

**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

**TWENTY-FIRST 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.**

JULY 11, 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**”). On June 2, 2009, the Court issued an Amended and Restated Appointment Order (as has been amended from time to time, 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 twenty reports with this Court. All background materials in respect of these proceedings, including, among other things, the

¹ Capitalized terms in this Twenty-First Report shall have the meanings ascribed to them in the body of this report and in the Glossary of Defined Terms attached as **Appendix “A”**.

Receiver's past reports to Court and orders of the Court, can be found on the Receiver's website at www.alvarezandmarsal.com/rosseau.²

1.3 The purpose of this Twenty-First Report (the "**Twenty-First Report**" or "**Report**") is to update the Court on the status of various matters in the receivership to date and to request that this Court grant orders substantially in the form of the draft orders filed:

- (a) approving the sale of substantially all of the Assets of RRDI (the "**Purchased Assets**") to Canadian Niagara Hotels Inc. ("**Canadian Niagara**" or the "**Purchaser**") substantially on the terms of an agreement of purchase and sale dated as of June 30, 2011 and executed by the Receiver on July 4, 2011 (the "**Purchase Agreement**"), conditional on Court approval, and vesting the Purchased Assets in and to Canadian Niagara (or an affiliate) free and clear of all claims and encumbrances other than Permitted Liens (as defined in the Purchase Agreement);
- (b) declaring that Unit Owners who have leases (the "**Leases**") with RRDI pursuant to settlement agreements (the "**Settlement Agreements**") between such Unit Owners and the Receiver on behalf of RRDI (the "**Sale/Leaseback Unit Owners**") are entitled to terminate their Leases on 30 days notice in accordance with their terms and, in any event,

² Copies of the Receiver's Reports and Orders referred to in this Report are filed with this motion in a Compendium of Receiver's Reports and a Compendium of Orders respectively.

their rights of usage under their RPMAs (as defined below) continue unamended by such Leases;

- (c) sealing Confidential Appendices “I”, “II”, and “III” of this Report pending further Order of the Court;
- (d) approving this Twenty-First Report and the activities of the Receiver set out herein;
- (e) setting a timetable for the hearing of a motion for approval of fees of the Receiver, its legal counsel, and its independent legal counsel; and
- (f) providing other relief related and ancillary to the foregoing.

2.0 *Terms of Reference*

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

3.0 Background to the Sale of Assets of RRDI

- 3.1 The Assets of RRDI comprise part of a condominium resort, including a hotel known as The Rosseau, a J.W. Marriott Resort & Spa, located on Lake Rosseau, in Muskoka, Ontario (the “**Hotel**”) and certain adjoining lands. RRDI is the developer of the Hotel.
- 3.2 The Hotel was intended to form part of a larger planned resort and community development called “Red Leaves” that was projected for completion in 2030, and was intended to consist of approximately 2,900 residential units when finished (the “**Red Leaves Development**”).
- 3.3 There are 221 condominium units in the Hotel (the “**Units**”). Eighty-nine Units are currently owned by individual Unit Owners. The remaining 132 Units are owned by RRDI. RRDI also owns a unit designated as a hotel management unit, which houses the front desk and management office of the Hotel.
- 3.4 The Units and associated common elements were established pursuant to Muskoka Standard Condominium Plan No. 62 (the “**Condominium Plan**”). Upon registration of the declaration pursuant to the *Condominium Act*, Muskoka Standard Condominium Corporation No. 62 (the “**Condominium Corporation**”) was created.
- 3.5 The Units are used as accommodation suites for Hotel guests when they are not in use by Unit Owners. Usage by Unit Owners is limited by, among other things, a rental pool management agreement (“**RPMA**”) between RRDI and

each Unit Owner negotiated subsequent to the receivership by the Unit Owners and the Receiver on behalf of RRDI, that replaced original rental pool management agreements that were with an affiliate of RRDI, The Rosseau Resort Management Services Inc. (“**RRMSI**”). The RPMA governs the terms on which the Units are rented to the public for use as a Hotel, and revenue generated by such rental is shared with Unit Owners. Use is also governed by a restrictive covenant registered on title to each Unit.

3.6 In addition to the Units, the Hotel contains commercial elements as well, which form part of the Assets of RRDI but do not form part of the Condominium Plan. These commercial elements include meeting rooms and ballrooms, restaurants, and a spa and pool area (the “**Commercial Space**”). The Assets also include certain undeveloped lands adjacent to the Hotel (the “**Development Lands**”), as well as a lease of property on which the Hotel’s sewage treatment plant is located (the “**STP Lease**”).

3.7 The construction of the Hotel was financed by a syndicate of lenders (the “**Syndicate**”), namely WestLB AG, New York Branch (“**WestLB**”) and CIT Financial Ltd., for which Syndicate WestLB is the administrative agent. The Syndicate provided a first priority senior secured credit facility to RRDI pursuant to a credit agreement dated February 1, 2007, as amended (the “**Credit Agreement**”). The obligations under the Credit Agreement are secured by, among other things, personal property security and mortgages registered on title to the real property forming part of the Assets of RRDI. As

at June 16, 2011, the amount outstanding under the Credit Agreement was approximately U.S. \$84,200,000.

- 3.8 In addition to the credit facilities provided by the Syndicate, Fortress Credit Corp. (“**Fortress**”) provided a \$25.5 million subordinated secured loan to RRDI. The Fortress personal property security and mortgage on the leasehold interest in the STP Lease has been assigned to 2258454 Ontario Inc., a corporation related to Ken Fowler, and the mortgage registered against the freehold property of RRDI in favour of Fortress has been discharged. Attached hereto as Appendix “B” is a copy of a recent search report under the PPSA. The search report continues to show Fortress as the registered secured party; however, notice of the assignment was provided by 2258454 Ontario Inc., and Fortress has confirmed in writing its removal from the service list in this matter.
- 3.9 The Assets are also subject to a collateral mortgage in favour of Travelers Guarantee Company of Canada, which insured deposits made by purchasers, pursuant to a deposit trust agreement.
- 3.10 The Receiver was appointed pursuant to the Appointment Order on the application of WestLB.
- 3.11 As disclosed in the original Application Record for the appointment of the Receiver, at the time of the Receiver’s appointment, RRDI was wholly owned by Red Leaves Resort, a partnership of five corporate partners. The majority partner in the partnership was Ken Fowler Enterprises Limited (“**KFE**”).

- 3.12 Red Leaves Resort assembled a number of adjacent properties on the shores of Lake Rosseau, in Muskoka, Ontario, for the purpose of the planned Red Leaves Development. RRDI is one of a number of corporate entities owning property that was originally intended to form part of the Red Leaves Development, along with 1515511 Ontario Inc., which operates as The Rock Golf Course (“**The Rock**”), Clevelands House Limited, Lakeside Lodge, and Wallace Marine Limited (“**Wallace Marine**”), all of which neighbour the Hotel and are corporately related to RRDI and KFE (the “**Neighbouring Properties**”).
- 3.13 At the time the Receiver was appointed, construction of the Hotel was not yet complete. Over the course of the appointment, primarily during the summer of 2009, the Receiver completed construction of the Hotel and arranged for the remediation and/or repair of numerous, and in some cases, significant and serious construction deficiencies relating principally to construction conducted prior to the appointment of the Receiver.
- 3.14 The Hotel is operated by Marriott Hotels of Canada Ltd. (“**Marriott**”), and has been since the Hotel’s inception. Marriott is currently operating pursuant to a hotel management agreement between RRDI, by the Receiver and Manager, and Marriott executed January 22, 2010 (the “**Hotel Management Agreement**”), together with other related agreements with Marriott (the “**Related Marriott Agreements**”) executed on the same date. These agreements govern the terms on which Marriott is delegated the responsibility

for operating the Hotel.³ The initial term of such agreements is 25 years, with additional rights to extend.

