

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**BETWEEN:**

**WESTLB AG, TORONTO BRANCH**

**Applicant**

**and**

**THE ROSSEAU RESORT DEVELOPMENTS INC.**

**Respondent**

**IN THE MATTER OF SECTION 47(1) OF *THE BANKRUPTCY AND INSOLVENCY  
ACT*, R.S.C. 1985, C.B-3, AS AMENDED, SECTION 101 OF THE  
*COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AND SECTION 68 OF THE  
*CONSTRUCTION LIEN ACT*, R.S.O. 1990 C. C. 30, AS AMENDED**

**FIFTH REPORT OF  
ALVAREZ & MARSAL CANADA ULC,  
AS RECEIVER AND MANAGER AND CONSTRUCTION LIEN ACT TRUSTEE AND  
MCINTOSH & MORAWETZ INC., AS INTERIM RECEIVER  
OF THE ASSETS OF THE ROSSEAU RESORT DEVELOPMENTS INC.**

**AUGUST 19, 2009**

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## ***1.0 Introduction***

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- 1.1 On May 22, 2009, the Ontario Superior Court of Justice (the “Court”) issued an order appointing Alvarez & Marsal Canada ULC (“A&M”) and McIntosh & Morawetz Inc. as trustee and interim receiver, respectively (collectively the “Interim Receiver”), pursuant to Section 68 of the *Construction Lien Act* (Ontario) (“CLA”) and Section 47(1) of the *Bankruptcy and Insolvency Act* (Canada) (“BIA”) of all the property, assets and undertakings (the “Assets”) of The Rosseau Resort Developments Inc. (“RRDI” or the “Company”). On June 2, 2009, the Court issued an Amended and Restated Appointment Order (the “Appointment Order”) continuing the appointment of the Interim Receiver and appointing A&M as receiver and manager (the “Receiver and Manager”) pursuant to Section 101 of the *Courts of Justice Act* (Ontario) (“CJA”) and pursuant to the CLA of the Assets of RRDI (the Interim Receiver and the Receiver and Manager collectively defined as the “Receiver”).<sup>1</sup>
- 1.2 On August 12, 2009, the Receiver filed its fourth report to the Court (the “Fourth Report”), which, among other things, described: (a) the steps that the Receiver proposes to take to restructure the Rental Pool and put in place a new form of Rental Pool management Agreement and enable it to be financially viable; and (b) the terms on which the Receiver proposes to complete new bilateral arrangements with Marriott Hotels.
- 1.3 On August 14, 2009 and August 19, 2009, the Receiver filed a first supplementary report to the Fourth Report (the “First Supplementary Report”) and a second supplementary

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<sup>1</sup> Capitalized terms in this Fifth Report shall have the meanings ascribed to them in the Glossary of Defined Terms attached as Appendix “A”, unless otherwise defined herein.

report to the Fourth Report (the “Second Supplementary Report”), respectively (the First Supplementary Report and the Second Supplementary Report are collectively defined as the “Supplementary Reports” and when reference is made to the Fourth Report, unless otherwise noted herein, such reference shall refer collectively to the Fourth Report and the Supplementary Reports). The purposes of the Supplementary Reports were to, among other things, provide this Honourable Court with a copy of the RRMSI Letter; and the Disclosure Documentation and to request that the Court approve the form of Disclosure Documentation.

- 1.4 On August 18, 2009, This Honourable Court issued an order (the “August 18th Order”) granting the Receiver the relief requested and described in the Fourth Report subject to any motion to vary or amend the relief granted in paragraph 6 of the August 18th Order, returnable on August 20, 2009, to be heard by this Honourable Court at the same time as the intended motion or application for the appointment of representative counsel for Unit Owners and Existing Unit Purchasers and the appointment of a receiver of RRMSI. A copy of the August 18th Order was delivered by email to the Service List as well as to Unit Owners and Existing Unit Purchasers who have signed Current RPMAs with RRMSI and is attached as Appendix “B”.
- 1.5 On August 19, 2009, counsel to RRMSI served, on the Service List, a Notice of Motion to appear before this Honourable Court and seek an order to amend paragraph 6 of the August 18th Order (the “RRMSI Motion”).
- 1.6 This report (the “Fifth Report”) is in support of the Receiver’s motion for this Honourable Court to make an order approving and ratifying the retention of Miller Thompson LLP (“Miller Thompson”) as representative counsel (“Representative

Counsel”) to represent those persons (the “Represented Unit Owners”) who have entered into Current RPMAs with RRMSI and are either existing Unit Owners or Existing Unit Purchasers, unless a represented unit owner provides written notice to Representative Counsel that they do not wish to be included as a Represented Unit Owner.

## ***2.0 Representative Counsel***

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- 2.1 Since the commencement of the receivership, the Receiver has been in constant and continuous contact with both Unit Owners and Existing Unit Purchasers by way of individual telephone discussions, emails and "in person" meetings both individually and in groups.
- 2.2 Immediately following the appointment of the Receiver, the Receiver caused RRDI to issue a letter to all Unit Owners and Existing Unit Purchasers describing the purpose of the receivership and the Receiver's immediate intentions upon its appointment.
- 2.3 On June 8, 2009, the Receiver met with a large group of Unit Owners and Existing Unit Purchasers in Toronto to discuss the status of the receivership, advise participants on the Receiver's intended course of action and answer any questions. Subsequent to that meeting a group of certain Unit Owners and Existing Unit Purchasers formed an Ad Hoc Committee of Unit Owners (the "Ad Hoc Committee"), and that on or about June 16, 2009, the Ad Hoc Committee retained Miller Thompson as its counsel.
- 2.4 The Receiver understands that Gordon Jacobs, Roland Klassen, Eugene Gierczak, Alec Rowlands, Maria Ouriadko, Johan Demeester and Paul Lachance, each of whom are either Unit Owners or Existing Unit Purchasers, were appointed to the Ad Hoc Committee.
- 2.5 The Receiver has been advised by the Ad Hoc Committee that Approximately 82 Unit Owners and Existing Unit Purchasers, who in aggregate own 90 Units (out of 137 Units which are either sold and closed or subject to an APS, and therefore representing 65% of all such Units) have either made, or are in the process of making, a contribution to a retainer for Miller Thompson.

