

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**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**

BETWEEN:

WESTLB AG, TORONTO BRANCH

Applicant

and

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

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

May 25, 2011

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1.0 Introduction and Summary of Proceedings to Date¹

- 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. (now Alvarez & Marsal Canada 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 are collectively defined as the “**Receiver**”).
- 1.2 To date, the Receiver has filed eighteen reports with this Honourable Court. All background materials in respect of these proceedings, including, among other things, the Receiver’s past reports to Court and orders of the Court, can be found on the Receiver’s website at www.alvarezandmarsal.com/rosseau.
- 1.3 On March 4, 2011, the Receiver filed its sixteenth report (the “**Sixteenth Report**”) in support of a motion for advice and directions with respect to RRDI’s obligation to pay condominium fees to the Condominium Corporation on account of common

¹ Capitalized terms in this Nineteenth Report shall have the meanings ascribed to them in either the body of this report or in the Glossary of Defined Terms attached as **Appendix “A”**.

expenses, and the obligation of the Condominium Corporation to reimburse RRDI for shared common expenses.

- 1.4 The Sixteenth Report outlines the basis for the assertion by the Receiver, on behalf of RRDI, that any obligation of RRDI to pay condominium fees to the Condominium Corporation was satisfied by setting that liability off against obligations owed by the Condominium Corporation to RRDI (the “**Set-off Motion**”). No hearing date in respect of the Set-off Motion has been set as the Receiver has been pursuing resolution of the Set-off Motion as well as the RPMA Dispute. In its previous reports, the Receiver reported that 64 Unit Owners had delivered Notices of Dispute in respect of the interpretation of the New RPMA, giving rise to the RPMA Dispute, described in detail herein.
- 1.5 In its Eighteenth Report dated May 2, 2011, the Receiver advised that an agreement had been reached in principal among the Receiver, the Condominium Corporation, the Ad Hoc Committee, the Independent Directors and the Potential Purchaser which provided a structure for the resolution of the RPMA Dispute and the dispute described in the Set-off Motion. The Potential Transaction with the Potential Purchaser has been terminated in accordance with its terms. The parties (other than the Potential Purchaser) have now concluded an amended and restated settlement agreement in the form attached as Schedule “B” to this report (the “**Settlement Agreement**”).
- 1.6 The purpose of this nineteenth report (the “**Nineteenth Report**”) is to provide to the Court the details of the Settlement Agreement and to seek the Court’s authorization

- and approval for the execution and implementation of the Settlement Agreement by the Receiver.
- 1.7 Pursuant to the Settlement Agreement, the parties have resolved the issues raised in the Set-off Motion by way of a **“Fresh Start Approach”** (as more fully described below) for the budget of the Condominium Corporation, and RRDI and the Condominium Corporation have agreed to release all claims against each other for the period prior to implementation of the Fresh Start Approach, subject to Court approval.
 - 1.8 In order to implement the Fresh Start Approach, the Receiver has agreed to consent on behalf of RRDI, in its capacities both as Unit Owner and as Declarant of the Condominium Corporation, to certain amendments to the Condominium Corporation’s declaration (the **“Declaration”**), subject to Court approval.
 - 1.9 The Receiver has also agreed, on behalf of RRDI, to implement a settlement of the RPMA Dispute by way of certain amendments to the New RPMA (the **“RPMA Resolution”**), and certain corresponding amendments to the Declaration, which settlement is conditional upon and shall only be implemented at the option of a purchaser of the Assets of RRDI, if and when such a purchaser is identified pursuant to the Sales Process and approved by the Court.
 - 1.10 The Receiver is therefore requesting that this Honourable Court grant an order:
 - a) approving the execution and delivery of the Settlement Agreement by the Receiver, on behalf of RRDI, in substantially the form attached as **Appendix “B”** to this Nineteenth Report, and granting ancillary relief related to such approval;

