
5. The Proposal Trustee supports the KERP for the following reasons:
 - a) the continued involvement and cooperation of the KERP Employees is critical to the overall success of this proceeding;
 - b) the Proposal Trustee believes the KERP will assist the Company to retain the KERP Employees, which is in the interest of stakeholders;
 - c) in the Proposal Trustee’s view, the amounts payable under the KERP are reasonable in the circumstances;
 - d) the involvement of the KERP Employees should assist to reduce professional fees, particularly as it relates to the Proposal Trustee’s involvement in the Sale Process and operational matters; and
 - e) CIBC and Fulcrum have advised that they do not oppose the terms of the KERP.

7.1 Sealing

1. The Company is requesting an order sealing Confidential Appendix “1”, which addresses the terms of the KERP. Confidential Appendix “1” includes personal, identifiable and commercially sensitive information, including the identity and proposed compensation of the KERP Employees.
2. The Proposal Trustee believes it is appropriate to seal Confidential Appendix “1”. The sealing of this type of commercially sensitive and personal information is typical in insolvency proceedings to avoid disruption to the debtor company and to protect the privacy of the KERP Employees. The Proposal Trustee does not believe that any stakeholder will be prejudiced if the KERP information contained in Confidential Appendix “1” is sealed.

8.0 Cash Flow

1. Pursuant to the BIA, the Company is required to prepare a cash flow forecast for the stay extension period. The Cash Flow Forecast for the period ending January 13, 2023 (the "Period"), together with Management's Report on the Cash-Flow Statement as required by subsection 50.4(2)(c) of the BIA, is provided in Appendix "C".
2. The Cash Flow Forecast was prepared by the Company with the assistance of the Proposal Trustee. The Company's receipts during the Period are comprised of accounts receivable collections. Projected disbursements are primarily for payroll and benefits, occupancy costs and other operating expenses, inventory purchases (forecasted to be paid on a COD-basis) and professional fees.
3. The Cash Flow Forecast reflects that the Company is projected to remain in compliance with the financial covenants prescribed in the Forbearance Agreement. CIBC is prepared to provide funding under the CIBC Credit Agreement, as set out in the Cash Flow Forecast, provided that all post-filing advances, and related fees, expenses and interest, are secured under the Lender Priority Charge.
4. Based on the Proposal Trustee's review of the Cash Flow Forecast, there are no material assumptions which seem unreasonable. The Proposal Trustee's Report on the Company's Cash Flow Statement as required by subsection 50.4(2)(b) of the BIA is attached as Appendix "D".

9.0 Court Ordered Charges

9.1 Administration Charge

1. The Company is seeking an Administration Charge of \$350,000 in respect of the fees and disbursements of the Proposal Trustee, its counsel and the Company's counsel. An Administration Charge is a standard feature of restructuring proceedings and is appropriate, in the Proposal Trustee's view, given the Company's illiquidity.
2. The Administration Charge is required in these proceedings as the professionals retained have not been paid retainers.
3. The Proposal Trustee understands that CIBC and Fulcrum do not oppose the amount or priority of the Administration Charge. All other registered secured creditors, as well as Canada Revenue Agency, will be given notice of the application for this charge and those mentioned below.

9.2 Lender Priority Charge

1. As a condition to the Forbearance Agreement, CIBC agreed to continue to provide funding to the Company under the CIBC Credit Agreement provided that the aggregate of any and all advances made on or after the Filing Date and all interest and other fees and costs accruing after the Filing Date shall be secured by the Lender Priority Charge, which security and charge shall rank in priority to every other claim, lien and security interest against the Company, other than the Administration Charge.
2. Pursuant to the terms of the Forbearance Agreement, CIBC will apply post-filing receipts against the Company's pre-filing debt and new advances by CIBC to the Company during these proceedings will be secured under the Lender Priority Charge.

3. The Proposal Trustee believes the creation of the Lender Priority Charge is reasonable and appropriate in the circumstances as the Company would not be able to continue to operate without funding under the CIBC Credit Agreement and no commercially reasonable lender can be expected to provide the financing urgently required by the Company on a subordinate basis to existing obligations.