3.15 The receivership has been financed by three tranches of receiver's borrowings advanced by the Syndicate (as to tranche 1) and WestLB (as to tranches 2 and 3) which have been approved by the Court (the "**Receiver's Borrowings**"), and which are secured by the Receiver's Borrowings Charge established by the Appointment Order. A large proportion of the Receiver's Borrowings have been expended in completing the construction of the Hotel, paying for professional fees, and financing the Hotel's operations as a going concern under the Hotel Management Agreement. The Hotel has operated at a loss since its opening in December, 2008.

3.16 The Receiver has conducted a sales process (the "**Sales Process**") for the sale of the Assets of RRDI, pursuant to its sales process protocol (the "**Sales Process Protocol**"), which was approved by Order of the Court on May 6, 2011 (the "**May 6 Order**"). As a result of the Sales Process, the Receiver has

³ The current Hotel Management Agreement and Related Marriott Agreements were executed upon the repudiation by the Receiver of a prior hotel management agreement and other agreements between RRDI and Marriott. The repudiation of the former agreements and the execution by the Receiver of the current Hotel Management Agreement and Related Marriott Agreements was authorized by amended Order of Justice Pepall dated August 18, 2009 (the "August 18 Order"). The grounds for entering into new agreements with Marriott were set out in detail in the Receiver's Second Report dated July 3, 2009 (the "Second Report"), and the Receiver's Fourth Report dated August 12, 2009 (the "Fourth Report").

entered into a Purchase Agreement with Canadian Niagara, subject to, among other things, WestLB⁴ approval and Court approval.

3.17 The Eighteenth Report of the Receiver, which was filed in support of the Receiver's motion for approval of its Sales Process, outlined the background to the establishment and commencement of the Sales Process. In summary:

- (a) the Receiver received authorization by Order dated July 24, 2009 (the "**July 24 Order**"), to conduct a retail sale of Units. This retail sale was undertaken by way of a "One Day Sale" that was conducted over the weekend of August 22 and 23, 2009. Fifteen transactions for the sale of Units pursuant to the One Day Sale were ultimately completed by the Receiver.
- (b) By its Order dated December 21, 2009 (the "**December 21 Order**") the Court approved an Institutional Sales Process Protocol for the sale of the remaining Assets of RRDI.
- (c) While conducting its Institutional Sales Process pursuant to the Institutional Sales Process Protocol, the Receiver was confronted with certain serious issues, including the receipt of 64 Notices of Dispute issued by certain Unit Owners with respect to the interpretation of the RPMA (the "**RPMA Dispute**"), as well as unresolved disputes with certain Neighbouring Properties. These issues led the Receiver to seek

⁴ WestLB's consent is contingent upon obtaining approval of the Syndicate and Erste Abwicklungsanstalt, ("EAA") which is a German entity that, as noted in the Seventeenth Report of the Receiver dated April 11, 2011 (the "Seventeenth Report"), is the assignee of certain beneficial rights of WestLB.

and obtain the authorization of the Court on May 19, 2010 (the “**May 19 Order**”) to suspend the Institutional Sales Process. The Institutional Sales Process was formally terminated by Order dated March 9, 2011 (the “**March 9 Order**”).

- (d) Pursuant to the May 19 Order, the Court also authorized the Receiver, on the Receiver’s recommendation, to conduct discussions with the Ad Hoc Committee of Unit Owners representing the 89 individual Unit Owners (the “**Ad Hoc Committee**”) and the Independent Directors of the Condominium Corporation (the “**Independent Directors**”)⁵ with respect to the potential acquisition of the Commercial Space by the Condominium Corporation. As disclosed in the Receiver’s Twelfth Report dated November 5, 2010 (the “**Twelfth Report**”), confidential negotiations with respect to such a transaction were undertaken that considered the basic terms of a transaction, the form of agreement, the financing options available and the request by the Ad Hoc Committee that the Receiver fund 60% of the legal fees incurred by the Condominium Corporation in pursuing such a transaction, as RRDI is owner of approximately 60% of the Units. Ultimately, these negotiations were discontinued as the Syndicate determined that it no longer supported such a transaction, upon considering the complications of financing the Condominium Corporation and the

⁵The Resort Corporation Board of Directors consists of five members, three of whom are appointees of RRDI, and two of whom (the “Independent Directors”) are individual Unit Owners who have been appointed pursuant to section 42(11) of the Condominium Act.

costs of continuing to hold Units until a retail sale could be completed. As noted below, although such negotiations were discontinued, members of the Ad Hoc Committee and the Independent Directors were invited to participate in the Sales Process described in this Report.

- (e) The Receiver was advised by WestLB in late December 2010 that it had been approached by a third party related to Maureen Fowler, spouse of Ken Fowler, in respect of a potential purchase (the “**Prior Purchaser**”). WestLB favoured pursuit of such potential transaction, which would be negotiated in connection with a global resolution of issues and costly litigation with the guarantors of RRDI. By the March 9 Order, the Receiver was authorized to conduct negotiations with the Prior Purchaser with a view to selling the Assets of RRDI to such Prior Purchaser. A summary of the key terms of the transaction with the Prior Purchaser was filed with the Court as a confidential appendix on the hearing of the motion for the March 9 Order. Filed with this Report as **Confidential Appendix “I”** is a copy of the summary of key terms.
- (f) An asset purchase agreement was ultimately entered into with the Prior Purchaser, subject to Court approval; however, prior to seeking Court approval, the financing condition of the agreement could not be satisfied by the Prior Purchaser, and the agreement was terminated in accordance with its terms on April 26, 2011.

3.18 Since the transaction with the Prior Purchaser terminated, the Receiver immediately commenced steps to establish a new process for the marketing and sale of the Assets. The Receiver sought and in accordance with the May 6 Order, obtained Court approval of its Sales Process. No party opposed the terms of the May 6 Order or sought to obtain any variations thereto.

3.19 The proposed sale of the Assets of RRDI is the culmination of a successful Sales Process, after a two-year receivership proceeding during which the Receiver encountered numerous property-related issues that it was necessary for the Receiver to resolve, including, among other things:

- (a) the completion of the construction of the Hotel;
- (b) the negotiation and completion of the new Hotel Management Agreement with Marriott;
- (c) the negotiation and completion of Settlement Agreements with Unit Owners and the new RPMA (as more particularly discussed below);
- (d) the administration of the Construction Lien Claims Process and the resolution of over 25 construction lien claims⁶;
- (e) the remediation of the Hotel's sewage treatment plant in consultation with the Ministry of the Environment and the remediation of the Hotel's water treatment plant;

⁶ Two construction lien claims remain outstanding. One is the subject of a claim issued by the Receiver on behalf of RRDI for deficiencies in the work that is the subject of the construction lien claim. Details of this claim are set out in the Receiver's Twelfth Report dated November 5, 2011. The other is the subject matter of funds that were paid into Court prior to the receivership.

- (f) the remediation of other construction deficiencies, most significantly those in respect of the Hotel's balcony railings, and leaking windows;
- (g) the resolution of issues with certain Neighbouring Properties including with respect to the STP Lease with Wallace Marine, which owns the land subject to the STP Lease, and the supply of water from Lake Rosseau to the Hotel and The Rock;
- (h) the RPMA Dispute;
- (i) a dispute with the Independent Directors over the liability of RRDI for condominium fees; and
- (j) a motion to appoint A&M as receiver of RRMSI, which had been the rental pool manager appointed under the prior rental pool management agreements.