- b) authorizing the Receiver to consent, on behalf of RRDI, in its capacities as both Unit Owner and Declarant of the Condominium Corporation, to an amendment to the Declaration of the Condominium Corporation, in substantially the form attached as **Appendix “C”** to this Nineteenth Report, for purposes of implementing the Fresh Start Approach;
- c) authorizing the Receiver, on behalf of RRDI, to agree to amendments to the New RPMA, as set out at paragraph 5 of the Settlement Agreement, for purposes of implementing the RPMA Resolution, conditional on the closing of an agreement of purchase and sale with a purchaser approved by the Court who wishes to implement the RPMA Resolution;
- d) authorizing the Receiver to consent, on behalf of RRDI, in its capacities as both Unit Owner and Declarant of the Condominium Corporation to an amendment to the Declaration of the Condominium Corporation, in substantially the form attached as **Appendix “D”** to this Nineteenth Report, for purposes of implementing the RPMA Resolution, conditional on the closing of an agreement of purchase and sale with a purchaser approved by the Court who wishes to implement the RPMA Resolution;
- e) sealing Confidential Appendix “1” to this Nineteenth Report; and
- f) approving this Nineteenth Report and the conduct and activities of the Receiver as described herein.

2.0 *Terms of Reference*

- 2.1 In preparing this Nineteenth Report, the Receiver has relied on unaudited financial information prepared by the Company and the Company's consultants and advisors, the Company's books and records and discussions with certain remaining employees of the Company. The Receiver has not performed an audit or other verification of such information. An examination of the Company's financial forecasts as outlined in the Canadian Institute of Chartered Accountants Handbook has not been performed. Future oriented financial information relied on in this Nineteenth Report is based on assumptions regarding future events; actual results achieved may vary from this information and these variations may be material. The Receiver expresses no opinion or other form of assurance with respect to the accuracy of any financial information presented in this Nineteenth Report, or relied upon by the Receiver in preparing the Nineteenth Report. All references to dollar figures contained in the Nineteenth Report are in Canadian currency unless otherwise specified.

3.0 Background to Disputes

Dispute in respect of Condominium Fees:

- 3.1 The two Independent Directors of the Condominium Corporation have asserted that RRDI is in arrears of its condominium fees in respect of the operational year 2009-2010 and will owe additional amounts once the budget for 2010-2011 is settled and condominium fees are assessed. That subsequent budget has not been concluded as a result of the RPMA Dispute.
- 3.2 The Receiver has disputed this assertion. As more fully set out in the Sixteenth Report, the Receiver has asserted that RRDI's obligation to pay condominium fees, if any, to the Condominium Corporation was satisfied by setting-off that obligation against amounts owed by the Condominium Corporation to RRDI for shared common expenses, resulting from RRDI's funding of all of the Hotel's operating losses prior to and since the appointment of the Receiver. The Receiver has asserted that, pursuant to a number of contracts governing the relationship between RRDI and the Condominium Corporation, the Condominium Corporation is obliged to reimburse RRDI for its share of those expenses funded by RRDI, together with other costs paid by RRDI directly on behalf of the Condominium Corporation (and an outstanding management fee).
- 3.3 In its Sixteenth Report, the Receiver sought advice and directions regarding the obligation of RRDI to pay fees to the Condominium Corporation on account of common expenses, and the right of RRDI to set off that obligation against its claim for reimbursement of amounts owing by the Condominium Corporation to RRDI.

- 3.4 As of March 9, 2010, RRDI owed the sum of \$1,342,971.28 to the Condominium Corporation, based on the number of Units it owned from time to time between March 9, 2009 and March 8, 2010, including the Hotel Management Unit. As of that same date, the Receiver asserted that the Condominium Corporation owed the sum of \$1,285,126.77 to RRDI for shared expenses under various agreements, including a reciprocal agreement, a shared facilities agreement, and a hotel easement and restrictive covenant agreement each dated as of March 9, 2009 (the “**Condominium Agreements**”), \$121,138.70 for other costs paid by RRDI on behalf of the Condominium Corporation, and \$84,864 for management fees, totalling \$1,491,129.
- 3.5 By setting off this obligation against the condominium fees owed by RRDI to the Condominium Corporation, the Receiver asserted that the mutual obligations of RRDI and the Condominium Corporation have been satisfied, resulting in a net amount owing by the Condominium Corporation to RRDI for its first operational year ended March 9, 2010 in the amount of \$148,158.19.
- 3.6 RRDI, by its Receiver, by way of proceeds of Receiver Borrowings provided by WestLB, continues to pay all of the operating losses of the Hotel, as required by the Hotel Management Agreement, until the Hotel achieves profitability. RRDI funds such costs generally, by funding Marriott who in turn operates the Hotel and makes payment on account of all costs which ultimately are to be allocated between RRDI and the Condominium Corporation pursuant to the Condominium Agreements. The Receiver has therefore asserted that set-off is available in respect of any condominium fees that may be payable by RRDI in the future, as and when the