9.3 D&O Charge

1. The Proposal Trustee understands that the Company is current on all pre-filing obligations for which directors may be personally liable, including payroll obligations and sales taxes. The Cash Flow Forecast contemplates that all such amounts will continue to be paid in the ordinary course and the Company is projected to have sufficient liquidity to do so provided the Lender Priority Charge is granted. The proposed D&O Charge provides protection for the directors and officers if the Company fails to pay certain obligations which may give rise to liability for directors and officers.
2. In these proceedings, the main risk of directors' and officers' exposure is unpaid payroll, accrued vacation pay and sales taxes. Payroll presently totals approximately \$400,000 per pay period (every two weeks), accrued vacation pay presently totals approximately \$200,000 and monthly sales tax obligations are estimated to total approximately \$325,000. The D&O Charge of \$925,000 is intended to cover one payroll cycle, including source deductions, the vacation pay obligation and one monthly sales tax remittance.
3. The directors and officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, to the extent such coverage is insufficient to pay an indemnified amount as described above, or to the extent that such coverage is denied by the insurance provider.
4. The D&O Charge is proposed to rank in priority to every other claim, lien and security interest against the Company, other than the Administration Charge and the Lender Priority Charge.
5. The Proposal Trustee is of the view that the D&O Charge is reasonable in the circumstances and that the continued involvement of the directors and officers is beneficial to the Company, its stakeholders, and these proceedings.

9.4 KERP Charge

1. The KERP was developed by the Company, in consultation with the Proposal Trustee. The KERP is for seven of the Company's employees (the "KERP Employees").
2. The KERP is comprised of "stay bonuses" and, in some cases, a variable component based on the results of the Sale Process. The maximum amount payable to all KERP Employees is \$800,000.
3. The Company is seeking approval of the KERP and the creation of the corresponding KERP Charge in the amount of \$800,000.
4. Subject to the terms of the KERP as described in Confidential Appendix "1", the KERP Charge is proposed to rank in priority to every other claim, lien and security interest against the Company, other than the Administration Charge, the Lender Priority Charge and the D&O Charge.

9.5 Priority Court Ordered Charges

1. The proposed priority of the Court ordered charges is as follows:
 - a) Administration Charge (\$350,000);
 - b) Lender Priority Charge (\$20 million plus interest, fees and expenses);
 - c) D&O Charge (\$925,000); and
 - d) KERP Charge (\$800,000).

10.0 Company's Request for an Extension

1. The Company is seeking an extension of the time required to file a proposal from November 26, 2022 to January 10, 2023. The Proposal Trustee supports the extension request for the following reasons:
 - a) the Company is acting in good faith and with due diligence;
 - b) the extension will enhance the likelihood of the Company being able to make a viable proposal to its creditors;
 - c) the extension should not adversely affect or prejudice any group of creditors as the Company is projected to have funding to pay post-filing services and supplies in the amounts contemplated by the Cash Flow Forecast; and
 - d) it will provide the Company the additional time it requires to further advance its restructuring and complete the Sale Process, which is in the interest of all stakeholders.

11.0 Conclusion and Recommendation

1. Based on the foregoing, the Proposal Trustee respectfully recommends that this Honourable Court make an order granting the relief being sought by the Company.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

**KSV RESTRUCTURING INC.
IN ITS CAPACITY AS TRUSTEE *IN RE* THE PROPOSAL OF
NILEX INC.
AND NOT IN ITS PERSONAL CAPACITY**

Appendix “C”



Clerk's stamp:

COURT/ESTATE FILE NUMBER 24-2878531
 COURT COURT OF KING'S BENCH OF ALBERTA
 JUDICIAL CENTRE CALGARY

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

APPLICANT: NILEX INC.
 DOCUMENT **SECOND REPORT OF THE PROPOSAL TRUSTEE**
November 21, 2022

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
Proposal Trustee
 KSV Restructuring Inc.
 150 King Street West, Suite 2308
 Toronto, ON, M5H 1J9

Attn: Bobby Kofman / David Sieradzki
 Telephone: 416-932-6228
 Email: bkofman@ksvadvisory.com / dsieradzki@ksvadvisory.com

Proposal Trustee's Counsel
 Cassels Brock & Blackwell LLP
 Suite 3810, Bankers Hall West
 888 – 3rd Street S.W.
 Calgary, AB T2P 5C5

Attn: Jane Dietrich / Danielle Marechal
 Telephone: 403-351-2922
 E-mail: jdietrich@cassels.com / dmarechal@cassels.com

File Ref.: 50505-7



**Second Report to Court of
KSV Restructuring Inc.
as Proposal Trustee of
Nilex Inc.**

November 21, 2022

Contents

	Page
1.0 Introduction	1
1.1 Purposes of this Report.....	1
1.2 Currency	3
1.3 Restrictions	3
1.4 Court Materials	4
2.0 Background	4
3.0 Sale Process	5
3.1 Sale Process Results	6
3.2 Orderly Wind-Down Analysis	6
4.0 Transaction	7
4.1 Recommendation re Transaction	8
4.2 Sealing.....	9
5.0 Nilex USA.....	10
5.1 Foreign Representative.....	10
5.2 Center of Main Interest.....	10
5.3 Stay of Proceedings.....	11
5.4 Court-Ordered Charges	12
5.5 Procedural Consolidation	12
6.0 Proposed Distributions to CIBC	13
7.0 Cash Flow	13
8.0 Companies’ Request for an Extension.....	14
9.0 Conclusion and Recommendation	14