3.20 The resolution of these issues, among others, as more fully discussed in previous reports and some of which are further discussed below, has permitted the Receiver to complete a successful Sales Process and bring this motion for approval of the sale of the Hotel to a prominent and successful hotel owner and operator.⁷

⁷ Details of the issues encountered by the Receiver are contained in the Reports filed from time to time by the Receiver, which are contained in the compendium of Receiver's Reports filed with this motion.

4.0 Executive Summary: Proposed Transaction and Impact on Stakeholders

4.1 The Receiver recommends that the Court approve the sale to Canadian Niagara as the Canadian Niagara offer is by far the superior offer for the Assets. As demonstrated in more detail below,

- (a) the Receiver conducted its Sales Process fairly and in accordance with the Sales Process Protocol that was approved by the Court. Any party interested in the Assets had the opportunity to participate in that Sales Process;
- (b) the sale to Canadian Niagara is unconditional (other than Court approval, WestLB approval and standard closing conditions) and represents the highest price offered of all unconditional offers submitted; and
- (c) Canadian Niagara is a well known, experienced and respected hotel owner and operator with the intention and wherewithal to operate the Hotel with a view to creating long-term viability.

4.2 As there will be a significant loss on the Receiver's Borrowings, the only stakeholder with an economic interest in the proceeds of sale is the Syndicate.

4.3 The Receiver has also considered the impact of the sale on Unit Owners and Marriott, who are also stakeholders in the Hotel. The Ad Hoc Committee has advised the Receiver that Unit Owners prefer a sale that will involve a termination of Marriott as operator of the Hotel, and by email to the Receiver

dated July 9, 2011, has advised the Receiver that they intend to oppose a sale to a purchaser who assumes Marriott. Attached hereto as **Appendix “C”** is a copy of the email to the Receiver.

- 4.4 Canadian Niagara will be assuming the Hotel Management Agreement and Related Marriott Agreements on the closing of its transaction with RRDI. Furthermore, subsequent to closing, Canadian Niagara and Marriott have advised the Receiver that they plan to pursue a new franchise arrangement which would replace the existing Hotel Management Agreement and Related Marriott Agreements. In such case, Canadian Niagara intends to replace Marriott with a Qualified Operator, all in accordance with the RPMAs.
- 4.5 In any event, as discussed in more detail below, the appointment of Marriott as operator was disclosed to all Unit Owners in the disclosure statement that was provided to them on their purchase of their Units.
- 4.6 The Unit Owners’ rights and obligations in respect of the operations of the Hotel are governed by the RPMA that was negotiated by the Unit Owners and the Receiver subsequent to the receivership.
- 4.7 The RPMA grants RRDI, as Rental Pool Manager thereunder, the exclusive authority to appoint the operator of the Hotel provided the operator is a “Qualified Operator” as defined in the RPMA. Marriott is considered to be a Qualified Operator under the RPMA.
- 4.8 In addition, the Receiver obtained approval of the Court to enter into a new Hotel Management Agreement and Related Marriott Agreements with

Marriott subsequent to the receivership, which was not opposed by Unit Owners.

- 4.9 Canadian Niagara has, among other things, agreed to assume the RPMAs with Unit Owners subject to the RPMA Dispute. A proposed resolution of such dispute, which would involve an amendment to the RPMA, was agreed to by the Receiver conditional on a purchaser accepting the terms of that resolution (pursuant to the Fresh Start/RPMA Agreement, as discussed further below). To the extent that Canadian Niagara does not consent to such resolution, Unit Owners' rights under the RPMA to have that dispute resolved by arbitration have not been compromised.
- 4.10 The benefits to Marriott of the sale are clear. Canadian Niagara is a well-known and respected hotel owner and operator with a strong existing relationship with Marriott. Marriott has consented to the assignment of its Hotel Management Agreement and Related Marriott Agreements to Canadian Niagara.
- 4.11 The Receiver commenced its Sales Process in a position to sell the Purchased Assets to a purchaser free of the burdens of the Outstanding Neighbouring Property Issues (as defined below), which have been resolved pursuant to various agreements and undertakings outlined in more detail below.
- 4.12 There is currently no other viable alternative to a sale of the Assets, as the Receiver does not have the financing to continue to operate the Hotel in the longer term. The operations of the Hotel on their own do not generate sufficient revenue during the fall and winter seasons to support the Hotel's

operating expenses. To the extent that a transaction cannot be completed before existing funds are exhausted, or additional financing may be secured, the availability of which is extremely uncertain, the Receiver will have no choice but to take steps to shut down the operations of the Hotel. This would have a devastating impact on all stakeholders.

- 4.13 The Receiver therefore recommends that the Court approve the sale to Canadian Niagara. Considering all of the variables in respect of each of the offers received, including the amount of estimated net realization on the Purchased Assets, the minimization of closing risk, and the stability and wherewithal of a long-term operator as purchaser, the acquisition by Canadian Niagara represents by far the best option for all stakeholders in the circumstances.

5.0 Sale Approval – the Sales Process

Steps Taken Pursuant to the Sales Process Protocol

- 5.1 As stated in the Eighteenth Report, which was filed in support of the Receiver's motion for approval of its proposed Sales Process, it was necessary for the Sales Process to proceed on an expeditious basis, to ensure that a sale of the Assets could be completed in a timely manner, given the Receiver's limited remaining Receiver's Borrowings and the fact that the operations of the Hotel will require funding at the conclusion of the busy summer Hotel season.
- 5.2 In its Eighteenth Report, the Receiver proposed a Sales Process Protocol for the conduct of its Sales Process, for which it obtained Court approval. The Receiver also received approval to engage CB Richard Ellis ("CBRE") as broker to assist with the conduct of the Sales Process.
- 5.3 The Sales Process Protocol provided for the following timelines:
- (a) potential purchasers were to be contacted from and after approval of the Sales Process on May 6, 2011;
 - (b) qualified bidders were to be identified and given access to the data site prepared and maintained by CBRE for due diligence purposes during the week of May 9-13, 2011;
 - (c) site visits to the Hotel were to be arranged with CBRE and the Receiver during May 16-18 and 24-26, 2011;
 - (d) buyer information sessions were to be conducted on June 1-2, 2011;

- (e) completion of due diligence and submission of binding offers was to be completed by 5:00 pm on June 21, 2011;
- (f) a shortlist of interested parties for further negotiations was to be identified by June 24, 2011;
- (g) a purchaser was to be confirmed by the Receiver on or about June 30, 2011; and
- (h) Court approval of the sale to a purchaser was to be sought on or about July 14, 2011.

Attached as **Appendix “D”** to this Report is a copy of the Sales Process Protocol.

- 5.4 In order to facilitate the Sales Process, the Receiver and CBRE prepared an Investment Overview for potential purchasers, as well as the form of Confidentiality Agreement to be executed by all potential purchasers who sought to participate in the Sales Process. Copies of the form of Investment Overview and the form of Confidentiality Agreement were filed with the Receiver’s Eighteenth Report.
- 5.5 The Receiver also prepared a template form of Asset Purchase Agreement (the “**Template APA**”) to be provided to all potential purchasers as the basis for any offer submitted to the Receiver.
- 5.6 Upon receipt of Court approval of the Sales Process Protocol, the Receiver commenced its Sales Process in accordance with the established timetable.