- 2.6 Since its inception and since the appointment of Miller Thompson as legal counsel to the Ad Hoc Committee, the Receiver has had extensive discussions and meetings with both the Ad Hoc Committee and Miller Thompson.
- 2.7 As described in the Fourth Report, the Receiver negotiated the terms of the Settlement Agreements with the Ad Hoc Committee and Miller Thompson. The Receiver also conducted negotiations with the Ad Hoc Committee in respect of the form of a New RPMA. The Ad Hoc Committee has unanimously recommended to Unit Owners and Existing Unit Purchasers that they accept the terms of these Settlement Agreements and has indicated that the Ad Hoc Committee is in support thereof. On August 6, 2009, the Receiver issued a letter to all Unit Owners and Existing Unit Purchasers describing the arrangements in respect of the Settlement Agreements and the form of the New RPMA. A copy of this letter is attached as Appendix "C".
- 2.8 Miller Thompson has previously appeared before this Honourable Court as counsel to the Ad Hoc Committee in connection with these proceedings and pursuant to the August 18<sup>th</sup> Order, the Court approved funding for Miller Thompson's legal fees and disbursements as counsel to the Ad Hoc Committee in the total cumulative amount of \$100,000.
- 2.8 In light of the RRMSI Motion, the Receiver believes that it is necessary and appropriate for Unit Owners and Existing Unit Purchasers to have Representative Counsel for Represented Unit Owners so that the Represented Unit Owners may properly respond to the RRMSI Motion.

\* \* \*



All of which is respectfully submitted, this 19<sup>th</sup> day of August, 2009

**ALVAREZ & MARSAL CANADA ULC &  
McINTOSH & MORAWETZ INC. IN THEIR CAPACITIES AS  
CONSTRUCTION LIEN ACT TRUSTEE AND RECEIVER AND MANAGER,  
AND INTERIM RECEIVER, RESPECTIVELY, OF THE ASSETS OF  
THE ROSSEAU RESORT DEVELOPMENTS INC.**

Per:   
Richard A. Morawetz

## **APPENDIX A**

### ***Glossary of Defined Terms***

<b>Term</b>	<b>Definition</b>
<b>A&amp;M</b>	Alvarez & Marsal Canada ULC
<b>A&amp;M Report</b>	collectively, the report of the proposed receiver dated May 19, 2009 and a supplementary report to that report dated May 20, 2009
<b>Appointment Order</b>	Amended and Restated Appointment Order issued June 2, 2009
<b>APS</b>	Agreements of purchase and sale
<b>Assets</b>	All the property, assets and undertakings The Rosseau Resort Developments Inc.
<b>Baker Price List</b>	The price list developed by Baker Real Estate to be utilized in connection with the sale of the Unsold Units and as approved by the Court
<b>Baker Real Estate</b>	Baker Real Estate Incorporated
<b>BIA</b>	<i>Bankruptcy and Insolvency Act</i> (Canada)
<b>CJA</b>	<i>Courts of Justice Act</i> (Canada)
<b>CLA</b>	<i>Construction Lien Act</i> (Ontario)
<b>Colliers</b>	Colliers MaCaulay Nicolls (Ontario) Inc.
<b>Committee</b>	Ad Hoc Committee of Unit Owners
<b>Company</b>	The Rosseau Resort Developments Inc.
<b>Court</b>	Ontario Superior Court of Justice
<b>Current HMA</b>	Amended and Restated Hotel Management Agreement among RRDI, RRMSI and Marriott Hotels dated October 6, 2006
<b>Current RPMA(s)</b>	The form of rental pool management agreement Unit Owners have entered into with RRMSI, as Rental Pool Manager
<b>DAF</b>	Dispute Analysis and Forensics group
<b>Declaration</b>	The Rosseau Resort Condominium Declaration, made pursuant to the <i>Condominium Act</i> , 1998
<b>Disclosure Documentation</b>	Form of disclosure statement and related documentation
<b>Effective Date</b>	The proposed date of repudiation of the Current HMA to be effective at 11:59 pm on Friday, September 18, 2009, to correspond with a 30 day notice of termination to be delivered by Marriott Hotels to RRDI and RRMSI, jointly as Owners pursuant to the Current HMA
<b>Exemption Ruling</b>	A ruling made on April 13, 2004 by the OSC which authorized RRMSI to enter into the Current RPMA with Unit Owners and to permit RRDI to market for sale the Hotel Units
<b>Existing Unit Purchasers</b>	Existing purchasers who have not yet closed outstanding APS's with RRDI
<b>First Report</b>	collectively, the report of the interim receiver dated May 27, 2009 and a supplementary report to that report dated May 29,