budget for the Condominium Corporation is set for 2010-2011 and for subsequent years, to the extent RRDI continues to fund operating losses of the Hotel.

- 3.7 The Independent Directors disagree with the position of the Receiver, and have asserted that the common expenses of the Hotel have been paid out of the revenue earned on the rental of the Units through the operations of the Hotel, and have therefore already been paid by Unit Owners. They rely on their interpretation of the New RPMA, which is the subject of the RPMA Dispute. As a result, they assert that there are no shared expenses for the Condominium Corporation to reimburse RRDI, and that therefore there is no obligation against which RRDI can set off its condominium fee obligation. As such, they assert that RRDI is in arrears to the Condominium Corporation on account of condominium fees, notwithstanding that RRDI has paid all operational losses of the Hotel. This position could only be advanced, if it could be advanced at all, if the RPMA Dispute was decided in favour of the Unit Owners advancing the RPMA Dispute.

RPMA Dispute:

- 3.8 As described more fully in the Receiver's previous reports, the Notices of Dispute delivered by 64 Unit Owners (the "**Disputing Unit Owners**") in respect of the interpretation of the New RPMA brought into question the cash flow distributions that would be available to the rental pool manager under the New RPMAs. The RPMA Dispute raised an impediment to the Receiver's Institutional Sales Process in 2010, and was a significant factor in the Receiver's decision to suspend that process.
- 3.9 Under the RPMA Dispute, the Disputing Unit Owners disputed the calculation of rental pool distributions to Unit Owners. They have asserted that RRDI, in its

capacity as rental pool manager under the New RPMAs, has misinterpreted the deductions to be made from “Gross Rental Pool Revenue” as defined in the New RPMA at section 3.2, in order to calculate the amount to be distributed to individual Unit Owners, if any, out of the rental pool under the New RPMA. The Disputing Unit Owners assert that the calculation of this amount should include, as deductions, those costs of repairs, maintenance, and utilities (“**Maintenance and Utilities Costs**”) that have been paid by Marriott under the Hotel Management Agreement which relate to the residential component of the Hotel. The largest single expense is the utilities. Attached as **Appendix “E”** to this Nineteenth Report is a sample copy of the form of New RPMA, without schedules. Attached as **Appendix “F”** is a sample copy of a Notice of Dispute.

- 3.10 RRDI, by its Receiver, has disputed this interpretation, asserting that the New RPMA does not provide for such deductions, and that Maintenance and Utility Costs are the obligation of the Condominium Corporation, and properly paid by Unit Owners to the Condominium Corporation through assessed condominium fees.
- 3.11 Pursuant to the Declaration, as well as the Condominium Agreements, Unit Owners are expressly responsible, by way of payment of condominium fees, for that portion of Maintenance and Utilities Costs associated with the residential components of the Hotel. RRDI, as owner of the commercial component of the Hotel, is responsible for its share of Maintenance and Utilities Costs associated with the commercial operations.