- 5.7 The Receiver, in consultation with CBRE, developed a list of prospective purchasers to be provided with the Investment Overview and invited to participate in the Sales Process. Such prospective purchasers were identified from those who had previously participated in the terminated Institutional Sales Process conducted by the Receiver in early 2010, as well as from inquiries that had been made independently of the Receiver by various parties. The Receiver and CBRE also developed a list of strategic contacts known to the Receiver and CBRE from experience in the industry, and certain contacts provided by the Syndicate. Members of the Ad Hoc Committee and Mr. Fowler were also invited to participate in the Sales Process by the Receiver.
- 5.8 Upon the Receiver and CBRE developing the list of prospective purchasers, CBRE contacted 1,233 individuals representing 703 separate parties and provided them with a copy of the Investment Overview, Confidentiality Agreement, and Sales Process Protocol. Of those parties, ten executed a Confidentiality Agreement and delivered an Introduction Letter to the Receiver describing the potential bidder and its business and industry expertise, the potential bidder's financial wherewithal or ability to obtain financing to complete a transaction; and whether the potential bidder contemplated any third party equity participation or joint acquisition, or otherwise pre-qualified as a bidder as they were known to have the wherewithal to complete a transaction of this scope by CBRE.

- 5.9 Those parties who executed a Confidentiality Agreement and pre-qualified as a bidder were granted access to the data site maintained by CBRE for the conduct of due diligence.
- 5.10 Ten parties accessed the data site and conducted due diligence in respect of the Assets. The Receiver and CBRE conducted five site visits to the Hotel. Buyer information sessions were conducted on June 7, 2011, in which eight potential purchasers participated. The Receiver and CBRE also fielded numerous due diligence questions posed by interested parties.
- 5.11 During the course of the Sales Process, all interested participants were given the opportunity to meet with and/or to speak to Marriott to discuss the financial operations of the Hotel and the terms of the Hotel Management Agreement. All potential purchasers were provided with the option to assume or not assume the Hotel Management Agreement and Related Marriott Agreements, which option was set out in the Template APA provided to all potential purchasers.
- 5.12 The Receiver also conducted information sessions via conference call with prospective purchasers to provide details in respect of the RPMAs, the RPMA Dispute, and the Fresh Start/RPMA Agreement (discussed below).
- 5.13 Throughout the Sales Process, the Receiver and CBRE kept the Syndicate and the EAA regularly apprised of developments, in accordance with the Sales Process Protocol. The Receiver conducted weekly conference calls with CBRE, the Syndicate, and legal counsel for the EAA, to provide updates on any material events arising from the Sales Process.

The Offers Received

- 5.14 On June 21, 2011, the Receiver received four offers to purchase the Assets each in the form of an executed asset purchase agreement. Each offer was blacklined to the Template APA to show each offeror's proposed changes to the terms and conditions of sale required by the Receiver as set out in the Template APA.
- 5.15 Upon review and consideration of the four offers received, the Receiver identified a shortlist of three purchasers for further negotiation, in accordance with the Sales Process. All four offerors were advised that a shortlist had been identified, and those three on the shortlist were requested to re-submit offers on or before noon on June 27, 2011. These prospective purchasers were requested to clarify certain aspects of their offers and improve the terms in the request to re-submit.
- 5.16 The fourth offeror that had not been included on the shortlist requested an opportunity to re-submit an offer as well, and the Receiver granted this request.
- 5.17 As a result, all four offerors submitted revised offers on June 27, 2011 by the deadline established by the Receiver.
- 5.18 A summary and copies of the original offers and the revised offers were presented by the Receiver and CBRE to the Syndicate and to legal counsel for the EAA, and discussions regarding an analysis of the offers were conducted with the Syndicate and counsel for the EAA.

- 5.19 The Receiver determined after a review of the four re-submitted bids that the best offer received was that of Canadian Niagara. The Receiver recommended to WestLB that the Receiver pursue the negotiation and completion of an asset purchase agreement with Canadian Niagara, subject to Court approval. WestLB consented to the Receiver negotiating a final form of Purchase Agreement, conditional on WestLB approval of the finalized transaction.
- 5.20 Upon receiving confirmation from WestLB, the Receiver pursued discussions with Canadian Niagara to finalize the terms of an agreement of purchase and sale. On July 4, 2011, the Receiver executed the Purchase Agreement, subject to WestLB final consent and the approval of this Court. Subsequently, the Receiver notified the other bidders participating in the second round of the Sales Process that the Receiver had entered into a purchase agreement with another party, and their deposits were then returned.
- 5.21 The Receiver has been advised that the consent of the Syndicate and EAA has been sought by WestLB, and that WestLB has requested that a response be provided during the week of July 11, 2011. This is a formal, internal procedure which has some inherent delays, given the administrative controls and structures regarding WestLB. In order to ensure that timelines in respect of the transaction contemplated by the Purchase Agreement are met, the Receiver has served its motion for approval of the sale to Canadian Niagara pending the approval of WestLB. It is anticipated that a response will be delivered before the hearing of the motion for sale approval.

Analysis of Offers

5.22 The Receiver has undertaken a detailed review and comparative analysis of all offers submitted for the purchase of the Assets of RRDI. The analysis of the competing offers by the Receiver has taken into account an assessment of the following:

- (a) the total purchase price, as well as the net proceeds to be realized after considering adjustments, conditions, and other factors affecting net realization;
- (b) the conditions attached to each offer, including whether any were subject to financing conditions, or third party consents or agreements;
- (c) the overall closing risk;
- (d) the financial wherewithal of the purchaser;
- (e) the amount of the deposit submitted with the offer;
- (f) the time required to complete the transaction;
- (g) the potential for continuing the business of the Hotel for the benefit of stakeholders, including Unit Owners; and
- (h) the issues associated with the assumption or termination of the Hotel Management Agreement and Related Marriott Agreements, including the costs of such termination and the impact on net realizations and on stakeholders.

5.23 A summary and comparison of the Canadian Niagara offer to the other three offers received, both in the first and second round of the Sales Process, is set

out in a schedule prepared by the Receiver and filed together with this Report as **Confidential Appendix “II”** (the “**Bid Analysis**”).

- 5.24 As can be noted from the Bid Analysis, the Canadian Niagara offer is the superior offer received by the Receiver, on the basis of price, lack of conditions, and closing risk. Other offers received either represented a lower net recovery, or are subject to significant conditions that give rise to a substantial closing risk.
- 5.25 Significantly, the Receiver understands that Canadian Niagara is purchasing the Hotel with its own financial resources, and will not require third party financing.

The Purchase Agreement

- 5.26 The Purchase Agreement that has been executed by the Receiver and Canadian Niagara is substantially similar to the Template APA provided by the Receiver to all potential purchasers. Very few substantive changes were made to the Template APA by Canadian Niagara. A copy of the Purchase Agreement, which has been redacted only to delete the purchase price and amount of the deposit, is attached hereto as **Appendix “E”**. An unredacted copy of those pages of the Purchase Agreement is filed with this Report as **Confidential Appendix “III”**.
- 5.27 The Purchase Agreement contemplates the sale of substantially all of the Assets of RRDI to Canadian Niagara, other than certain Excluded Assets and Excluded Contracts, as defined in the Purchase Agreement. The most significant Excluded Assets are (a) the litigation with Ross Windows, which

has been described in previous reports, and which has not been resolved, and
(b) any property tax refunds that may become due for the period prior to the sale, as a result of a tax appeal that is currently ongoing.

5.28 Under the Purchase Agreement, Canadian Niagara has agreed to assume the Hotel Management Agreement and Related Marriott Agreements. This represents a substantial cost savings to the estate. While the Receiver of RRDI has negotiated certain contractual rights to terminate the Hotel Management Agreement and Related Marriott Agreements (as discussed in greater detail below), those termination rights are subject to certain fees and conditions. Marriott would assert a right to set-off its costs in respect of the termination of its contracts against the funds it is holding on behalf of RRDI, including operating revenue and a reserve for furniture, fixtures, and equipment. Termination costs are estimated by Marriott to be approximately \$2 million.