	2009
<b>Fourth Report</b>	This report dated August 12, 2009
<b>Fowler Related Releasees</b>	RRMSI, Ken Fowler Enterprises Ltd., Red Leaves Partnership, Kenneth A. Fowler, and Peter Fowler as releasees
<b>Hotel</b>	221 unit condominium hotel complex located on the property owned by RRDI situated along the north-west end of Lake Rosseau in Muskoka, Ontario
<b>IHLC</b>	International Hotel Licensing Company S.a.r.l, an affiliate of Marriott Hotels
<b>Indulgence Cards</b>	A certain form of Purchaser Incentive whereby certain Unit Purchasers received cards which could be used as a "currency" for use to pay for items and/or services at the Hotel
<b>Interim Receiver</b>	Collectively, Alvarez & Marsal Canada ULC ("A&M") and McIntosh & Morawetz Inc. as trustee and interim receiver, respectively
<b>KFE</b>	Ken Fowler Enterprises Ltd.
<b>Livia</b>	Livia Capital Management Inc.
<b>Marriott Hotels</b>	Marriott Hotels of Canada, Ltd.
<b>McCarthy's</b>	McCarthy Tetrault LLP
<b>New HMA</b>	A New Hotel Management Agreement that will be based on the template of the Current Hotel Management Agreement and as modified by the Side Letter, the financial terms and conditions of which are set out in the Summary of Terms, all subject to Court approval
<b>New Marriott Agreements</b>	Other New Marriott Agreements together with the New HMA
<b>New RPMA</b>	New forms of Rental Pool Management Agreements agreed upon by the Committee and RRDI, subject to Court approval
<b>New Unit Purchasers</b>	All potential new purchasers of Units
<b>Operating Profit</b>	As is defined in the Current HMA - "with respect to any given period of time, the excess Gross Revenues over Deductions (each calculated in accordance with this Agreement and the Uniform System of Accounts)"
<b>OSC</b>	Ontario Securities Commission
<b>Other Current Marriott Agreements</b>	Royalty and Licensing Agreement between RRDI, RRMSI and IHLC dated October 6, 2006, and any other current agreements between RRDI, RRMSI, and Marriott Hotels or its affiliates
<b>Priority Lien Claims</b>	The portion of construction trade lien claims which are determined to have priority over all mortgages registered on title to the real property of RRDI
<b>Purchaser Incentive Proposal</b>	A draft proposal, made on a without prejudice basis, from the Receiver to address the Purchaser Incentives
<b>Purchaser Incentives</b>	Several types of incentives provided to Unit purchasers
<b>Receiver</b>	collectively, the Interim Receiver and the Receiver and Manager
<b>Receiver and Manager</b>	Alvarez & Marsal Canada ULC in its capacity as receiver and

	manager
<b>Release</b>	The full and final release proposed to be provided by each Unit Owner and Existing Unit Purchaser in favour of RRDI, the Syndicate, the Receiver and certain other parties which may include the Fowler Related Releasees
<b>Rental Pool</b>	The rental pool in which all Unit Owners are required to participate in
<b>Rental Pool Covenant</b>	A Rental Pool covenant registered on title to all Units which covenant, among other things, requires that all Unit Owners place their Units in the Rental Pool
<b>RPMA(s)</b>	Rental Pool Management Agreement(s)
<b>Rental Pool Management Fee</b>	Rental Pool Manager receives a fee from Unit Owners out of the Adjusted Gross Revenue available for distribution.
<b>Rental Pool Manager</b>	Rental pool manager
<b>Retail Marketing Program</b>	Proposed marketing and promotional program being undertaken in connection with the Retail Sales Program by Baker Real Estate
<b>RRCI</b>	Rock Ridge Contractors Inc.
<b>RRDI</b>	The Rosseau Resort Developments Inc.
<b>RRMSI</b>	The Rosseau Resort Management Services Inc.
<b>Sales and Marketing Order</b>	The Order issued by the Court on July 8, 2009
<b>Second Report</b>	The Receiver's second report dated July 3, 2009 and a supplementary report to that report dated July 7, 2009.
<b>Section 39 Memorandum</b>	Independent legal counsel to the Receiver provided all lien claimants who had made Section 39 Requests with an information memorandum
<b>Section 39 Requests</b>	Requests for information made under S. 39 of the CLA
<b>Settlement Agreements</b>	A package of settlement documents delivered to all Unit Owners and Existing Unit Purchasers containing either a Unit Owner Settlement Agreement or a Unit Purchaser Settlement Agreement, among other things
<b>Side Letter</b>	A certain letter agreement between RRDI, by its Receiver and Marriott Hotels, which modifies the terms of the New HMA, specifically in respect of these receivership proceedings
<b>Summary of Terms</b>	A summary document setting out the principal financial terms and conditions in respect of the New HMA
<b>Syndicate</b>	Lender Syndicate
<b>Tarion</b>	Tarion Warranty Corporation
<b>Third Report</b>	The Receiver's third report dated July 21, 2009
<b>Travelers</b>	Travelers Guarantee Company of Canada
<b>Unit Owner Settlement Agreement</b>	Settlement agreements with Unit Owners substantially on the terms as set out in the forms of Unit Owner Settlement Agreement, subject to Court approval
<b>Unit Owners</b>	Current owners of Units at the Hotel

<b>Unit Owners' Charge</b>	<b>Charge granted on the Assets of RRDI in favour of the Unit Owners</b>
<b>Unit Purchaser Settlement Agreement</b>	<b>Settlement agreements with Existing Unit Purchasers substantially on the terms as set out in the forms of Unit Purchaser Settlement Agreement, subject to Court approval</b>
<b>Units</b>	<b>The 221 condominium units of the Hotel</b>
<b>Unsold Units</b>	<b>84 unsold condominium units at the Hotel</b>
<b>WestLB</b>	<b>WestLB AG, Toronto Branch, as agent for the Lender Syndicate</b>

## **APPENDIX B**

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

THE HONOURABLE

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TUESDAY, THE 18<sup>TH</sup> DAY

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MADAM JUSTICE PEPALL

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OF AUGUST, 2009

**IN THE MATTER OF SECTION 47(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, C. C. 30, AS AMENDED**

BETWEEN:



**WESTLB AG, TORONTO BRANCH**

Applicant

- and -

**THE ROSSEAU RESORT DEVELOPMENTS INC.**

Respondent

**ORDER**

THIS MOTION, made by Alvarez & Marsal Canada ULC, in its capacity as Court-appointed receiver and manager pursuant to section 101 of the *Courts of Justice Act* (Ontario) (the "CJA") and trustee and receiver and manager under the *Construction Lien Act* (Ontario), and McIntosh & Morawetz Inc., in its capacity as interim receiver pursuant to section 47(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), (jointly and collectively, the "Receiver"), of the undertaking, property and assets (the "Assets") of The Rosseau Resort Developments Inc. ("RRDI") for an Order:



- (a) abridging the time for service of the Notice of Motion and the Motion Record herein and dispensing with further service thereof;
- (b) authorizing the Receiver, on behalf of RRDI, to repudiate the Amended and Restated Hotel Management Agreement between RRDI, The Rosseau Resort Management Services Inc. ("RRMSI") and Marriott Hotels of Canada Ltd. ("Marriott") dated October 6, 2006 (the "Current Hotel Management Agreement"), relating to the operation of the 221 unit condominium hotel located on property on Lake Rosseau, Muskoka, Ontario (the "Hotel"), such repudiation to be effective at 11:59 p.m. on Friday, September 18, 2009, to correspond with a 30 day notice of termination to be delivered by Marriott to RRDI and RRMSI pursuant to the Current Hotel Management Agreement (the "Effective Date");
- (c) authorizing A&M, solely in its capacity as receiver and manager pursuant to the CJA, on behalf of RRDI, to enter into a new form of Hotel Management Agreement (the "New Hotel Management Agreement") with Marriott on the principal terms and conditions of the Current Hotel Management Agreement, and a side letter to the New Hotel Management Agreement (the "Side Letter") in a form to be filed with the Court prior to the hearing of this Motion, to be effective on the Effective Date. The principal terms of the New Hotel Management Agreement and Side Letter are as set out in a summary of terms (the "Summary of Terms") attached in redacted form as an Appendix to the Fourth Report of the Receiver dated August 12, 2009 (the "Fourth Report"), and in a non-redacted form as a Confidential Appendix to the Fourth Report. The completion of a New Hotel Management Agreement and Side Letter is subject to definitive documentation based on the Summary of Terms in a form acceptable to A&M;
- (d) authorizing the Receiver, on behalf of RRDI, to repudiate effective as of the Effective Date an International Services Agreement between RRDI, RRMSI and International Hotel Licensing Company S.a.r.l, an affiliate of Marriott ("IHLC") dated October 6, 2006, a Royalty and Licensing Agreement between RRDI, RRMSI and IHLC dated October 6, 2006, and any other current agreements with Marriott or its affiliates that the Receiver deems necessary, and to enter into new

such agreements as between RRDI and Marriott on such terms as the Receiver may agree and as are consistent with the terms of the New Hotel Management Agreement (the "Other New Marriott Agreements"), all as of the Effective Date;

- (e) authorizing the Receiver on behalf of RRDI, to repudiate any and all agreements, verbal or otherwise, between RRDI and RRMSI whereby RRDI arranged to delegate the appointment of rental pool manager ("Rental Pool Manager") to RRMSI in respect of the rental pool in which all current owners (the "Unit Owners") of condominium units at the Hotel ("Units") are required to participate;
- (f) authorizing A&M, solely in its capacity as receiver and manager pursuant to the CJA, on behalf of RRDI, to enter into new forms of Rental Pool Management Agreements (the "New Rental Pool Management Agreements") with Unit Owners, existing purchasers of Units who have not yet closed outstanding agreements of purchase and sale with RRDI ("Existing Unit Purchasers"), and new purchasers of Units ("New Unit Purchasers"), substantially in the form set out in the draft New Rental Pool Management Agreement attached to the Fourth Report as an Appendix, effective on the Effective Date;
- (g) authorizing A&M, solely in its capacity as receiver and manager pursuant to the CJA, on behalf of RRDI, to enter into settlement agreements with Unit Owners and Existing Unit Purchasers substantially on the terms as set out in the forms of Unit Owner Settlement Agreement (the "Unit Owner Settlement Agreement") and Unit Purchaser Settlement Agreement (the "Unit Purchaser Settlement Agreement") attached as Appendices to the Fourth Report;
- (h) approving the form of release (the "Release") to be executed by Unit Owners and Existing Unit Purchasers in connection Unit Owner Settlement Agreements and Unit Purchaser Settlement Agreements in the form attached as an Appendix to the Fourth Report, provided that the form of the Release shall not include RRMSI, Ken Fowler Enterprises Ltd., Red Leaves Partnership, Kenneth A. Fowler, and Peter Fowler (the "RRMSI Parties"), as requested by RRMSI, in the event that the relief requested at paragraph (i) below is opposed by RRMSI;

- (i) declaring that upon the termination of the Current Hotel Management Agreement by Marriott and upon the repudiation of any and all agreements, verbal or otherwise, between RRDI and RRMSI delegating the appointment of Rental Pool Manager to RRMSI, the existing Rental Pool Management Agreements (the "Existing Rental Pool Management Agreements") between RRMSI and Unit Owners and Existing Unit Purchasers are frustrated and cannot be performed by RRMSI; that Unit Owners and Existing Unit Purchasers are entitled to terminate their Existing Rental Pool Management Agreements; and that the execution by Unit Owners and Existing Unit Purchasers of the New Rental Pool Management Agreements shall be deemed to be notice of the termination by the Unit Owners and Existing Unit Purchasers of their Existing Rental Pool Management Agreements;
- (j) declaring that in the event the relief sought at paragraph (i) above is opposed by RRMSI, any action against a Unit Owner or Existing Unit Purchaser by RRMSI by reason of the execution of a New Rental Pool Management Agreement by a Unit Owner or Existing Unit Purchaser is stayed pending further Order of this Court;
- (k) approving the form of disclosure statement and related documentation ("Disclosure Documentation") to be distributed to potential New Unit Purchasers in respect of the Retail Sales Program approved and authorized by Order of this Court dated July 8, 2009, substantially in the form to be filed with the Court, subject to such clarifying amendments that the Receiver may make in the process of finalizing the Disclosure Documentation, and any amendments that may need to be made in connection with the outcome of this Motion;
- (l) authorizing the Receiver to execute the certificate required on the Disclosure Documentation, following the necessary amendments as described in paragraph (k) above, in lieu of, and on behalf of the chief executive officer and chief financial officer of RRDI, regardless of whether such officers are currently appointed for RRDI, without any personal liability on their part or on the part of the Receiver or its directors or officers;