- 3.12 Maintenance and Utilities Costs were included in the Condominium Corporation's First Year Budget, and the Receiver asserts that they form a significant portion of each Unit Owners' total obligation to pay condominium fees.
- 3.13 However, in accordance with its obligations pursuant to the Hotel Management Agreement described above, Marriott makes payment on account of all Maintenance and Utilities Costs in respect of the Hotel, including that portion which relates to the residential component of the Hotel. As there can be no interruption of such services, Marriott does not wait for amounts to be assessed from the Unit Owners before making payments on account of these expenses. Maintenance and Utilities Costs paid by Marriott, which are deducted from the Hotel's total revenue, reduce the Operating Profit² of the Hotel. If the Hotel is operating at a loss, the Maintenance and Utilities Costs increase the Operating Loss, which must be funded and have been funded to date by RRDI under the Hotel Management Agreement. Pursuant to the Hotel Management Agreement, RRDI is either (a) entitled to receive the Operating Profits, if any, from Marriott, by way of a distribution; or (b) required to fund the Operating Loss to Marriott to make up any deficiency for both the residential and commercial aspects of the Hotel. The Condominium Agreements provide for reimbursement to RRDI for the costs which RRDI has incurred on behalf of the Unit Owners in respect of the residential aspects of the Hotel.
- 3.14 The Disputing Unit Owners have asserted that, based on their interpretation of the New RPMA, Maintenance and Utilities Costs are properly paid out of the revenues of the Hotel, and as a result, are to be deducted from their distributions.

² As those terms are defined in the Hotel Management Agreement

Correspondingly they assert that the residential portion of such costs should not form part of the expenses of the Condominium Corporation to be assessed against each Unit Owner as condominium fees, and, accordingly, there is nothing for the Condominium Corporation to reimburse to RRDI.

- 3.15 The Disputing Unit Owners assert that their interpretation of the New RPMA is correct because they argue that it is consistent with the deductions made under the Hotel Management Agreement. As a result of that interpretation, they state that they are required to pay twice for Maintenance and Utilities Costs, if paid, first, out of the revenues of the Hotel and, second, by way of assessed condominium fees on account of these costs. They state that, as their interpretation of the New RPMA is the correct one, to remedy this alleged duplication it is appropriate to eliminate Maintenance and Utilities Costs as expenses of the Condominium Corporation assessed against Unit Owners.
- 3.16 The Receiver disputes the interpretation asserted by the Disputing Unit Owners of the New RPMA, as the Receiver is of the view that such interpretation is inconsistent with the terms of the New RPMA, which the Receiver views as clear and unambiguous. The Receiver asserts that the New RPMA does not include Maintenance and Utilities Costs as deductions. The interpretation asserted by Disputing Unit Owners is inconsistent the Declaration and the Condominium Agreements, all of which make Maintenance and Utilities Costs a component of common expenses, and the responsibility of Unit Owners through their assessed condominium fees.

4.0 *The Settlement Agreement*

- 4.1 After serving the Set-off Motion, the Receiver commenced discussions with the members of the Ad Hoc Committee and the Independent Directors, in order to determine whether (a) the issue of RRDI's alleged liability for condominium fees; and/or (b) the issues raised in the RPMA Dispute, could be resolved in the context of a sale specifically to the Potential Purchaser, as described in the Fifteenth Report.
- 4.2 An earlier version of the Settlement Agreement was initially executed by the Potential Purchaser, the Receiver on behalf of RRDI, the Independent Directors, the members of the Ad Hoc Committee, and the Condominium Corporation.
- 4.3 As disclosed in the Eighteenth Report, the proposed transaction with the Potential Purchaser has been terminated. The Receiver has been authorized by Order of the Court dated May 6, 2011 to commence a Sales Process on the basis of a Sales Process Protocol approved by such Order.
- 4.4 Since the termination of the proposed sale to the Potential Purchaser, the Receiver has conducted further discussions with the Independent Directors and members of the Ad Hoc Committee. The parties have agreed to amend and restate the Settlement Agreement.
- 4.5 The Settlement Agreement provides for the implementation of the Fresh Start Approach without requiring the consent of a purchaser as it (a) resolves issues in the receivership without the cost, expense and disruption of litigation; (b) has minimal adverse impact on the financial aspects of the Condominium Corporation going forward; and (c) the adverse impact, if any, is outweighed by the positive benefit

resulting in the settlement of the Set-off Motion on a reasonable and practical basis. The RPMA Resolution, on the other hand, will only be implemented if a purchaser requests that it be implemented, as it changes the financial return to the Rental Pool Manager under the New RPMA.

