

**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**

**SUPPLEMENTARY REPORT TO THE SIXTH 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 25, 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* (“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* (“CJA”) and pursuant to the CLA of the Assets of RRDI (the Interim Receiver and the Receiver and Manager are hereinafter collectively defined as the “Receiver”).<sup>1</sup>

1.2. On July 8, 2009, this Honourable Court issued the Sales and Marketing Order, which, among other things, authorized the Receiver to undertake the Sales and Marketing Process, including the sale and marketing of the 84 unsold condominium units (the “Unsold Units”) at the Hotel, not currently subject to agreements of purchase and sale (the “Retail Sales Program”).

1.3. On July 24, 2009, the Receiver sought and obtained this Honourable Court’s authorization to proceed with the Retail Marketing Program in connection with the Retail Sales

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

Program, and to permit Baker Real Estate to utilize the Baker Price List in connection with the sale of the Unsold Units.

1.4. The Fourth Report dated August 12, 2009 described the form, terms and content of certain Settlement Agreements between the Receiver and Unit Owners and Existing Unit Purchasers. The Receiver sought and obtained approval of the Court in respect of the Settlement Agreements.

1.5. On Saturday, August 22, 2009, Baker Real Estate conducted the "Court Approved Sale" in respect of the Retail Sales Program at the Hotel. Strong interest and demand from potential purchasers required that the Court Approved Sale be continued to Sunday, August 23, 2009 as well.

1.6. On Monday, August 24, 2009, RRMSI provided to the Service List a copy of an unsworn affidavit of Ken Fowler stated to be sworn August 24, 2009 (the "Fowler Affidavit") to be filed in support of the Variation Motion and in opposition to the RRMSI Receivership Motion. A sworn version of the Fowler Affidavit was served on August 25, 2009.

1.7. The purpose of this supplementary report (the “Supplementary Report to the Sixth Report”) is to:

- advise this Honourable Court on the results of the Court Approved Sale;
- advise this Honourable Court on the outcome in respect of the number of Unit Owners and Existing Unit Purchasers that executed the Settlement Agreements with the Receiver; and
- respond to the Fowler Affidavit.

## ***2.0 Court Approved Sale***

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2.1. On August 22, 2009 and August 23, 2009, Baker Real Estate conducted the Court Approved Sale of the Unsold Units at the Hotel pursuant to the Court approved Retail Sales Program and Retail Marketing Program. Baker Real Estate has advised the Receiver that during the Court Approved Sale, it conducted over 400 scheduled appointments.

2.2. The Baker Price List, which was attached as Confidential Appendix "C" to the Third Report had listed 84 units that were available for sale. Unsold Units were offered for sale at or above the Baker Price List. Subsequent to the Third Report and leading up to the Court Approved Sale, the Receiver became aware of two situations whereby two additional Existing Unit Purchasers (which, collectively had agreements to purchase three Units) had each independently agreed to enter into certain standstill agreements with RRDI prior to the commencement of the receivership proceedings (the "Standstill Agreements"). In general terms, these Standstill Agreements obligated RRDI to attempt to sell each of the respective Units at minimum prices agreed upon between RRDI and the respective Existing Unit Purchaser. The Standstill Agreements stipulated that if sale transactions were completed at a value less than the initial purchase price of the Unit under consideration, the respective Existing Unit Purchasers would forfeit a substantial portion of the deposit being held in trust by RRDI in respect of that respective Unit. Given the nature and terms of these existing Standstill Agreements, the Receiver believed it would be in the best interests of all stakeholders to honour the Standstill Agreements and accordingly, the total number of Units available for sale at the Court Approved Sale was 87.

2.3. Of the 87 Units that were available for sale, the Receiver entered into Agreements of Purchase and Sale ("APS's") on August 22 and 23, 2009 with 76 new purchasers (the "New

Purchasers”). In addition, on August 23, 2009, the Receiver entered into APS’s with an additional 13 new purchasers (the “Backup New Purchasers”) who agreed to enter into “Backup” APS’s in respect of certain Units. These “Backup” APS’s contained a condition which provided that if the existing APS for the applicable Unit was rescinded within the statutory 10 day rescission period (the “Cooling Off Period”), the Receiver would then proceed with the Backup New Purchaser’s APS for such Unit.

2.4. It should be noted that two of the three Units subject to a Standstill Agreement were sold during the Court Approved Sale for proceeds in excess of the price agreed to between the respective Existing Unit Purchaser and the Receiver. The other such Unit was sold at the price agreed upon between the respective Existing Unit Purchaser and the Receiver. In each case, the selling price was determined by Baker Real Estate, after consultation with the Receiver.

2.5. As all APS’s are subject to the Cooling Off Period, the Receiver will provide this Honourable Court with an update in respect of the final outcome of the Court Approved Sale in a subsequent report.



### ***3.0 Update on Settlement Agreements***

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3.1. As described in the Fourth Report, the Receiver negotiated the terms of Settlement Agreements with the Committee of Unit Owners. A key element included in the Settlement Agreements was a form of New RPMA to be entered into between RRDI, acting as the Rental Pool Manager, and each Unit Owner and Existing Unit Purchaser. As described in the Fifth Report, the Committee unanimously recommended to Unit Owners and Existing Unit Purchasers that they accept the terms of these Settlement Agreements, including the New RPMA. In summary, 61 Unit Owners out of a total of 73 have executed Settlement Agreements with the Receiver. Of the 61 Unit Owners who have executed Settlement Agreements with the Receiver 52, out of a total of 59, are Unit Owners who have an executed Current RPMA with RRMSI. The aggregate gross purchase price paid by these 59 Unit Owners in respect of the Units which they purchased was approximately \$26 million.