(m) in connection with the Unit Owner Settlement Agreements, granting charges on the Assets of RRDI in favour of the Unit Owners, as follows (the "Unit Owners' Charges"):

- (i) in an amount sufficient to secure the total aggregate obligation of RRDI to pay rent under New Leases (as they are defined in the Unit Owner Settlement Agreements) entered into with all Unit Owners pursuant Unit Owner Settlement Agreements, not to exceed \$1.6 million; and
- (ii) in an amount sufficient to secure the total aggregate obligation of RRDI to honour the Indulgence Cards and Other Incentives (as they are defined in the Unit Owner Settlement Agreements) in respect of all Unit Owner Settlement Agreements, not to exceed \$3.7 million;

such Charges to rank *pari passu* with each other and subordinate only to the Receiver's Charge and the Receiver's Borrowings Charge each as provided for in the Amended and Restated Appointment Order dated June 2, 2009 (the "Appointment Order"), and that portion of the construction trade lien claims which are determined to have priority over all mortgages registered on title to the real property of RRDI (the "Priority Lien Claims");

(n) granting charges on the Assets of RRDI in order to secure the obligations of RRDI to Marriott under the New Hotel Management Agreement and Other New Marriott Agreements, as follows:

- (i) a charge in the maximum amount of \$5 million to be secured by RRDI's right, title and interest in and to the real and personal property comprising the Hotel (the "Primary Marriott Charge"); and
- (ii) a charge in the maximum amount of \$2 million secured by RRDI's right, title and interest in and to its real property other than the Hotel (the "Secondary Marriott Charge");

such charges to rank subordinate only to the Receiver's Charge and the Receiver's Borrowings Charge each as provided for in the Appointment Order, the Priority

Lien Claims, and the Unit Owners' Charge, provided that the total amount secured by the Primary Marriott Charge and the Secondary Marriott Charge shall not exceed \$5 million, with access to the Secondary Marriott Charge only if there are not sufficient Assets available for distribution under the Primary Marriott Charge;

- (o) approving and authorizing the Receiver to pay the reasonable legal fees and disbursements, inclusive of GST, of the Ad Hoc Committee of Unit-Owners represented by Miller Thomson LLP:
  - (i) in an amount to a maximum of \$75,000 in respect the matters relating to the Unit Owner Settlement Agreements and the Unit Purchaser Settlement Agreements and the other matters raised herein; and
  - (ii) in an amount to a maximum of \$25,000 in respect of a trust claim that may be raised by Unit Owners relating to funds held by McCarthy Tetrault LLP, in the event that the issue of entitlement to such funds is brought forward to the Court for determination;
- (p) approving the Fourth Report and the conduct and activities of the Receiver described therein;
- (q) sealing the Confidential Appendices to the Fourth Report pending further Order of this Court; and
- (r) such further and other relief as counsel may request and this Honourable Court deems just.

was heard this day, at 330 University Avenue, Toronto, Ontario.

ON READING the Second Report of the Receiver dated July 3, 2009, the Fourth Report, the Supplementary Report to the Fourth Report of the Receiver dated August 14, 2009 (the "Supplementary Report"), the affidavits of service of Wendy Robinson dated August 13, 2009, Katherine McEachern dated August 14, 2009 and David Munro dated August 14, 2009 (the "Affidavits of Service"), and on being advised of the service of the Notice of Motion on all Unit

Owners and Existing Unit Purchasers who entered into an Existing Rental Pool Management Agreement with RRMSI, and on noting the correspondence in the Supplementary Report from RRMSI advising that it would not attend on the return of this motion despite notice of the relief that would be sought in connection with the Existing Rental Pool Management Agreements, on reading the letter dated August 6, 2009 from the Receiver to the Unit Owners and Existing Unit Purchasers, filed, and the email exchange between counsel for the Receiver and RRMSI dated August 12 and 13, 2009 and August 17, 2009, filed, and on hearing the submissions of independent counsel for the Receiver, counsel for WestLB AG, Toronto Branch, and the Receiver, counsel for the Ad Hoc Committee of Unit Owners, and counsel for Marriott, counsel for certain Existing Unit Purchasers, and counsel for Fortress Credit Corp. not opposing, no one appearing for any other person on the service list:

#### **Service**

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof, and the service of the Notice of Motion and the Motion Record in accordance with the Affidavits of Service is hereby validated.

#### **Hotel Management Agreement and Other Hotel Agreements**

2. THIS COURT ORDERS that the Receiver be and is hereby authorized to enter into and execute the New Hotel Management Agreement and Side Letter substantially on the terms and conditions as set out in the Summary of Terms filed as Confidential Appendix "1" to the Fourth Report, and as set out substantially in the form of Side Letter filed confidentially with the Court, which shall be subject only to such non-material amendments to which the Receiver and Marriott may agree, together with such further terms and conditions to the New Hotel Management Agreement as the parties may agree to in order carry into effect the New Hotel Management Agreement, to be effective on the Effective Date (or such other date as the Receiver and Marriott may agree).

3. THIS COURT ORDERS that the Receiver be and is hereby authorized to enter into and execute such Other New Hotel Agreements that the Receiver deems necessary, on such terms as the Receiver may agree with Marriott and or its affiliates, and as are consistent with the terms of



the New Hotel Management Agreement, to be effective on the Effective Date (or such other date as the Receiver and Marriott may agree).

