

TAB 1

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, 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

NOTICE OF MOTION
(Returnable April 13, 2011)

Alvarez & Marsal Canada ULC in its capacity as Court-appointed receiver and manager pursuant to Section 101 of the *Courts of Justice Act* (Ontario) and trustee and receiver and manager under the *Construction Lien Act* (Ontario) (the “**Receiver and Manager**”), and Alvarez & Marsal Canada Inc. in its capacity as interim receiver pursuant to Section 47(1) of the *Bankruptcy and Insolvency Act* (the “**Interim Receiver**”), (jointly and collectively, the “**Receiver**”), of the undertaking, property and assets (the “**Assets**”) of The Rosseau Resort Developments Inc. (“**RRDI**”), will make a motion to a Judge of the Commercial List at 10:00 a.m. on Wednesday, the 13th day of April, 2011, or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion will be heard orally.

THE MOTION IS FOR AN ORDER:

- (a) abridging the time for service of this Notice of Motion and Motion Record, if necessary, validating service of the Notice of Motion and Motion Record, and dispensing with further service thereof;
- (b) declaring that all capitalized terms not otherwise defined in the Order shall have the same meaning as in the Seventeenth Report of the Receiver dated April 11, 2011 (the “**Seventeenth Report**”);
- (c) authorizing and directing the Receiver on behalf of RRDI to deliver a full and final release of any and all claims that RRDI may have or could have against WestLB AG, EAA, and all Secured Parties under the Credit Agreement and the Loan Documents, or otherwise, in the form attached to the Seventeenth Report as Appendix “B” (all capitalized terms as defined in the Seventeenth Report);
- (d) authorizing and directing the Receiver on behalf of RRDI to consent to judgment against RRDI for the obligations under the Credit Agreement;
- (e) approving a Water Supply Agreement (as defined in the Seventeenth Report) and the execution and delivery thereof by the Receiver on behalf of RRDI in the form attached as Appendix “C” to the Seventeenth Report;
- (f) approving the Seventeenth Report, and the conduct and activities of the Receiver as described therein; and
- (g) such further and other relief as counsel may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

- (a) The consent to judgment against RRDI and the release by RRDI will assist a settlement that will result in the final resolution of litigation commenced in the

State of New York in respect of the guarantee obligations of certain parties related to RRDI and the liability of RRDI under the Credit Agreement. It is of benefit to the estate for these matters to be resolved;

- (b) The Water Supply Agreement resolves issues between RRDI and the Rock golf course regarding the shared supply of water;
- (c) The grounds as more particularly set out in the Seventeenth Report; and
- (d) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Pleadings and proceedings herein;
- (b) The Seventeenth Report; and
- (c) such further and other material as counsel may advise and this Honourable Court permit.

Date: April 11, 2011

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WESTLB AG, TORONTO BRANCH
V.
THE ROSSEAU RESORT DEVELOPMENTS INC.

Applicant

Respondent

ONTARIO

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**NOTICE OF MOTION
(Returnable April 13, 2011)**

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TAB 2

**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

**SEVENTEENTH 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.**

APRIL 11, 2011

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Appendix "A" – Glossary of Terms

Appendix "B" - Release

Appendix "C" - Water Supply Agreement

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 collectively defined as the “**Receiver**”).
- 1.2 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 Capitalized terms in this Seventeenth 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”**.

2.0 Terms of Reference

- 2.1 In preparing this Seventeenth Report (the “**Seventeenth 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 Seventeenth 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 Seventeenth Report, or relied upon by the Receiver in preparing the Seventeenth Report. All references to dollar figures contained in the Seventeenth Report are in Canadian currency unless otherwise specified.

3.0 *The Motion*

3.1 This Report is filed by the Receiver in support of a motion:

- a) authorizing and directing the Receiver on behalf of RRDI to deliver a full and final release of any and all claims that RRDI may have or could have against WestLB AG, New York Branch ("**WestLB**"), Erste Abwicklungsanstalt ("**EAA**")², and all Secured Parties as referred to and defined in a Credit Agreement dated as of February 1, 2007 among, *inter alia*, RRDI, as Borrower, WestLB AG, Toronto Branch (now WestLB AG, New York Branch), various financial institutions, as the Lenders, CIT Financial Ltd. ("**CIT**"), as Syndication Agent and Raiffeisen Bank International AG (legal successor to Raiffeisen Zentralbank Österreich AG) ("**RZB**"), as Documentation Agent (as amended, supplemented or modified from time to time up to the date hereof, the "**Credit Agreement**") and the Loan Documents described and defined therein, or otherwise, in the form attached hereto as **Appendix "B"**;
- b) authorizing and directing the Receiver on behalf of RRDI, *nunc pro tunc*, to consent to judgment in the Litigation as against RRDI for the obligations under the Credit Agreement;
- c) approving a water supply agreement dated March 18, 2011 between 1515511 Ontario Inc. ("**The Rock**") and RRDI, by its Receiver, and the execution and

² EAA is the assignee of and successor to certain interests of WestLB.

delivery thereof by the Receiver on behalf of RRDI in the form attached as **Appendix “C”** to this Report; and

- d) approving this Report and the activities of the Receiver described herein.