Appendices

Appendix	Tab
Certificate of Filing	A
First Report to Court dated October 31, 2022	B
Sale Process Letter.....	C
Asset Purchase Agreement (redacted version)	D
Cash Flow Forecast and Management’s Report on Cash Flow	E
Proposal Trustee’s Report on Cash Flow	F

Confidential Appendices

Offer Summary.....	1
Wind-Down Analysis	2
Asset Purchase Agreement (unredacted version).....	3



Court File No.: 24-2878531

COURT OF KING'S BENCH OF ALBERTA

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
NILEX INC.**

IN THE CITY OF CALGARY, IN THE PROVINCE OF ALBERTA

**SECOND REPORT OF KSV RESTRUCTURING INC.
AS PROPOSAL TRUSTEE OF
NILEX INC.**

November 21, 2022

1.0 Introduction

1. This report ("Report") is filed by KSV Restructuring Inc. ("KSV"), in its capacity as proposal trustee (the "Proposal Trustee") in connection with a Notice of Intention to Make a Proposal ("NOI") filed on October 27, 2022 (the "Filing Date") by Nilex Inc. (the "Company") pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"). A copy of the certificate of filing issued by the Office of the Superintendent of Bankruptcy is provided in Appendix "A".
2. This Report is also filed in connection with the Company's wholly-owned subsidiary, Nilex USA Inc. ("Nilex USA"), which intends to commence insolvency proceedings in the near term by filing a Notice of Intention to Make a Proposal pursuant to the BIA.
3. The principal purposes of this proceeding are to:
 - a) create a stabilized environment to allow the Company to continue a sale process (the "Sale Process") for its business and assets, including those of Nilex USA, that it commenced prior to these proceedings, which Sale Process was approved pursuant to an order of the Court of King's Bench of Alberta (the "Court") dated November 8, 2022 (the "November 8th Order");
 - b) provide the Company and Nilex USA (jointly, the "Companies") with the opportunity to complete a going concern value maximizing transaction, as more fully discussed below; and
 - c) provide the Company the opportunity to file a proposal to creditors pursuant to the provisions of the BIA ("Proposal").

1.1 Purposes of this Report

1. The purposes of this Report are to:
 - a) provide background information about the Companies and these proceedings;
 - b) summarize the results of the Sale Process;

- c) summarize an orderly wind-down analysis prepared by the Proposal Trustee (the “Wind-Down Analysis”) that illustrates that the liquidation value of the Companies’ business and assets is significantly less than the value of the Transaction (as defined below);
- d) detail the terms of a going-concern sale of substantially all of the Companies’ business and assets to Terrafix Geosynthetics Inc. (the “Canadian Purchaser”) and Hanes Companies, Inc. (the “US Purchaser”), (jointly, the Canadian Purchaser and the US Purchaser are defined as the “Purchasers”), pursuant to an Asset Purchase Agreement (the “APA”) dated November 18, 2022 (the “Transaction”);
- e) provide the Proposal Trustee’s rationale for recommending that the Court approve the Transaction;
- f) provide the Proposal Trustee’s rationale for supporting the following relief should Nilex USA file a NOI:
 - i. continuing and procedurally consolidating the Companies’ NOI proceedings and ordering that the style of cause be amended to include Nilex USA;
 - ii. extending to Nilex USA the broader stay provisions approved in the November 8th Order in respect of the Company;
 - iii. extending the Court-ordered charges approved pursuant to the November 8th Order to the business and assets of Nilex USA;
 - iv. appointing the Proposal Trustee as foreign representative (the “Foreign Representative”) for the purpose of commencing recognition proceedings in the United States Court for the District of Colorado (the “US Court”) pursuant to chapter 15 (“Chapter 15”) of title 11 of the United States Code, 11 U.S.C. §§ 101-1532, including the reasons that the Proposal Trustee believes that Alberta is the Companies’ centre of main interest (“COMI”);
- g) set out the basis for the Proposal Trustee’s recommendation that it be authorized to make one or more distributions to Canadian Imperial Bank of Commerce (“CIBC”), up to the full amount of the Companies’ indebtedness owing to CIBC, from the proceeds generated by the Transaction;
- h) discuss the Companies’ request for an extension of the deadline to file a Proposal to a date that is 45 days following the initial 30-day stay granted to Nilex USA under its NOI filing;
- i) report on the Company’s weekly cash flow projection for the period November 11, 2022 to February 24, 2023 (the “Cash Flow Forecast”); and