- 4.6 The Settlement Agreement, as amended and restated, is attached at **Appendix “B”**. Schedule “A” to the Settlement Agreement has been redacted from the Settlement Agreement, and is filed separately as **Confidential Appendix “1”** to this Nineteenth Report, as it contains information that is private to individual Unit Owners, and is therefore subject to confidentiality concerns. The Receiver is requesting an Order sealing the contents of Confidential Appendix “1”.

The Fresh Start Approach:

- 4.7 The Fresh Start Approach is the basis on which the parties have agreed to resolve the issues with respect to common expenses raised in the Set-off Motion. The Fresh Start Approach is, in effect, an agreement to “restart the clock” with respect to the obligations of Unit Owners to remit condominium fees to the Condominium Corporation for the period up to the Fresh Start Date (defined below).
- 4.8 The parties have agreed to implement the Fresh Start Approach on the earlier of (i) the end of the calendar month in which the closing of a sale by RRDI, by its Receiver of the assets of RRDI to a purchaser occurs, whether such sale transaction takes place pursuant to the Sales Process or otherwise; (ii) the end of the month in which the Sales Process is terminated by Order of the Court; and (iii) December 31, 2011 (the “**Fresh Start Date**”).

4.9 As noted above, certain expenses that form part of the First Year Budget have been paid by Marriott on behalf of RRDI through the operations of the Hotel. Those expenses have been funded by RRDI. In accordance with the Condominium Agreements, RRDI asserts that it is entitled to be reimbursed by the Condominium Corporation. Under the Fresh Start Approach, RRDI agrees to forgo its claim for reimbursement from the Condominium Corporation from the date of the incorporation of the Condominium Corporation to the Fresh Start Date. The result is that only minimal administrative expenses have been incurred by the Condominium Corporation, and the First Year Budget of the Condominium Corporation will be amended by the Fresh Start Approach.

4.10 The Fresh Start Approach therefore proposes the retroactive establishment of a substantially reduced First Year Budget for the Condominium Corporation and for the subsequent period prior to the Fresh Start Date, providing for only those expenses that have been incurred by the Condominium Corporation, including administrative and insurance expenses, as well as the funding of the reserve fund. The reduced First Year Budget eliminates any amounts for Maintenance and Utilities Costs, which were the largest budgeted expenses in the First Year Budget. As noted above, such expenses were essentially funded out of the revenues generated by the Hotel, and the Operating Loss funded by RRDI under the Hotel Management Agreement, and RRDI has agreed under the Settlement Agreement to forgo reimbursement for those expenses under the Condominium Agreements.

- 4.11 Subsequent budgets to the First Year Budget, up to the Fresh Start Date, will be set on a similar basis. Future budgets of the Condominium Corporation subsequent to the Fresh Start Date will require a resolution of the RPMA Dispute.
- 4.12 In implementing the Fresh Start Approach, (a) the Condominium Corporation forgoes and releases its claim against RRDI for the payment of fees to the Condominium Corporation on account of common expenses for the period prior to the Fresh Start Date, and (b) certain Unit Owners who have paid condominium fees to the Condominium Corporation during that period (based on the First Year Budget and estimated Second Year Budget) receive a credit to be applied to future condominium fees as and when assessed, which credits will be amortized against future condominium fees over a five year period.
- 4.13 The credits to be given include amounts currently held in trust by the Receiver in respect of condominium fees and Indulgence Cards. These amounts were originally held in trust by McCarthys out of proceeds of sale of Units purchased by certain of the Unit Owners prior to the receivership. These amounts are currently held by the Receiver for or on behalf of the Condominium Corporation and/or individual Unit Owners pursuant to the provisions of the December 21 Order. The December 21 Order was granted on the basis of the Receiver's Eighth Report, which contained an analysis of respective entitlements to these funds. The Settlement Agreement provides that it is conditional upon the relevant Unit Owners directing the Receiver to pay these amounts to the Condominium Corporation in return for the issuance of the proposed credits.