#### **Repudiation of Arrangements with RRMSI**

4. THIS COURT ORDERS that the Receiver be and is hereby authorized to repudiate any and all agreements, verbal or otherwise, between RRDI and RRMSI whereby RRDI arranged to delegate the appointment of Rental Pool Manager to RRMSI, with such repudiation to be effective upon written notice to counsel for RRMSI who filed a Notice of Appearance in these proceedings, and such repudiation to be effective on the date and time as set out in such written notice.

#### **Rental Pool Management Agreements**

5. THIS COURT ORDERS that the Receiver be and is hereby authorized to enter into New Rental Pool Management Agreements with Unit Owners, Existing Unit Purchasers, and New Unit Purchasers, substantially in the form set out in the draft New Rental Pool Management Agreement attached to the Fourth Report as Appendix "F", with such non-material amendments as may be agreed to by the Receiver.

6. THIS COURT ORDERS AND DECLARES that as a result of the repudiation by the Receiver and termination by Marriott of the Current Hotel Management Agreement, and the repudiation by the Receiver on behalf of RRDI of any agreements, verbal or otherwise, between RRDI and RRMSI delegating the appointment of Rental Pool Manager to RRMSI, the Existing Rental Pool Management Agreements between RRMSI and Unit Owners and Existing Unit Purchasers are not capable of performance and may be terminated by Unit Owners and Existing Unit Purchasers. The execution by a Unit Owner or Existing Unit Purchaser of the New Rental Pool Management Agreement shall be deemed to be notice of the termination by the Unit Owner or Existing Unit Purchaser of their Existing Rental Pool Management Agreement; provided further that any action against a Unit Owner or Existing Unit Purchaser by RRMSI by reason of the execution of a New Rental Pool Management Agreement by a Unit Owner or Existing Unit Purchaser is stayed pending further Order of this Court.

6a. THIS COURT ORDERS that the relief granted in paragraph 6 shall be subject to any motion to vary or amend returnable on August 20, 2009, to be heard at the same time as the

intended motion or application for the appointment of a receiver of RRMSI and representative counsel for Unit Owners and Existing Unit Purchasers.

#### **Settlement Agreements**

7. THIS COURT ORDERS that the Receiver be and is hereby authorized to enter into settlement agreements with Unit Owners and Existing Unit Purchasers substantially on the terms as set out in the forms of Unit Owner Settlement Agreement and Unit Purchaser Settlement Agreement attached as Appendices "H" and "I", respectively, to the Fourth Report.

8. THIS COURT ORDERS that the form of Release to be executed by Unit Owners and Existing Unit Purchasers in connection with Unit Owner Settlement Agreements and Unit Purchaser Settlement Agreements attached as Appendix "J" to the Fourth Report, as amended in the form as filed with the Court to add Fortress Credit Funding (Europe) I Limited and FCCO Limited, and to delete Ken Fowler Enterprises Ltd., Red Leaves Partnership, Kenneth A. Fowler, Peter Fowler, and RRMSI as Releasees under the Release, be and is hereby approved.

#### **Disclosure Documentation**

9. THIS COURT ORDERS that the relief sought on this motion in respect of the Disclosure Documentation is hereby adjourned to August 20, 2009.

#### **Charges**

10. THIS COURT ORDERS that in connection with the Unit Owner Settlement Agreements, the Unit Owners shall be entitled to the benefit of and are hereby granted charges on the Assets of RRDI in favour of the Unit Owners (the "Unit Owners' Charges"), as follows:

- (a) in an amount sufficient to secure the total aggregate obligation of RRDI to pay rent under New Leases entered into with all Unit Owners pursuant Unit Owner Settlement Agreements, not to exceed \$1.6 million; and
- (b) in an amount sufficient to secure the total aggregate obligation of RRDI to honour the Indulgence Cards and Other Incentives as provided by all Unit Owner Settlement Agreements, not to exceed \$3.7 million; provided that the maximum amount of \$3.7 million shall be reduced dollar for dollar by (i) each dollar



recovered by a Unit Owner on account of 50% of such Unit Owner's claim against RRDI for Indulgence Cards and Other Incentives from the Funds (all such terms as defined in the Unit Owner Settlement Agreement); and (ii) each dollar required to be held back by the Receiver from a closing with an Existing Unit Purchaser on account of the obligations of the Receiver to such Existing Unit Purchaser under the Unit Purchaser Settlement Agreement;

such Charges to rank *pari passu* with each other and subordinate only to the Receiver's Charge and the Receiver's Borrowings Charge each as provided for in the Appointment Order (as same may be amended from time to time), and the Priority Lien Claims.

11. THIS COURT ORDERS that Marriott and IHLC shall be entitled to the benefit of and are hereby granted charges on the Assets of RRDI in order to secure the obligations of RRDI to Marriott and IHLC under the New Hotel Management Agreement, the Side Letter, and Other New Marriott Agreements (the "Marriott Obligations"), as follows:

- (a) a charge in the maximum amount of \$5 million to be secured by RRDI's right, title and interest in and to the real and personal property comprising the Hotel (the "Primary Marriott Charge"); and
- (b) a charge in the maximum amount of \$2 million secured by RRDI's right, title and interest in and to its real and personal property other than the Hotel (the "Secondary Marriott Charge"),

such charges to rank subordinate only to the Receiver's Charge and the Receiver's Borrowings Charge each as provided for in the Appointment Order (as same may be amended from time to time), the Priority Lien Claims, and the Unit Owners' Charge, provided that the maximum amount which Marriott or IHLC may recover under the Primary Marriott Charge and the Secondary Marriott Charge is limited to \$5 Million and that, to the extent that Marriott or IHLC recovers less than \$5 Million (the "Deficiency") under the Primary Marriott Charge, Marriott or IHLC may recover the lesser of (i) the Deficiency and (ii) \$2 Million under the Secondary Marriott Charge. For greater certainty, any claim by Marriott or IHLC against RRDI or the Receiver in respect of the Marriott Obligations in excess of \$5 million shall be an unsecured claim against RRDI.