5.29 In addition, Canadian Niagara has agreed to assume the RPMA's with Unit Owners notwithstanding and subject to the RPMA Dispute, without a requirement that such dispute be resolved before closing. This relieves the estate of the burden and cost of litigating the issues raised by the RPMA Dispute⁸.

⁸ As discussed further below, the Receiver has entered into the Fresh Start/RPMA Agreement, which was concluded in order to provide a purchaser with the option of resolving the RPMA Dispute by way of the RPMA Resolution provided for therein. However, Canadian Niagara is not required to implement the RPMA Resolution.

- 5.30 Canadian Niagara has an option to determine whether it wishes to assume (a) certain propane supply and management agreements with Sparling's Propane Co. Limited; and (b) certain agreements with StaffRes (TF) Inc. relating to the provision of residences to staff employed by the Hotel. Canadian Niagara is required to determine whether these agreements are to be assumed within 4 business days prior to the hearing of this motion.
- 5.31 Canadian Niagara has agreed to pay a substantial amount as a deposit (in excess of the 10% of the purchase price requested by the Receiver), which would be forfeited in the event that the transaction fails to close as a result of the default of Canadian Niagara.
- 5.32 The Purchase Agreement contains certain standard conditions, including, among other things,
- (a) the consent of Marriott to the assumption of the Hotel Management Agreement and other Marriott Agreements by Canadian Niagara. Such consent was requested by written notice to Marriott on July 6, 2011 and consent in writing was delivered by Marriott to the Receiver on July 11, 2011;
 - (b) the consent of WestLB (which as noted above, is pending);
 - (c) the granting of an order approving the sale to Canadian Niagara and vesting the Purchased Assets in Canadian Niagara (the "**Sale Approval Order**"), and such order not being the subject matter of an appeal;

- (d) the execution and delivery of a general conveyance of the Purchased Assets from the Receiver, on behalf of RRDI, to Canadian Niagara, and the execution and delivery of all other documents contemplated by the Purchase Agreement, including any assumption agreements that may be required;
- (e) compliance with the terms and conditions of the Purchase Agreement applicable prior to closing; and
- (f) the payment of the balance of the purchase price.

5.33 The date for closing the transaction (the “**Closing**”) established by the Purchase Agreement is the 31st day following the granting of the Sale Approval Order, as such date may be extended in the event that an appeal has been filed in respect of the Sale Approval Order. The Purchase Agreement has an outside closing date of October 10, 2011.

Canadian Niagara

5.34 The Receiver has been provided by Canadian Niagara with information regarding its financial wherewithal and its business. Canadian Niagara has demonstrated that it is an experienced and respected hotel owner and operator and the most prominent hotel owner on both sides of the border in Niagara Falls. It was the winner of the Gold Award as 2006 Hotelier of the Year. It is landlord to Casino Niagara. It owns and operates eight hotels in the Niagara Falls region, with a total of approximately 2,600 rooms and over 3,100 employees. It currently owns and operates two full service Marriott-branded hotels, and is an approved Marriott owner/operator and developer. Its

properties include Marriott Niagara Falls Fallsview & Spa, Marriott Niagara Falls Gateway on the Falls, The Sheraton on the Falls Hotel & Convention Centre, The Crowne Plaza Niagara Falls – Fallsview, Days Inn at the Falls, Skyline Inn, and Hampton Inn by Hilton, as well as numerous restaurants, coffee shops and other tourist oriented outlets in Niagara Falls, Ontario and Niagara Falls, New York, forming a fully integrated tourism company.

- 5.35 CBRE has advised the Receiver that Canadian Niagara is known to them as a strong hands-on hotel operator with a reputation for service excellence.
- 5.36 The Receiver has been advised by Canadian Niagara that it does not currently intend to sell on a retail basis the Units it is purchasing, and that it plans to pursue a new franchise arrangement with Marriott in respect of the Hotel, with a view to making a profit from its ownership of the Units and the Commercial Space. Canadian Niagara has demonstrated to the Receiver and to Marriott that it has the wherewithal to finance and continue operations at the Hotel notwithstanding short term projected losses of the Hotel, while having the experience and industry relationships to enable it to work towards making the Hotel viable for itself and Unit Owners in the longer term.
- 5.37 As such, Canadian Niagara's interests in achieving profitability of the Hotel are aligned with the interests of Unit Owners in respect of their investment, and with Marriott in achieving a long-term successful hotel operation.

6.0 Stakeholders

- 6.1 The stakeholders with a secured financial interest in the Assets are the following, in order of their respective priorities:
- (a) the Receiver, in respect of its Receiver's Charge, which was established by the Appointment Order;
 - (b) the Syndicate and WestLB, in respect of the Receiver's Borrowings, which have been advanced in three tranches pursuant to three separate term sheets that have been approved by the Court by the Appointment Order, the December 21 Order and an Order dated November 12, 2010. The term sheets approved by the Court pursuant to which the Receiver's Borrowings have been advanced provide the requirement that the Receiver "shall obtain WestLB's prior written consent to any sale, lease or other disposition of assets, properties and undertaking of RRDI". Attached hereto as **Appendix "F"** are copies of the term sheets in respect of each tranche of Receiver's Borrowings;
 - (c) WestLB, in respect of certain construction lien claims that have been determined to have priority over all mortgages registered on title to the real property of RRDI (the "**Priority Construction Lien Claims**") in the amount of approximately \$2.8 million pursuant to an Order dated December 12, 2010. Those Priority Construction Lien Claims have been assigned to WestLB pursuant to settlements between WestLB and the respective lien claimants. In addition, there remain two lien

claims that are unresolved. One, in favour of Parry Sound Glass, operating as Ross Windows, has not be resolved as it is the subject matter of a Statement of Claim that has been issued by the Receiver on behalf of RRDI in respect of deficiencies in the work that is the subject matter of the lien claim. The other outstanding lien claim, by Rock Solid Granite Tops, is the subject matter of funds that were paid into Court prior to the receivership.

- (d) Sale/Leaseback Unit Owners, in respect of certain charges in favour of Unit Owners (the “**Unit Owners’ Charges**”) which were established by amended Order dated August 18, 2009 (the “**August 18 Order**”), and which are limited in the aggregate amount of \$5.3 million. The amount outstanding and which would be owing to Sale/Leaseback Unit Owners for the balance of the terms of the Leases is currently calculated to be in the amount of approximately \$2.19 million;
- (e) Marriott, in respect of its Primary Marriott Charge and its Secondary Marriott Charge, both of which were established by the August 18 Order, to secure obligations of RRDI under the Hotel Management Agreement and Related Marriott Agreements, and which are limited in the aggregate amount of \$5 million;
- (f) the Syndicate, in respect of its construction mortgage the amount of which outstanding as at June 16, 2011 is approximately U.S. \$84,200,000;

- (g) Travelers, in respect of its collateral mortgage over the real property of RRDI; and
- (h) 2258454 Ontario Inc., as assignee by Fortress of its security interest in the Assets.

6.2 In addition to the Syndicate and the other parties with financial interests in the Assets, other stakeholders include the 89 individual Unit Owners, who have made a substantial investment in their Units, and Marriott, which has an interest in the successful continuation of the Hotel as a Marriott-branded operation. These stakeholders are discussed in more detail below.

Unit Owners

- 6.3 Of the 89 current Unit Owners, 74 purchased their Units from RRDI prior to the receivership. An additional 15 Units were sold by the Receiver by way of the One Day Sale by the Receiver that was conducted pursuant to the July 24 Order. Those transactions were closed in February and March, 2010.
- 6.4 The Receiver has served all 89 Unit Owners with notice of this motion, in accordance with an Order for substituted service that the Receiver obtained from the Court on July 5, 2011, permitting it to serve the motion by email on all Unit Owners.
- 6.5 The interests of the Unit Owners have been a matter of major consideration for the Receiver from the outset of the receivership. The following is a brief discussion of the various interests of the Unit Owners.