- 4.14 Units owned by RRDI will also receive a credit for amounts RRDI paid directly on behalf of the Condominium Corporation for certain of its administrative costs and in respect of the funding of its reserve fund.
- 4.15 The total of these credits is approximately \$1.2 million. By amortizing the credits to Unit Owners and RRDI over a period of five years, the credits are not applied all at once, and the financial impact of the credits on the cash flow of the Condominium Corporation is therefore minimal.
- 4.16 With the concurrence of the Receiver, the Condominium Corporation has engaged Faskens to provide advice and assistance with respect to the implementation of the Fresh Start Approach. The Receiver has been advised by its legal counsel that Faskens has orally provided an opinion that the Fresh Start Approach is not precluded by the *Condominium Act*, and a draft written opinion to this effect has been reviewed by legal counsel for the Receiver. Faskens is in the process of finalizing their written opinion, which the Receiver understands will be finalized by the time of this motion and made available to the Condominium Corporation and the Receiver. The Receiver will confirm the delivery of such opinion on the return of the motion. The recitals to the Settlement Agreement contemplate that such opinion will be delivered prior to its execution and delivery by the parties.
- 4.17 The Fresh Start Approach is to be implemented by way of an amendment to the Declaration of the Condominium Corporation, in substantially the form attached as **Appendix “C”**. In order for the amendment to be made, the *Condominium Act* requires that, among other things:

- a) a resolution by the Board of Directors of the Condominium Corporation be passed approving the amendment;
- b) at least 80% of owners of Units consent to the amendment in writing;
- c) the Declarant of the Condominium Corporation consents to the amendment;
and
- d) the Board of Directors of the Condominium Corporation call and conduct a meeting of Unit Owners.

4.18 The Receiver considers the implementation of the Fresh Start Approach as an efficient and effective means of resolving the Set-off Motion to the Fresh Start Date, and has executed the Settlement Agreement, subject to and conditional upon Court approval. The Receiver recommends the Fresh Start Approach and seeks the Court's approval of its execution and performance of the Settlement Agreement in respect of the Fresh Start Approach.

4.19 The Receiver furthermore seeks the Court's authorization to consent, on behalf of RRDI, in both its capacity as owner of 132 Units, and in its capacity as Declarant of the Condominium Corporation, to the proposed amendment to the Declaration, for purposes of implementing the Fresh Start Approach.

4.20 If the Receiver obtains Court approval as requested, the Settlement Agreement requires the Condominium Corporation to call a meeting of its Board of Directors in order to consider a resolution to approve the proposed amendments to the Declaration, and to call a meeting of Unit Owners to be conducted on or before

June 15, 2011, as required by the *Condominium Act*. Detailed individual packages will be prepared and delivered to Unit Owners that will include a copy of the Settlement Agreement and the proposed amendments to the Declaration. The package will also include notice of a meeting of Unit Owners to be held once Court approval of the Settlement Agreement has been obtained and once the Board of Directors has considered the resolution. Individual Unit Owners have not been served with this motion, as the implementation of the Fresh Start Approach is subject to the notice and consent requirements outlined above, and the Fresh Start Approach cannot be implemented without this requisite consent of Unit Owners.

The RPMA Resolution:

- 4.21 The Settlement Agreement provides for the resolution of the RPMA Dispute by way of an amendment to the New RPMA, and a corresponding amendment to the Declaration of the Condominium Corporation. These amendments would only be put in place at the request of a purchaser who wishes to settle the RPMA Dispute in the manner of the RPMA Resolution.
- 4.22 The amendment to the New RPMA that is proposed in order to implement the RPMA Resolution set out at paragraph 5 to the Settlement Agreement. The amendment specifies that the calculation of Adjusted Gross Revenue under section 3.2 of the New RPMA is to include a deduction of the Maintenance and Utilities Costs paid by Marriott under the Hotel Management Agreement in respect of the residential aspect of the Hotel. In other words, the amount available for distribution to Unit Owners under the New RPMAs would be net of Maintenance and Utilities Costs.