#### ***4.0 Response to the Fowler Affidavit***

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##### **No Payments of Operating Profit**

4.1. The Receiver has been advised by Marriott Hotels that since the commencement of Hotel operations on December 22, 2008, Marriott Hotels has made no distributions of Operating Profit (as referenced in paragraph 24 of the Fowler Affidavit) or any other funds to either RRDI or RRMSI as owners under the Current HMA. As well, no Distributions (as defined in the July 8, 2009 Order of the Honourable Mr. Justice Cumming) have been paid to the Receiver by Marriott Hotels.

##### **Previous Rental Pool Distributions to Unit Owners**

4.2. Notwithstanding the lack of any Distributions of Operating Profit and the position of RRMSI (as set out in the Fowler Affidavit) that it has no obligation to make payments to Unit Owners unless the Operating Account is funded, certain Unit Owners' have advised the Receiver that, based on the original disclosure statements, Unit Owners' understood that they would receive distributions pursuant to the terms of the Current RPMA and that the obligation of RRMSI to make such payments continued even if there were no funds available in the Operating Account (as defined in the Current RPMA).

4.3. Contrary to the statements in the Fowler Affidavit, the Receiver has been advised by certain Unit Owners, that, in circumstances where there were no funds paid by Marriott Hotels to the Operating Account, during the period in which Unit Owners had interim occupancy of their Units, but before closing of the sale of the Units, multiple payments were made to the Unit Owners by RRMSI. Attached as Appendix "B" are copies of the statements from RRMSI issued

to one such Unit Owner, Mr. Joe Zinner, who received a series of payments from RRMSI during the relevant time periods.

### **Purported Verbal Agreement**

4.4. In the Fowler Affidavit, Mr. Fowler states at paragraph 26 that there was a “verbal agreement” between RRMSI and RRDI that all amounts required to be funded by RRMSI or RRDI as joint and several ‘owners’ under the Current HMA were to be funded by RRDI. As well, at paragraph 30, Mr. Fowler states that “RRMSI is not a guarantor of any of RRDI’s debts”. These statements are at odds with paragraphs 14 and 15 of the Fowler Affidavit where Mr. Fowler states that RRMSI has guaranteed to pay any deficiency suffered as a result of certain costs associated with the rentals of the Hotel Units (the “Guarantee”).

4.5. As well, on August 25, 2009, the Receiver was advised by Marriott Hotels, that contrary to the Receiver’s earlier understanding that RRMSI had not funded any of the operating losses of the Hotel, on January 12, 2009 RRMSI made a payment of \$435,000 to Marriott Hotels to satisfy a funding request sent by Marriott Hotels in respect of Hotel operating losses. A copy of the cheque from RRMSI to Marriott Hotels is attached hereto as Appendix “C”.

4.6. The “verbal agreement” is also inconsistent with the disclosure statement dated August 1, 2006 (the “2006 Disclosure”), provided to the Unit Owners upon the purchase of their Units, a copy of which is attached as Appendix “D”, in that:

- although the 2006 Disclosure provided to Unit Owners explicitly referenced the Guarantee of RRMSI, no disclosure was made regarding the verbal agreement between RRMSI and RRDI; and

- section 7.10(j) of the 2006 Disclosure provides that “the ability of the Rental Pool Manager to fulfill its obligations to fund the ongoing operations of the Rental Pool may depend on its ability to arrange other sources of financing”.

4.7. As well, rather than explaining in the 2006 Disclosure that the appointment of RRMSI as Rental Pool Manager was exclusive (as is alleged by the “verbal agreement”), the term ‘Rental Pool Manager’ was defined in the 2006 Disclosure as “...the rental pool manager appointed to manage the Rental Pool under the Rental Pool Management Agreements. The initial Rental Pool Manager will be The Rousseau Resort Management Services Inc.” (emphasis added). Clearly, it was contemplated by the 2006 Disclosure that a party other than RRMSI may act as rental pool manager.

#### **Integrity of RRMSI as a Special Purpose Vehicle**

4.8. Contrary to the Fowler Affidavit and the intention to maintain RRMSI as a special purpose vehicle to serve as rental pool manager with limited obligations and assets to ensure the integrity of the ‘trust arrangements’, the Receiver believes the operational structure between RRDI and RRMSI is inextricably linked.

4.9. The Receiver notes that it has identified inter-company transfers of funds between RRDI and RRMSI during the period between January and April 2009, from a review of RRDI’s books and records.

4.10. As well, the Receiver has been advised by certain Unit Owners that payments in respect of their interim occupancy of the Units were made payable to RRMSI.

## ***5.0 Conclusions and Recommendation***

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5.1. The Receiver respectfully requests that this Honourable Court dismiss the Variation Motion and grant the relief requested by the Receiver and Representative Counsel in the RRMSI Receivership Motion.

All of which is respectfully submitted, this 25<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

**ONTARIO**

**SUPERIOR COURT OF JUSTICE  
PROCEEDING COMMENCED AT  
TORONTO**

**SUPPLEMENTARY REPORT TO  
THE SIXTH REPORT OF  
ALVARZ & MARSAL CANADA  
ULC**

**(August 25, 2009)**

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