Incentives and Unit Owner Settlement Agreements

- 6.6 In its Second Report dated July 3, 2009, the Receiver reported that those Unit Owners who had purchased their Units from RRDI prior to the receivership had been promised by RRDI several types of incentives and benefits to entice them to purchase their Units (the “**Incentives**”). These Incentives varied from Unit Owner to Unit Owner, but often included an agreement to pay condominium fees and expenses (“**Common Expenses Subsidies**”), or the issuance of “Indulgence Cards” to be used to purchase services and pay expenses at the Hotel.
- 6.7 One specific form of Incentive was a sale/leaseback program, pursuant to which a purchaser agreed to buy a Unit, and RRDI agreed to lease back the Unit from the purchaser. In general, the Sale/Leaseback Unit Owner would forego or limit his/her use of the Unit and distributions of rental pool revenue for the period of the lease, in return for an annual rent payment and payment of other Incentives by RRDI. Thirty-four of the Unit Owners are Sale/Leaseback Unit Owners.
- 6.8 In its Second Report, the Receiver advised the Court that it had met with the Ad Hoc Committee of Unit Owners to address the issue of the Incentives and the status of Unit Owners vis-à-vis the receivership.
- 6.9 In the meantime, as reported in the Receiver’s Second Report and its Fourth Report, the Receiver had determined that the existing rental pool management agreements with Unit Owners, were not viable for a number of reasons. The

Receiver concluded that it would be necessary to negotiate a new form of rental pool management agreement.

6.10 In its Fourth Report the Receiver reported that the Receiver had reached an agreement in principal with the Ad Hoc Committee in respect of the Incentives, pursuant to which RRDI would agree to honour 50% of Incentives and sale/leaseback transactions for Unit Owners and purchasers who had executed purchase agreements for Units but which had not yet closed their transactions. In connection with such settlement, Unit Owners and purchasers would agree to execute the RPMA, the terms of which were negotiated with the Ad Hoc Committee.

6.11 All but two Unit Owners executed Settlement Agreements with RRDI, pursuant to which RRDI agreed to honour 50% of Incentives, and Unit Owners agreed to execute the RPMA, and a release in favour of RRDI and the Receiver. Attached hereto as **Appendix “G”** is a copy of the form of settlement agreement executed by Unit Owners, together with a copy of the form of release executed by Unit Owners.⁹

6.12 In addition, the 34 Sale/Leaseback Unit Owners executed their Leases providing for the payment of rent in an amount equal to 50% of the amount payable under their previous leases with RRDI. Attached hereto as **Appendix**

⁹ No purchasers with outstanding purchase agreements agreed to the terms of the settlement proposal, although one ultimately closed its transaction and executed an RPMA. Ultimately the Receiver obtained Court authorization by Order dated May 19, 2010 to repudiate outstanding agreements of purchase and sale with purchasers who had not closed their transactions. The Receiver helped facilitate the return of deposits to such purchasers by Travelers.

“H” is a sample copy of the form of the Lease executed by 32 of the 34 Sale/Leaseback Unit Owners.¹⁰

6.13 The Settlement Agreements and the Leases provided that notwithstanding the provisions of the Settlement Agreements and the Leases, no Incentives would be honoured and no rent or other amounts payable under the Leases would be paid by RRDI until such time as the Receiver had realized sufficient proceeds from the Assets of RRDI to honour such obligations.

6.14 In order to secure the obligations of RRDI under the Settlement Agreements and the Leases, the Receiver agreed, on behalf of RRDI, to seek two Court-ordered charges over the Assets of RRDI in favour of Unit Owners to rank *pari passu* with each other, and subordinate to the Receiver’s Charge, the Receiver’s Borrowings Charge, and any Priority Construction Lien Claims.

6.15 In accordance with the Settlement Agreements, the Receiver sought and obtained the Unit Owners’ Charges in the August 18 Order.

Funds held in trust by McCarthys from proceeds of sale to Unit Owners

6.16 The Settlement Agreements also provided that the Receiver would investigate the facts regarding certain funds that had been retained by McCarthy Tetrault LLP¹¹ (“**McCarthys**”) from proceeds arising from the closing of the sale of Units to Unit Owners prior to the receivership. Certain of those funds had

¹⁰ The other two Sale/Leaseback Unit Owners have modified forms of Leases, as they received on closing, as a credit against the purchase price payable for their Unit, the aggregate amount of the rent that would have been payable to them over the entire term of their Lease.

¹¹ McCarthy Tetrault LLP acted as lawyers for RRDI in respect of the establishment of the Condominium Corporation and the sale of Units.

been deducted from sale proceeds collected by RRDI prior to the receivership and retained in trust pursuant to a Joint Undertaking executed by RRDI and McCarthys in favour of WestLB, Travelers, and Fortress as the secured creditors of RRDI. These amounts were deducted on account of certain expenses of RRDI arising from the sale of Units, including real estate commissions payable on the transactions, legal fees payable to McCarthys, and other amounts that RRDI had agreed to pay to or on behalf of Unit Owners as Incentives.

- 6.17 Unit Owners agreed under their Settlement Agreements that to the extent funds were recovered from the McCarthys trust account on their behalf, they would not be entitled to more than 100% satisfaction of their original Incentives with RRDI.
- 6.18 In its Eighth Report to the Court dated December 14, 2009 (the “**Eighth Report**”), the Receiver advised the Court that the Receiver’s independent legal counsel, Fraser Milner Casgrain LLP (“**FMC**”), had conducted a review and analysis of the Joint Undertaking executed by RRDI and McCarthys, and the basis on which the funds had been retained by McCarthys. FMC prepared a memorandum setting out its analysis, which was filed with the Eighth Report.
- 6.19 As a result of various meetings with the Ad Hoc Committee and their legal counsel, the claims to the funds held by McCarthys were settled on the basis that approximately \$927,324 would be recognized as belonging to particular Unit Owners and to be applied to such Unit Owners’ Indulgence Cards,

Common Expenses Subsidies, or realty taxes, as applicable. The balance of \$730,380 would be remitted to RRDI. Of the \$730,380, approximately \$703,935 was comprised of amounts calculated to pay certain common expenses under sale/leaseback transactions on behalf of Sale/Leaseback Unit Owners. These amounts were found by FMC not to be subject to any trust in favour of such Sale/Leaseback Unit Owners.

6.20 The December 21 Order approved the proposed distribution of the funds held by McCarthys. The amounts for Indulgence Cards and Common Expenses Subsidies were paid to the Receiver in trust.

6.21 As a result of the approved distribution, all Incentives promised to Unit Owners by RRDI prior to the receivership have been accounted for and satisfied in full, except for the obligations to Sale/Leaseback Unit Owners under their Leases.

6.22 As such, the only Unit Owners with a remaining interest in the Unit Owners' Charges are the 32 of the 34 Sale/Leaseback Unit Owners who have not received payments under their Leases.

6.23 As noted below, unfortunately there will not be sufficient funds available from the proceeds of sale to provide any recovery to Sale/Leaseback Unit Owners under their Unit Owners' Charges, which is the basis upon which payments would be made under their Leases and the sole source of such payments. Consequently, the Leases are not being assumed by Canadian Niagara.

6.24 On Closing, the Purchaser will take an assignment of the RPMAs, but not the Leases with Sale/Leaseback Unit Owners, as the only source of payment under the Leases was to be proceeds of sale, not an obligation to be passed on to a purchaser. Sale/Leaseback Unit Owners are entitled, under their Leases, to terminate such Leases on 30 days notice in accordance with their terms. The Receiver proposes a declaration that Sale/Leaseback Unit Owners are entitled to terminate their Leases in accordance with their terms. As the Receiver does not intend to enforce the usage provisions of the Leases subsequent to Closing, in the absence of proceeds to make the payment under the Leases, the Receiver further proposes a declaration by the Court that Sale/Leaseback Unit Owners' rights of usage under their respective RPMAs continue after Closing unamended by their Leases.