- j) recommend that the Court issue Orders as requested by the Companies, among other things:
 - i. continuing and procedurally consolidating the Companies' NOI proceedings and ordering that the style of cause be amended to include Nilex USA;
 - ii. approving the Transaction, the APA and the Transition Services Agreement between the Companies and the Purchasers (the "TSA");
 - iii. vesting all right, title and interest in and to the Purchased Assets (as defined in the APA) in the Purchasers, free and clear of and from any and all claims, liabilities, liens and encumbrances;
 - iv. authorizing the Proposal Trustee to make distributions to CIBC up to the full amount of the Companies' indebtedness owing to CIBC;
 - v. sealing the Confidential Appendices to this Report pending expiry of the TSA or further order of the Court; and
 - vi. extending the date by which the Company is required to file a Proposal to the date that is 45 days following the date by which Nilex USA must file a Proposal (which date will be prescribed in the order sought at the return of this Application).

1.2 Currency

1. Unless otherwise noted, all currency references in this Report are to Canadian dollars.

1.3 Restrictions

1. In preparing this Report, the Proposal Trustee has relied upon unaudited financial information prepared by the Company's representatives, the books and records of the Companies and discussions with the Companies' advisors and representatives. The Proposal Trustee has not performed an audit or otherwise attempted to verify the accuracy or completeness of the financial information relied on in a manner that complies with Canadian Auditing Standards ("CAS") pursuant to the Chartered Professional Accountants of Canada Handbook and, accordingly, the Proposal Trustee expresses no opinion or other form of assurance contemplated under the CAS in respect of such information. Any party wishing to place reliance on the financial information should perform its own diligence.
2. The Proposal Trustee accepts no responsibility for any reliance placed by any third party on the Companies' financial information presented herein. An examination of the Cash Flow Forecast as outlined in the *Chartered Professional Accountants Canada Handbook* has not been performed. Future oriented financial information relied upon in this Report is based upon the Companies' assumptions regarding future events; actual results achieved may vary from this information and these variations may be material.

1.4 Court Materials

1. Court materials filed in these proceedings are available on the Proposal Trustee's website at: <https://www.ksvadvisory.com/experience/case/nilex-inc>.

2.0 Background

1. The Company has been operating in the geosynthetics industry providing civil environmental products and technologies since 1977. The Company provides environmental solutions that are used in road building, erosion and sediment control, water management and containment. The Company also offers conversion and fabrication options, customization of standard products to site and project-specific requirements.
2. The Company's registered office is in Calgary. The Company leases its head office premises in Edmonton. It also operates from four other leased premises in Calgary, Saskatoon, Surrey and Toronto.
3. PEF 2010 Nilex Investment Limited Partnership ("Fulcrum") has been the Company's controlling shareholder since 2013.
4. The Company is the 100% shareholder of Nilex USA, which operates from leased premises in Utah and Colorado. As at the date of this Report, Nilex USA is not subject to the Company's NOI proceedings or any other insolvency process. Nilex USA has continued to operate in the normal course since the commencement of the Company's NOI proceedings. Prior to the return of the Company's application, Nilex USA intends to file a Notice of Intention to Make a Proposal pursuant to the BIA.
5. The Company presently has approximately 70 full-time employees and 44 seasonal employees. Nilex USA has eight employees. The Companies' workforce is not unionized. The Company offers its employees a defined contribution pension plan and Nilex USA offers its employees a 401k plan, in each case where the respective Nilex entity matches contributions by its employees. The Companies are current on their pension plan contributions.
6. CIBC is the Companies' senior secured lender. As of the date of this Report, CIBC was owed approximately \$15.8 million by the Companies.
7. Fulcrum is also a secured creditor of the Company. Fulcrum has subordinated the amounts owed to it by the Company to CIBC. As of the date of this Report, Fulcrum was owed approximately \$45 million by the Company.
8. CIBC has continued to provide funding to the Company during these proceedings - its post-filing advances are secured under a Court-approved Lender Priority Charge, as defined in the November 8th Order.

9. Additional background information about the Companies is included in the Affidavit of Jeff Allen, the Company's Vice President, Finance, sworn October 31, 2022 (the "First Allen Affidavit"), Mr. Allen's Affidavit sworn November 21, 2022 in support of the Company's application dated November 21, 2022 (the "Second Allen Affidavit") and the Proposal Trustee's First Report to Court dated October 31, 2022 (the "First Report"). A copy of the First Report, without appendices, is attached as Appendix "B".