12. THIS COURT ORDERS that the Receiver be and is hereby authorized to pay the reasonable legal fees and disbursements, inclusive of GST, of the Ad Hoc Committee of Unit-Owners represented by Miller Thomson LLP:

- (a) in an amount to a maximum of \$75,000 in respect the matters relating to the Unit Owner Settlement Agreements and the Unit Purchaser Settlement Agreements and the other matters raised herein; and
- (b) in an amount to a maximum of \$25,000 in respect of a trust claim that may be raised by Unit Owners relating to funds held by McCarthy Tetrault LLP, in the event that the issue of entitlement to such funds is brought forward to the Court for determination.

#### **Fourth Report**

13. THIS COURT ORDERS that the Fourth Report, and the activities and conduct of the Receiver described therein, be and are hereby approved.

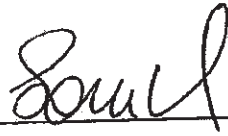
#### **Sealing Order**

14. THIS COURT ORDERS that Confidential Appendices 1 and 2 filed with the Fourth Report, and the form of Side Letter filed confidentially with the Court, be and are hereby sealed and shall remain sealed until further Order of this Court.

#### **Aid and Recognition**

15. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

16. THIS COURT ORDERS that pursuant to the BIA, section 195, this Order is subject to provisional execution notwithstanding any appeal therefrom.

A handwritten signature in cursive script, appearing to read "Saul", is written over a horizontal line.

ENTERED AT / INSCRIT A TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

AUG 18 2009

PER / PAR:

WESTLB AG, TORONTO BRANCH

V.

THE ROSSEAU RESORT DEVELOPMENTS INC.

Court File No. CV-09-8201-00CL

Applicant

Respondent

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

**ORDER**

**BLAKE, CASSELS & GRAYDON LLP**  
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Lawyers for WestLB, AG, Toronto Branch,  
and Alvarez & Marsal Canada ULC and McIntosh  
Morawetz Inc., in their respective  
capacities as Court-appointed interim  
receiver, trustee, receiver and manager

## **APPENDIX C**



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August 6, 2009

**TO: THE UNIT OWNERS OF THE ROSSEAU, A JW MARRIOTT  
RESORT & SPA (the "Hotel")**

**AND TO: PURCHASERS OF UNITS OF THE HOTEL UNDER AGREEMENT  
OF PURCHASE AND SALE**

**IMPORTANT CHANGES TO THE RENTAL POOL ARRANGEMENTS**

**PLEASE REVIEW IMMEDIATELY UPON RECEIPT**

As you know, Alvarez & Marsal Canada ULC has been appointed receiver and manager of the assets of The Rosseau Resort Developments Inc. ("RRDI") by appointment of the Ontario Superior Court of Justice (the "Receiver"). We are writing to you in that capacity to provide Unit Owners and Purchasers with information regarding the existing and proposed rental pool arrangements at the Hotel.

As you are aware, since the commencement of the receivership proceedings, the Receiver has expressed concern about the existing rental pool management agreements (the "RPMAs") that Unit Owners and Purchasers have entered into with The Rosseau Resort Management Services Inc. ("RRMSI") either on closing or interim occupancy. RRMSI is an affiliate of RRDI, the entity which is in receivership. RRMSI was incorporated as a single purpose entity to act as the manager of the rental pool and accordingly was made a party to the Hotel Management Agreement (the "HMA") between Marriott Hotels of Canada, Ltd. ("Marriott") and the "Owner". The Owner under the HMA is defined jointly to include RRMSI, in its capacity as the rental pool manager, and RRDI. A summary of the agreements involving Marriott, RRDI and RRMSI is set out in the Second Report of the Receiver dated July 3, 2009, and filed with the Court. The Receiver reported to the Court the need to address the structure of the management arrangements for the Hotel.

As it has been communicated to Unit Owners and Purchasers previously, one of the Receiver's primary objectives is to maintain the viability of the Hotel for all stakeholders and ultimately position the residual interest in the Hotel to be sold to a new owner. In order to position the Hotel for sale, the Receiver has developed a new form of RPMA, to be approved by the Court, which will have RRDI, by its Receiver, act as the rental pool manager pending a sale of the residual interest in the Hotel and the assignment of the RPMAs to a new buyer of the residual interest in the Hotel.

**New purchasers of units going forward will be required to execute the new RPMA, and the Receiver is also seeking to have the existing Unit Owners and Purchasers execute the new form of RPMA as well. As most existing Unit Owners and Purchasers know, it is a condition of the Receiver's proposal dated July 8, 2009 to honour 50% of existing sale leaseback and other incentives (the "Incentive**

**Proposal”) that such Unit Owners and Purchasers execute the new RPMA. A copy of the Incentive Proposal is attached.**

**You will be receiving shortly a package of documents from the Receiver containing the new form of RPMA for execution by you, conditional upon approval by the Court. For those Unit Owners and Purchasers participating in the Incentive Proposal, you will be provided with the necessary documentation for execution as well.**

**PLEASE REVIEW IMMEDIATELY UPON RECEIPT.** You will be provided with instructions on execution and may wish to obtain legal advice once received.

The following is a summary of the new form of RPMA the Receiver will be putting in place upon Court approval.

The first step in completing the ‘transition’ to the new form of RPMA and to ultimately facilitate the Receiver’s sale of the residual interest in the Hotel is for the Receiver to repudiate the existing HMA between Marriott, RRDI and RRMSI. The Receiver already has the general authority from the Court to do this, but will be seeking express authorization from the Court for the repudiation of the existing HMA and implementation of the new arrangements described in this letter.