The RPMA

6.25 The rights and obligations of Unit Owners with respect to the operations of the Hotel and the rental pool are governed by the RPMA. Attached hereto as **Appendix "I"** is a copy of a sample RPMA to which all Unit Owners are subject, without schedules.

6.26 The RPMA, pursuant to which RRDI is appointed Rental Pool Manager, provides that RRDI is solely responsible for the appointment of the operator of the Hotel, and may replace the operator, so long as such replacement is a Qualified Operator, as defined by the RPMA.

6.27 "Qualified Operator" is defined in the RPMA as "the Hotel Operator or another professional hotel operator of comparable managerial capacity and

ability to that of the Hotel Operator...”. “Managerial capacity and ability” is further defined in detail in the RPMA. “Hotel Operator” is defined as Marriott, or a replacement made pursuant to the RPMA.

6.28 The RPMA also requires that RRDI, as Rental Pool Manager, “not terminate the Hotel Management Agreement unless the Rental Pool Manager has complied with the terms of section 2.11 in respect of its proposed assignment of its interest under this Agreement.”

6.29 Section 2.11(1) of the RPMA permits the assignment by RRDI of the RPMA to a purchaser that assumes all of the RPMAs and either is a Qualified Operator itself, or appoints a Qualified Operator as the operator of the Hotel.

6.30 Under the Purchase Agreement, Canadian Niagara is assuming all of the RPMAs with Unit Owners. As Canadian Niagara will continue to retain Marriott as Hotel Operator, the provisions of section 2.11 of the RPMA with respect to a Qualified Operator will be complied with.

6.31 Marriott and Canadian Niagara have advised the Receiver that subsequent to the Closing, they plan to pursue a new franchise agreement in place of the existing Hotel Management Agreement and Related Marriott Agreements. On the completion of the franchise agreement Canadian Niagara intends to replace Marriott with a Qualified Operator as provided for under the terms of the RPMA.

The Set-Off Motion and the RPMA Dispute

- 6.32 As set out in more detail in the Receiver's Sixteenth Report dated March 9, 2011 (the "**Sixteenth Report**"), the two Independent Directors of the Condominium Corporation asserted that RRDI was in arrears of its condominium fees in respect of the amounts payable for the Condominium Corporation's operational year 2009-2010, and would owe additional condominium fees once the budgets for 2010-2011 and 2011-2012 were settled and condominium fees assessed.
- 6.33 The Receiver disputed this claim, asserting 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, pursuant to certain contracts between RRDI and the Condominium Corporation, resulting from RRDI's funding of all of the Hotel's operating expenses, both prior to and since the appointment of the Receiver.
- 6.34 The Receiver sought the determination of this issue by the Court by way of a motion, on the grounds as set out in the Sixteenth Report (the "**Set-Off Motion**"). The Set-Off Motion was adjourned to permit the Receiver and the Independent Directors to discuss a potential resolution of the Set-Off Motion.
- 6.35 In its Nineteenth Report dated May 25, 2011 (the "**Nineteenth Report**"), the Receiver sought approval of a settlement agreement with Unit Owners and the Condominium Corporation with respect to (a) the issues raised by the Set-Off Motion; and (b) the RPMA Dispute (the "**Fresh Start/RPMA Agreement**").

- 6.36 Under the Fresh Start/RPMA Agreement, the parties agreed to resolve the issues raised by the Set-Off motion by way of a “Fresh Start Approach”, which 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.
- 6.37 The parties also agreed to resolve the RPMA Dispute by way of an amendment to the RPMA, and a corresponding amendment to the Declaration of the Condominium Corporation (the “**RPMA Resolution**”).
- 6.38 Because the Receiver recognized that the RPMA Resolution might not be acceptable to a purchaser, the Receiver agreed to the RPMA Resolution conditional, among other things, upon the agreement by a purchaser to the RPMA Resolution.¹²
- 6.39 By Order dated May 30, 2011 (the “**May 30 Order**”), the Receiver obtained approval of its execution of the Fresh Start/RPMA Agreement, and authorization to take steps to implement the Fresh Start Approach and the RPMA Resolution (on condition that a purchaser agreed with the RPMA Resolution).
- 6.40 The Fresh Start Approach and the RPMA Resolution both require amendments to the Condominium Corporation’s Declaration. The *Condominium Act* requires compliance with a number of conditions in order

¹² The details and background to the Set-Off Motion, the Fresh Start Approach, the RPMA Dispute and the RPMA Resolution are found in the Receiver’s Sixteenth Report and Nineteenth Report.

to amend such Declaration, including the consent of 80% of Unit Owners, as well as the calling and holding of a meeting of Unit Owners. In order to amend the RPMA for purposes of implementing the RPMA Resolution, a threshold number of Unit Owners are also required under the RPMA to consent to such amendment.

- 6.41 As a result, the Fresh Start/RPMA Agreement contemplated that the consent of Unit Owners would be sought in writing, and that a meeting of Unit Owners would be held as required by the *Condominium Act*.
- 6.42 Upon receiving Court approval of the Fresh Start/RPMA Agreement pursuant to the May 30 Order, notice of the meeting of Unit Owners was provided by way of packages delivered to Unit Owners on May 31, 2011.
- 6.43 The meeting of Unit Owners and the Receiver was conducted on June 15, 2011, at which a detailed review of the terms of the Fresh Start/RPMA Agreement was undertaken. At that meeting, it was confirmed to the Unit Owners, both by the Receiver and one of the Independent Directors and member of the Ad Hoc Committee, that the RPMA Resolution was optional to a purchaser of the Assets of RRDI, and that in the event that such purchaser did not assume the RPMA Resolution, the Unit Owners would continue to have their rights to seek arbitration of the RPMA Dispute under the RPMA.
- 6.44 At that meeting, in addition to discussing the Fresh Start/RPMA Agreement, the Unit Owners were also apprised of the status of the Sales Process that was then ongoing. It was confirmed to Unit Owners at that meeting by the

Receiver that it was still open for them to form a purchaser group and seek to acquire part or all of the Assets by the deadline in the Sales Process Protocol.

- 6.45 As of the date of this Report, 73 consents of the 89 Unit Owners to the Fresh Start Approach has been received, and as a result, together with the consent of RRDI, by its Receiver, the threshold required under the *Condominium Act* for amendment to the Declaration has been achieved, permitting the Condominium Corporation to implement the Fresh Start Approach. In addition, 73 consents of Unit Owners, conditional on the acceptance of the RPMA Resolution by a purchaser, have been received in respect of the RPMA Resolution, and as a result, the threshold required under the RPMA to amend its terms has been received, subject to the decision of a purchaser to implement the RPMA Resolution.
- 6.46 In addition, 28 of those 35 Unit Owners for whom funds are currently held in trust by the Receiver in respect of Indulgence Cards and Common Expenses Subsidies from the funds held by McCarthys pursuant to the December 21 Order have directed the Receiver to pay such funds over to the Condominium Corporation in return for a credit from the Condominium Corporation to be applied against such Unit Owner's respective future liability for common expenses.
- 6.47 Sixty-nine Unit Owners have also delivered a certificate to the Receiver certifying that the RPMA is not in material default, subject to the RPMA Dispute.