- 4.23 In order to avoid duplication of expenses, Maintenance and Utilities Costs would no longer form part of the Condominium Corporation budget going forward, and would not be assessed against Unit Owners as part of their condominium fees. The RPMA Resolution therefore includes a corresponding amendment to the Declaration of the Condominium Corporation, attached as **Appendix “D”**, to clarify the definition of “Common Expenses” of the Condominium Corporation, to provide that they do not include Maintenance and Utilities Costs paid by the Hotel Operator under the Hotel Management Agreement.
- 4.24 The most significant impact on Unit Owners of the implementation of the RPMA Resolution is a significant reduction in the total amount of condominium fees payable by all Unit Owners (including RRDI in its capacity as owner of 132 Units) now and in the future. This will occur because the residential component of Maintenance and Utilities Costs will no longer be considered expenses to be paid by the Condominium Corporation, but rather, these amounts will be deducted, pursuant to Section 3.2 of the New RPMAs, from distributions which otherwise would be made to Unit Owners, to the extent funds are available for distribution once the Hotel achieves profitability. The effect of this is for Unit Owners to pay their share of Maintenance and Utilities Costs out of their revenue from Hotel operations. To the extent such revenue is not available as a result of operating losses, such expenses would be funded by RRDI in its capacity as Owner by the funding of operating losses under the requirements of the Hotel Management Agreement. These costs would no longer be costs of the Condominium Corporation to be shared with RRDI under the Condominium Agreements.

- 4.25 The meaningful reduction of condominium fees resulting from the RPMA Resolution is expected to result in an increase in the value of each Unit, as the carrying costs of all Units will be reduced. Accordingly, a purchaser of the Assets may benefit from the increased value of the Units in any resale of such Units, or can benefit from the reduced costs of holding the Units.
- 4.26 As described previously by the Receiver in its Eleventh Report to this Honourable Court, the Receiver asserts that the current language of the New RPMA is clear and unambiguous, but has favoured settlement discussions over litigation. While the Receiver remains prepared to assist a purchaser to implement the RPMA Resolution, subject to Court approval and the requisite Unit Owner approval, the Receiver understands that the RPMA Resolution may not be acceptable to a purchaser of the Assets, and therefore has made its implementation optional to a purchaser.
- 4.27 In the course of their due diligence, potential purchasers of the Assets will need to consider the attributes of the RPMA Resolution, one of which is the positive benefit of settling the RPMA Dispute without further litigation, in order to determine whether a purchaser wishes to request that the Receiver implement the RPMA Resolution, and/or whether such a purchaser wishes to engage in negotiations with the Ad Hoc Committee in respect of modifying the RPMA Resolution. To the extent a potential purchaser wishes to engage in negotiations with the Ad Hoc Committee, the Receiver intends to help facilitate such discussions.
- 4.28 The Settlement Agreement provides that the parties will seek the requisite consent of Unit Owners to the amendments proposed to the New RPMA, as provided by the

New RPMA, and the consent of Unit Owners to the corresponding amendments to the Declaration, conditional on the purchaser requesting that the Receiver implement the RPMA Resolution. This consent will be requested in conjunction with the notice to Unit Owners with respect to the Fresh Start Approach.

- 4.29 By taking steps now to conditionally implement the RPMA Resolution, the Receiver is in a position to make available to a prospective purchaser, in the course of conducting the Sales Process, an option for resolving the RPMA Dispute that can be readily implemented. The approval of Unit Owners will have already been sought and, if obtained in the requisite majority, the Settlement Agreement will be effective immediately at a purchaser's option without delay. The Receiver therefore seeks approval by the Court to take steps to implement the RPMA Resolution in accordance with the Settlement Agreement.

5.0 *Recommendations*


- 5.1 Based on the foregoing, the Receiver seeks an order as set out in paragraph 1.10 above.

* * *

All of which is respectfully submitted, this 25th day of May, 2011.

**ALVAREZ & MARSAL CANADA ULC &
ALVAREZ & MARSAL CANADA 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