3.0 Sale Process

1. As set out in the First Report, the Company engaged Valitas Capital Partners ("Valitas") on October 6, 2021 to conduct the Sale Process. The Sale Process, including its milestones and deadlines, was approved pursuant to the November 8th Order.
2. A summary of the Sale Process is provided below:
 - a) the Sale Process offered for sale the Companies' business and assets;
 - b) Valitas compiled a comprehensive list of over 400 prospective purchasers based on geography and industry;
 - c) 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
 - d) the nine prospective purchasers, plus three additional strategic parties, performed due diligence, including reviewing the confidential information memorandum (the "CIM") 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.
3. The Sale Process timelines and milestones were, in part, a product of negotiations between the Company 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 Companies and CIBC, which considered that the Sale Process had been ongoing for several months. Funding under the Forbearance Agreement was tied to the Company advancing the Sale Process in accordance with the agreed timelines and milestones in the Forbearance Agreement.
4. 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 Company. At the time, the Company forecasted improved results for the balance of 2022 and the Company 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.
5. 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.

6. On or around October 8, 2022, Valitas sent interested parties a process letter, which sets out the process timelines (the “Process Letter”). The Process Letter, a copy of which is attached as Appendix “C”, *inter alia*:
 - a) required interested parties 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 (the “Template APA”); and
 - b) indicated that the Company’s objective was to enter into a binding agreement of purchase and sale (the “Purchase Agreement”) by no later than November 15, 2022.

3.1 Sale Process Results

1. A summary of the Sale Process results is as follows:
 - a) four going-concern offers were submitted;
 - b) from the Bid Deadline until November 18, 2022, the Companies, with the assistance of Valitas, the Proposal Trustee, the Companies’ legal counsel and the Proposal Trustee’s legal counsel, worked with the Purchasers and their legal counsel to finalize the terms of the APA; and
 - c) the APA was executed on November 18, 2022.
2. A summary of the offers received in the Sale Process is attached as Confidential Appendix “1”. The Proposal Trustee’s rationale for sealing this schedule is set out in Section 4.2 below.

3.2 Orderly Wind-Down Analysis

1. As discussed in the First Report, KSV Advisory Inc. (“KSV Advisory”)¹ was engaged by the Company to assist it to consider restructuring options and to oversee the Sale Process being conducted by Valitas prior to the commencement of these proceedings. This included preparing a liquidation analysis based on an orderly wind-down of the Companies’ business.
2. The Wind-Down Analysis reflects that the value of the Transaction significantly exceeds the projected recoveries that may be generated from an orderly wind-down process. A copy of the Wind-Down Analysis is provided in Confidential Appendix “2”. The Proposal Trustee’s rationale for filing this analysis on a confidential basis is set out in Section 4.2 below.

¹ KSV’s affiliate, KSV Advisory Inc., was engaged for this advisory mandate.

4.0 Transaction²

1. A summary of the APA is as follows:

Description	Canadian Transaction	US Transaction
Purchaser	Terrafox Geosynthetics Inc.	Hanes Companies, Inc.
Purchased Assets	Substantially all assets of the Companies	
Purchase Price	For the reasons set out in Section 4.2 of this Report, the Proposal Trustee recommends that the Purchase Price be sealed pending expiry of the TSA or further order of the 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 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 Vendor/Purchaser, as applicable, which amount shall accrue interest at the Prime Rate plus 1%.	
Locations	The Canadian Purchaser will assume the leases for the Company's premises in Edmonton, Calgary and BC. The leases for the Company's premises in Ontario and Saskatchewan will not be assumed by the Canadian Purchaser. The Company may continue to occupy the Ontario and Saskatchewan locations for up to six months in accordance with the 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 the Company's employees in Canada and four of the eight Nilex USA employees. Certain of the employees who are not offered employment by the Purchaser will be offered the opportunity to provide transition services to the Purchaser pursuant to the TSA.</p> <p>All wages and vacation pay accrued to the Effective Date are for the account of the Companies. Following and after the Effective Date, all wages and vacation pay accruing in respect of Transferred Employees will be for the account of the Purchasers, as will wages and vacation pay for Transition Employees pursuant to the TSA, albeit Transition Employees will remain employees of the Company or Nilex USA. Payroll and benefits for any non-Transferred Employees and non-Transition Employees will remain the obligation of the Company 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.	

² Defined terms in this section of the Report have the meanings provided to them in the APA.

Description	Canadian Transaction	US Transaction
Closing	Subject to Court approval, 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 Court approval. 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 Court and the US Court. The closing of the US Transaction is subject to the completion of the Canadian Transaction.