4.0 Release

- 4.1 As disclosed in the affidavit of Robert Dyck sworn May 19, 2009 filed on the initial application for the appointment of the Receiver, the loan to RRDI under the Credit Agreement was guaranteed pursuant to certain guarantees (the “**Guarantees**”) by various entities related to RRDI, including Ken Fowler Enterprises Limited (“**KFE**”), Ken Fowler (N.Y.), Ltd., Ken Fowler, (Columbus), Ltd., Ken Fowler (Texas), Ltd., Peter Fowler Enterprises Ltd., and Red Leaves Resort Partnership (“**RLRP**”) (collectively, the “**Guarantors**”).
- 4.2 Pursuant to a complaint in the Supreme Court of the State of New York on September 10, 2009, certain of the Guarantors commenced proceedings against, among others, WestLB and CIT seeking a release from the Guarantees.
- 4.3 Pursuant to a complaint filed in the Supreme Court of the State of New York on November 3, 2010, WestLB commenced proceedings against KFE to collect the amounts guaranteed by KFE under the Guarantees, against RLRP in respect of a non-recourse pledge guarantee whereby RLRP pledged to WestLB the sole common share issued by RRDI, and against RRDI in respect of its obligations under the Credit Agreement (the complaints, collectively, the “**Litigation**”).
- 4.4 WestLB has advised the Receiver that in the context of the Potential Transaction with the Potential Purchaser, as described in the Receiver’s Fifteenth Report dated March 3, 2011, WestLB has entered into a confidential agreement on its behalf and on behalf of the Lenders with the Guarantors to settle the obligations outstanding under the Guarantees and the matters raised in the Litigation.

- 4.5 As part of the settlement, the resolution of the Litigation contemplates a consent judgment against RRDI for the obligations under the Credit Agreement, which the Receiver does not dispute, and which has been executed and delivered in escrow in connection with the Potential Transaction.
- 4.6 In addition, as part of the settlement, the Guarantors, including RLRP, which is the sole shareholder of RRDI, and 2258454 Ontario Inc., which is the successor to Fortress Credit Corp., have consented to the delivery by the Receiver on behalf of RRDI of a full and final release of all claims or potential claims by RRDI against WestLB, EAA, and all Secured Parties under or pursuant to the Credit Agreement or the Loan Documents or otherwise, in a form satisfactory to WestLB. The Receiver understands that the written consent of the Guarantors to the delivery of this release has been delivered in escrow, in connection with the Potential Transaction.
- 4.7 The parties have requested that the Receiver seek authorization and direction of the Court to deliver such a release on behalf of RRDI on an urgent basis, in order to facilitate the settlement of the Guarantees and the Litigation in the next few days.
- 4.8 As noted in the Receiver's Fifteenth Report dated March 3, 2011, at paragraph 5.1, WestLB is the only party with any significant interest in the Assets of RRDI. The Receiver is of the view that it is of benefit to the estate to assist the parties in concluding the issues raised under the Guarantees and the Litigation, and that it is appropriate to deliver the requested Release, in the form attached hereto as **Appendix "B"**, and therefore seeks the Court's authorization and direction in this regard.

5.0 Water Supply Agreement

- 5.1 The Twelfth Report of the Receiver dated November 5, 2010 advised the Court that the Receiver was in negotiations with The Rock golf course to enter into arrangements for the sharing of the supply of water from Lake Rosseau, which would permit the parties to consent to the issuance by the MOE of a new water taking permit in the name of RRDI. The current water permit expired in August 2009. The MOE had refrained from issuing the new permit pending the parties' finalization of their agreement. In the meantime, water has continued to be drawn under the original permit, notwithstanding its expiry.
- 5.2 In the context of negotiating the Potential Transaction, the parties have finalized the Water Supply Agreement, which has been executed and delivered by the Receiver on behalf of RRDI, subject to Court approval. The Water Supply Agreement outlines the basis on which RRDI agrees to supply water to The Rock, and the terms on which The Rock will compensate RRDI for such supply. Payments required to be made to date under the Water Supply Agreement have been paid by The Rock. The agreement also settles the ownership of the water supply infrastructure, by way of quitclaim by The Rock in favour of RRDI. A copy of the Water Supply Agreement is attached hereto as **Appendix "C"**.
- 5.3 The Receiver has negotiated the Water Supply Agreement on behalf of RRDI and is satisfied with its terms. On approval by the Court of the agreement, the parties will advise the MOE that they consent to the issuance of the water permit without further delay.

- 5.4 The Receiver therefore requests that the Court approve the Water Supply Agreement, which will resolve the outstanding issues between RRDI and The Rock with respect to the issuance of a water permit.

6.0 Conclusions and Recommendations

6.1 Based on the foregoing, the Receiver seeks an order:

- a) authorizing and directing the Receiver on behalf of RRDI to deliver a full and final release of any and all claims that RRDI may have or could have against WestLB AG, EAA, and all Secured Parties under the Credit Agreement and the Loan Documents, or otherwise, in a form satisfactory to WestLB AG;
- b) authorizing and directing the Receiver on behalf of RRDI to consent to judgment against RRDI for the obligations under the Credit Agreement;
- c) approving the Water Supply Agreement and the execution and delivery thereof by the Receiver on behalf of RRDI in the form attached as **Appendix “C”** to this Report; and
- d) approving this Report and the activities of the Receiver described herein.

* * *

All of which is respectfully submitted, this 11 th day of April, 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:



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