Immediately upon repudiating the HMA, the Receiver intends to cause RRDI to enter into a new HMA with Marriott. The business terms of this new hotel management agreement will be essentially the same as those of the original agreement; however, only RRDI and Marriott will be parties to it. Once a new HMA has been entered into between RRDI and Marriott, the Receiver will be in a position to cause RRDI to enter into new RPMAs with the unit owners. RRDI, by its Receiver, will perform the responsibilities of the rental pool manager, pending a sale by the Receiver of the residual interest in the Hotel.

The primary change from the existing RPMA to the proposed new RPMA is the calculation of distributions to unit owners. Under the existing RPMA, distributions to unit owners are not limited to the actual operating profit generated by the Hotel. Marriott however, is only required, under the terms of the HMA, to distribute to RRDI the Hotel’s operating profit (i.e. the distribution calculated to be owing to unit owners could exceed the Hotel’s operating profit, as described in more detail below).

It must be understood that the existing RPMA had been developed under a scenario that is significantly different than the current receivership scenario, whereby the developer had assumed that it would have the financial resources to back stop the return to unit owners even if operating losses were generated by the Hotel or if distributions from Marriott were not sufficient to permit full payment of amounts owing to unit owners under the existing RPMA. Unfortunately, the insolvency of RRDI has made this scenario unworkable. The Receiver has been working with representatives of the Ad Hoc

Committee of Unit Owners (the “Committee”) to explain this issue, address it and settle the form of the new RPMA.

The operating profit of the Hotel is equal to, essentially, the net cash flow generated from all of the Hotel’s operations; both the commercial operations of the Hotel (such as the conference facilities, spa and food and beverage services) and the residential operations of the Hotel. As you know, the unit owners are entitled to the ‘net revenue’ or, the ‘operating profit’ generated by the residential operations of the Hotel.

For example:

- Assume that the operating profit of the Hotel is equal to \$100. The existing RPMA calls for the Rental Pool Manager to undertake an allocation, in accordance with the RPMA, to determine that component which relates to the residential operations and that which relates to the commercial operations.
- Where the \$100 operating profit is generated by \$75 of residential profit and \$25 of commercial profit, the matter is quite simple: The residential unit owners get \$75, less the rental pool management fee and a few other deductions, and RRDI retains the profits from the commercial operations of \$25.
- However, in the case where the \$100 operating profit results from \$150 of residential profit and a loss of \$50 from the commercial operations, the matter becomes more complicated. In this scenario, under the existing RPMA, RRDI would be obligated to pay to the unit owners \$150; however, it only has \$100 available to distribute.
- The real possibility of the last scenario makes the existing RPMA unsustainable.

In order to correct this issue, the new RPMA that the Receiver has negotiated with Marriott and the Committee does, among other things, the following:

- It maintains the same basic principles and business terms as in the existing RPMA and provides for the same calculation of Adjusted Gross Revenue as before.
- It makes no change to the existing unit factors used to determine the Unit Revenue Share owing to each individual unit owner.
- It enhances the transparency to unit owners by improving the format of the rental pool management statement to be provided. Going forward, statements will be provided and distributions will be calculated on a quarterly basis, subject to adjustment based on the actual annual financial results of the rental pool.
- It reduces the rental pool management fee payable to the rental pool manager by 20% from between 46% and 50% (depending on the number of weeks of usage) of Adjusted Gross Revenue to between 26% and 30% of Adjusted Gross Revenue.



- It places a cap on the total distribution that can be made to unit owners equal to 95% of the operating profit of the Hotel as calculated by Marriott. In other words, if the Hotel incurs an operating loss, there will be no distribution to unit owners and if the residential operations of the Hotel are more profitable than the commercial operations of the Hotel, the distribution to unit owners will be limited to the overall profitability of the Hotel. RRDI (or any subsequent purchaser of the Hotel) cannot make a distribution to unit owners that is greater than the distribution it receives from Marriott. Nor can RRDI (or any subsequent purchaser of the Hotel) be obligated to make distributions to unit owners and at the same time be obligated to Marriott to fund operating deficiencies. Notwithstanding the limitation that the cap imposes, it does put unit owners 'first in line' for any/all of the operating profits generated by the Hotel and available for distribution.
- It does not require unit owners to fund any losses of the Hotel (however, unit owners will always be responsible for payment of condominium fees as assessed by the Condominium Corporation, property taxes, mortgage payments that unit owners have contracted for and Resort Association fees).
- It establishes a mechanism for unit owners to require RRDI to conduct an audit (or engage an independent auditor) of Marriott's calculation of operating profit and to provide a certification to the Board of Directors of the Condominium Corporation on the results of that audit.

The Receiver believes that the most significant issue for Unit Owners and Purchasers to consider with respect to this new form of RPMA is the implementation of the limitation on distributions to unit owners. While this limitation of 95% of operating profits does change the structure of the agreement Unit Owners and Purchasers previously entered into with RRMSI, it has the major benefit of creating a sustainable rental pool that will ensure stability.

As the Unit Owners and Purchasers will appreciate, the Receiver is only a short term operator of RRDI. The structural issues described above must be addressed and corrected. If they are not, the Receiver will not be able to identify a buyer for the residual interest in the Hotel to take on a structure which requires the funding of distributions to unit owners even if the Hotel is operating at a loss, which operating loss must also be funded by the owner of the Hotel. Accordingly, to help ensure the long term operations of

the business, including workable responsibilities for the rental pool manager, the RPMAs must be restructured for the benefit of existing Unit Owners and Purchasers as well as future purchasers.

Yours very truly,

**ALVAREZ & MARSAL CANADA ULC  
IN ITS CAPACITY AS RECEIVER AND MANAGER  
OF THE ASSETS OF THE ROSSEAU RESORT DEVELOPMENTS INC.,  
AND NOT IN ITS PERSONAL CAPACITY**

A handwritten signature in black ink, appearing to read 'Adam Zalev', with a stylized flourish at the end.

Per: Adam Zalev  
*Director*