2. **Transition Services Agreement:** Pursuant to the APA, the execution of the TSA by the Companies and the Purchasers is a condition to closing of the Canadian Transaction and the US Transaction. The purpose of the TSA is for the Companies 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 Companies. Also pursuant to the TSA, certain employees will remain employees of the Companies 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 Companies in providing the 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.
3. A copy of the redacted version of the APA is attached as Appendix "D". The TSA is a schedule to the APA. A copy of the unredacted version of the APA is provided in Confidential Appendix "3" and is being filed on a confidential basis for the reasons set out in Section 4.2 of this Report. The unredacted version of the APA included in Confidential Appendix "3" does not include copies of schedules that contain customer or employee information, however, information contained therein is available upon request subject to confidentiality restrictions.

4.1 Recommendation re Transaction

1. The Proposal Trustee recommends the Court issue an order approving the Transaction for the following reasons:
 - a) the Sale Process was carried out in accordance with the November 8th Order;
 - b) in the Proposal Trustee's view, the Sale Process was commercially reasonable, including its timelines, the breadth of the marketing process and the information made available by the Company to interested parties, including information in the CIM and data room;
 - c) the value of the Transaction was the highest of the offers received in the Sale Process;

- d) the value of the Transaction materially exceeds the liquidation value of the Companies' business and assets based on the Wind-Down Analysis;
- e) the Sale Process provided prospective bidders with the opportunity to submit offers for the business and assets of either or both the Company and Nilex USA;
- f) the Transaction is expected to preserve employment for a substantial number of the Companies' employees;
- g) CIBC, which will be repaid in full from the Transaction, is supportive of the Transaction. CIBC has been funding the Companies' operations over the course of these proceedings. Should a transaction not be completed imminently, the Company would be in default of the Forbearance Agreement;
- h) Fulcrum supports approval of the Transaction notwithstanding that it will incur a substantial shortfall on its advances to the Company;
- i) the Sale Process commenced in early 2022, and accordingly, the Proposal Trustee does not believe that further time spent marketing the Companies' business and assets will result in a superior transaction; and
- j) Valitas has advised the Proposal Trustee that it believes that the Transaction is in the best interest of the Companies and their stakeholders and concurs with the Proposal Trustee that further time spent marketing the Companies' business and assets will not result in a superior transaction.

4.2 Sealing

1. The Proposal Trustee recommends that the unredacted version of the APA, the offer summary and the Wind-Down Analysis be filed with the Court on a confidential basis and remain sealed pending expiry of the TSA or further Court order, as the availability of this information to other parties may negatively impact any future sale process for the Companies if the Transaction does not close. The redacted version of the APA has only been redacted for purchase price, deposit amount, and related information.
2. In the Proposal Trustee's view, sealing this information is necessary to maximize recoveries in these proceedings and maintain the integrity and confidentiality of key information in the Sale Process. The salutary effects of sealing such information from the public record greatly outweigh any deleterious effects of doing so. The Proposal Trustee believes the proposed sealing of the Confidential Appendices is appropriate in these circumstances. The Proposal Trustee does not believe that any stakeholder will be prejudiced if the information is sealed.

5.0 Nilex USA

1. Nilex USA is a much less significant business than the Company's, with annual sales of approximately US\$6 million and total assets and liabilities of approximately US\$2.5 million and US\$5.2 million³, respectively, as reflected in Section 3 of the First Report.
2. As noted above and in the Second Allen Affidavit, it is expected that by the return of this application, Nilex USA will have filed a NOI. Subject to approval of the Transaction by the Court, and consolidation of the Nilex USA NOI proceedings with the Company's NOI proceedings, the Companies, through KSV as Foreign Representative, intend to seek recognition of the Canadian proceedings by the US Court for the primary purpose of completing the Transaction. The proposed recognition proceeding, and US Court approval of the US Transaction, is a requirement of the APA.

5.1 Foreign Representative

1. The Company is seeking an order authorizing the Proposal Trustee to be the Foreign Representative. As the Canadian Court officer overseeing the NOI proceedings, the Proposal Trustee believes it is appropriate for it to act as the Foreign Representative, particularly given its familiarity with the Companies and the Transaction.
2. Subject to Court approval, the Proposal Trustee intends to work with US counsel to take the steps required to forthwith commence Chapter 15 recognition proceedings in order to fulfill the conditions precedent to completing the US Transaction.

5.2 Center of Main Interest

1. The Proposal Trustee is of the view that Alberta is the COMI for the Companies for the following reasons:
 - a) essentially all of the Companies' strategic decision-making and management functions occur in Alberta. Nilex USA's operations are managed from the Company's head office in Alberta. All employees of Nilex USA report to the Company's employees in Canada;
 - b) the principals, directors and officers of Nilex USA are Canadian residents of, and based in, Canada;
 - c) the Company's Board of Directors is responsible for oversight and guidance of the entirety of the Companies' business and operations;
 - d) the principal secured creditor of the Companies is CIBC, and the loan agreement is governed by Canadian law;

³ Excluding off-balance sheet liabilities, including amounts owing to CIBC, certain employee claims and amounts owing for real property and equipment leases.

- e) the majority of the Companies' administrative functions, including those of Nilex USA, including general accounting, financial reporting, budgeting and cash management, is performed by the Company's management in Alberta and the books and records of the Companies are maintained in Alberta;
 - f) the Companies' human resource department is centralized and managed from Alberta;
 - g) Nilex USA maintains a bank account in Canada and its treasury management function is centralized at the head office in Alberta; and
 - h) the Companies are part of a consolidated cash management system pursuant to which funding for the Companies is determined and managed from the head office in Alberta.
2. The Second Allen Affidavit provides further information illustrating that Alberta is the COMI for the Companies' business.
 3. The Proposal Trustee is of the view that the contemplated foreign main recognition proceeding provides a centralized, fair and cost-efficient process to implement the Transaction with the US Purchaser, as contemplated under the APA.

5.3 Stay of Proceedings

1. The November 8th Order expanded the statutory stay provisions under the NOI to include provisions similar to those in the model Initial Order issued in a CCAA proceeding, including as they relate to requiring suppliers and service providers to continue to provide goods and services to the Company without disruption, provided they are not required to do so on credit.
2. Extending the November 8th Order to Nilex USA is in the spirit of stabilizing Nilex USA's operations and allowing it the greatest opportunity to preserve normal course operations during the NOI proceedings. Any supply disruptions would impair Nilex USA's ability to continue to operate in the normal course and, potentially, the prospect of completing the Transaction with the US Purchaser. Accordingly, the Proposal Trustee believes that expanding the scope of the stay of proceedings in favour of Nilex USA is appropriate as the continued operation of Nilex USA will assist it to complete the Transaction with the US Purchaser. It is also reasonable that both the Company and Nilex USA have the same stay provisions apply in order to avoid confusion among their respective stakeholders.

5.4 Court-Ordered Charges

1. The November 8th Order created the following Court-ordered charges (collectively, the “Charges”) over all of the Company’s business and assets:
 - a) Administration Charge (\$350,000);
 - b) Lender Priority Charge securing CIBC’s post-filing advances up to an aggregate principal amount of \$20 million plus interest, fees and expenses;
 - c) D&O Charge (\$925,000); and
 - d) KERP Charge (\$800,000).
2. Given the integrated nature of the Companies’ operations, the Sale Process, the Transaction, and CIBC’s security interest over all of the Companies’ business and assets, the Proposal Trustee believes it is reasonable and appropriate for the Charges to be extended to include the property of Nilex USA.

5.5 Procedural Consolidation

1. The Companies’ application materials seek an order continuing and procedurally consolidating the Company’s NOI proceedings and Nilex USA’s NOI proceedings.
2. As the consolidation is for administrative purposes only, the Company and Nilex USA would remain separate for the purpose of a claims process and making distributions to creditors, if any.
3. The Proposal Trustee believes that procedurally consolidating the proceedings is appropriate as:
 - a) it will permit all applications to be brought before one justice, rather than having multiple proceedings. Additionally, the consolidation sought will allow the Companies to complete the Sale Process previously approved by the Court in the most expedient and efficient manner for the benefit of all stakeholders;
 - b) the business and assets of both entities are subject to the same Transaction pursuant to the APA;
 - c) it will facilitate the orderly administration of these proceedings;
 - d) creditor rights will not be affected by the procedural consolidation; and
 - e) it will reduce costs, including by filing materials in one proceeding only.

6.0 Proposed Distributions to CIBC

1. CIBC is the Companies' senior secured creditor. CIBC is presently owed approximately \$15.8 million by the Companies, comprised of approximately \$13.3 million under its revolving loan facility and approximately \$2.5 million under the business credit availability program ("BCAP"). Interest and costs continue to accrue on both facilities.
2. The Proposal Trustee is not aware of any other secured creditors or any claim that ranks or may rank in priority to CIBC, other than the amounts secured under the Charges. Any equipment lessors with security interests in certain leased assets will either be assumed by the Purchasers under the Transaction or these assets will be returned to the lessor.
3. In advance of these proceedings, the Proposal Trustee instructed its legal counsel, Cassels Brock & Blackwell LLP ("CBB"), to provide an opinion on the validity and enforceability of CIBC's security. CBB's opinion dated October 29, 2022, which addresses the laws of Alberta, British Columbia and Ontario⁴, provides that, subject to the customary assumptions and qualifications contained therein, the security granted to CIBC is valid and enforceable. A copy of the security opinion can be made available to the Court upon request.
4. As at the date of this Report, the Proposal Trustee's US counsel is reviewing CIBC's security over Nilex USA as well. Should any concerns be identified by the Proposal Trustee's US counsel in this regard, the Proposal Trustee intends to advise the Court of same.
5. Based on the foregoing, the Proposal Trustee recommends that the Court issue an order authorizing the Proposal Trustee to make distributions to CIBC, from the proceeds generated from the Transaction, up to the amount of the Companies' indebtedness owing to CIBC.

7.0 Cash Flow

1. Pursuant to the BIA, the Companies are required to prepare a cash flow forecast for the stay extension period. The Cash Flow Forecast for the period ending February 24, 2023 (the "Period"), together with Management's Report on the Cash-Flow Statement, as required by subsection 50.4(2)(c) of the BIA, is provided in Appendix "E".
2. The Cash Flow Forecast was prepared with the assistance of the Proposal Trustee. It should be noted that the Cash Flow Forecast does not reflect closing of the Transaction during the Period as doing so would provide confidential information regarding the value of the Transaction.

⁴ CBB's opinion also notes that CIBC's security is registered in Saskatchewan as well.

3. Based on the Proposal Trustee's review of the Cash Flow Forecast, there are no material assumptions which seem unreasonable. The Proposal Trustee's Report on the Companies' Cash Flow Statement as required by subsection 50.4(2)(b) of the BIA is attached as Appendix "F".

8.0 Companies' Request for an Extension

1. The Companies are seeking an extension of the time required to file a Proposal to the date that is 45 days following the deadline by which Nilex USA must file a Proposal (which date will be provided in the order sought by the Company). The Proposal Trustee supports the extension request for the following reasons:
 - a) the Companies are acting in good faith and with due diligence;
 - b) it will provide the Companies with additional time required to complete the Transaction and to carry out their obligations under the APA, particularly as it relates to the TSA;
 - c) it will enhance the likelihood of the Companies being able to file a Proposal; and
 - d) the extension should not adversely affect or prejudice any group of creditors as the Companies are projected to have sufficient funding to pay post-filing services and supplies in the amounts contemplated by the Cash Flow Forecast.

9.0 Conclusion and Recommendation

1. Based on the foregoing, the Proposal Trustee respectfully recommends that this Honourable Court make an order granting the relief being sought by the Companies.

* * *

All of which is respectfully submitted,

KSV Restructuring Inc.

**KSV RESTRUCTURING INC.
IN ITS CAPACITY AS TRUSTEE *IN RE* THE PROPOSAL OF
NILEX INC.
AND NOT IN ITS PERSONAL CAPACITY**

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
Barristers and Solicitors
3500 Bankers Hall East
855 – 2nd Street SW
Calgary, Alberta T2P 4J8

Attention: Kelly Bourassa / Alexia Parente
Telephone: 403-260-9697 / 416-863-2417
Email: kelly.bourassa@blakes.com /
alexia.parente@blakes.com

Fax No.: 403-260-9700
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.

Exhibit B

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

Barristers and Solicitors
3500 Bankers Hall East Tower
855 – 2 Street SW
Calgary, Alberta T2P 4J8

Attention: Kelly Bourassa / Alexia Parente

Telephone: 403-260-9697 / 416-863-2417

Email: kelly.bourassa@blakes.com /
alexia.parente@blakes.com

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.



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 **ORDER (interim distribution)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT
BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
3500 Bankers Hall East Tower
855 – 2 Street SW
Calgary, Alberta T2P 4J8

Attention: Kelly Bourassa / Alexia Parente
Telephone: 403-260-9697 / 416-863-2417
Email: kelly.bourassa@blakes.com / alexia.parente@blakes.com

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 of Lindsay Farr sworn December 12, 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

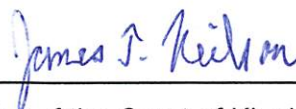
3. Pursuant to section 5(5) of the WEPPA, Nilex and its employees whose employment has been or may be terminated in these proceedings meet the criteria prescribed by section 3.2 of the Wage Earner Protection Program Regulations, SOR/2008-222, and Nilex is a former employer all of whose employees in Canada 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.



Justice of the Court of King's Bench of Alberta