- 6.48 Disclosure of the details of the RPMA Dispute with Unit Owners, as well as the terms of the Fresh Start/RPMA Agreement, was provided to potential purchasers in the virtual data site maintained by CBRE. In addition, as indicated above, the Receiver conducted information sessions for potential purchasers to describe the details of the RPMA Dispute and the Fresh Start/RPMA Agreement.
- 6.49 Pursuant to the Purchase Agreement, Canadian Niagara has agreed to purchase the Purchased Assets subject to the Fresh Start Approach, and, as noted above, Canadian Niagara has agreed to purchase the Purchased Assets subject to the RPMA Dispute, without any requirement for it to be resolved prior to Closing.
- 6.50 As the foregoing has demonstrated, throughout the receivership, the Receiver has maintained regular communication with the members of the Ad Hoc Committee and Unit Owners on numerous issues, and has successfully resolved matters relating to the Unit Owners through such dialogue.

Marriott

- 6.51 The Canadian Niagara transaction contemplates the continuation of Marriott as operator of the Hotel. This is obviously a benefit to Marriott, and provides stability for the Hotel. It also represents a substantial savings to the estate of RRDI as no termination costs or fees will be payable.
- 6.52 Pursuant to a side letter agreement with Marriott dated January 22, 2010 (the “**Side Letter**”), which the Receiver was authorized to execute by the August 18 Order, the Receiver has the right to terminate Marriott in certain

circumstances, including in the event of a sale of the Hotel. The Receiver negotiated these provisions in order that it would have the option to sell the Assets to a purchaser who did not wish to retain Marriott.

6.53 However, a termination of the Hotel Management Agreement and Related Marriott Agreements by RRDI under the Side Letter in order to facilitate a sale would be conditional on the payment of a termination fee and certain costs that would be incurred by Marriott as a result of that termination. These costs include the costs of terminating the employment of Marriott's employees at the Hotel, as well as other costs of "de-branding" the Hotel as a Marriott property.

6.54 As noted above, pursuant to the Hotel Management Agreement, in the event of a termination of its appointment as Hotel Operator, Marriott's position is that it is entitled to set off those amounts owed to it for operating expenses and termination costs against amounts held by Marriott on behalf of RRDI.

6.55 The Receiver has obtained a detailed estimate of the costs of termination from Marriott, which are estimated in the amount of approximately \$2 million, not including any termination fee. Marriott and the Receiver estimate that approximately \$1.5 million would be available in the accounts of the Hotel, as of the end of the summer high season. The exercise of set-off by Marriott would result in a cost to the estate of approximately \$1.5 million. Marriott has indicated to the Receiver that it will be forced to take steps to protect its exposure to out-of-pocket expenses in the event of its termination, including

assertions that the Receiver should be obligated to reimburse termination costs on a priority basis.

- 6.56 The assumption by Canadian Niagara of Marriott ensures minimal disruption to the operations of the Hotel, and minimizes this cost to the estate, thereby maximizing value on the recovery on the Assets.

Conditional Termination by Marriott

- 6.57 The Side Letter described above also gives Marriott the right to terminate the Hotel Management Agreement and Related Marriott Agreements at its own initiative on no less than 60 days notice to RRDI in the event that Marriott reasonably determines that RRDI has insufficient financial resources and liquidity to fulfill its obligations to Marriott.
- 6.58 Marriott has advised that it will give notice of termination notwithstanding the desired assumption by Canadian Niagara of the Hotel Management Agreement and Related Marriott Agreements, in order to mitigate the costs of termination in the event that the transaction with Canadian Niagara does not close and a termination becomes necessary.
- 6.59 Marriott intends to give notice of termination on or about July 18, 2011, and to give working notice to its employees of the termination of their employment on the same date, in order that, so far as possible, the costs of severance and termination payments to employees are minimized in the event that there is no Closing.

Introduction Fee

6.60 Pursuant to a Marketing and License Agreement between the Receiver and Marriott, Marriott had asserted that an introduction fee was payable on the sale of the Hotel (the “**Introduction Fee**”). The maximum amount of such fee that would be payable is \$825,000. After discussions between the Receiver and Marriott, Marriott has agreed to waive any claim to payment of such Introduction Fee on the sale of the Hotel to Canadian Niagara in which Canadian Niagara assumes the Hotel Management Agreement and Related Marriott Agreements. This also represents a substantial saving to the estate.

7.0 *Impact of Sale on Stakeholders*

- 7.1 The amount currently outstanding under the Receiver's Borrowings is \$29,198,347. The Receiver has approximately \$1,871,270 remaining of the Receiver's Borrowings, which is anticipated to be fully utilized to fund ongoing expenses of the receivership until the Receiver's discharge.
- 7.2 While the Receiver is not in a position to publicly disclose the purchase price in the Purchase Agreement, as is disclosed to the Court by the Bid Analysis at Confidential Appendix "II", upon calculating the estimated net recoveries on the sale, along with other recoveries in the estate, there will be a loss in excess of \$5 million on the Receiver's Borrowings and no recovery on the Priority Construction Lien Claims assigned to WestLB. As such, the only party with a financial interest in the proceeds of realization of the Assets is WestLB and the Syndicate, in respect of the Receiver's Borrowings.
- 7.3 In recommending the transaction with Canadian Niagara, in addition to the priority secured claims of the Syndicate, the Receiver has considered the interests of Unit Owners and Marriott, as well as the employees of the Hotel.
- 7.4 With respect to Unit Owners, members of the Ad Hoc Committee have advised the Receiver that the Unit Owners desire that Marriott be terminated as operator of the Hotel, and oppose a sale to a purchaser who will retain Marriott.

- 7.5 The Receiver has considered the fact that Unit Owners acquired their Units with the knowledge and understanding that Marriott had been appointed as operator of the Hotel by RRDI, as disclosed in the disclosure statements that were provided to Unit Owners at the time of their purchase. In addition, Unit Owners are subject to the RPMA, which was negotiated with the Receiver on behalf of RRDI subsequent to the receivership, and approved by the Court by its August 18 Order, pursuant to which RRDI is granted the exclusive authority to appoint and/or replace the Hotel operator as long as the Hotel operator is a Qualified Operator, and pursuant to which Marriott is a Qualified Operator.
- 7.6 Furthermore, the Hotel Management Agreement and Related Marriott Agreements that were negotiated by the Receiver and Marriott subsequent to the receivership, pursuant to which Marriott continued to be retained by RRDI as operator of the Hotel, were approved by the Court. No Unit Owner opposed the approval of these agreements.
- 7.7 The Receiver's position is that Unit Owners do not have the contractual right to decide the identity of the operator of the Hotel, so long as such operator is a "Qualified Operator" under the RPMA, and are therefore not in a position to object to what the Receiver recommends as the best offer simply on the basis that it contemplates the continued appointment of Marriott as operator.
- 7.8 As noted, Marriott and Canadian Niagara plan to pursue a new franchise agreement in place of the existing Hotel Management Agreement and Related Marriott Agreements subsequent to Closing. In such case, Canadian Niagara

intends to replace Marriott with a Qualified Operator all in accordance with the terms of the RPMA.

- 7.9 As can be seen from the Bid Analysis, the offers from the bidders other than Canadian Niagara do not provide the certainty of closing that is provided by Canadian Niagara. The only offer higher than that of Canadian Niagara is subject to unacceptable conditions. The others, leaving aside the issue of closing risk, would generate much lower net realizations for the Syndicate. Any termination of Marriott would further decrease significantly the net realizations of proceeds of sale on behalf of the Syndicate, as a result of Marriott's set-off rights and claims to priority for its significant out-of-pocket expenses in the event of termination. Furthermore, no other bidder has put forward a clear plan for operating the Hotel in the absence of Marriott, which creates uncertainty with respect to the future operations of the Hotel, with consequent uncertainty for employees, Unit Owners, and other stakeholders.
- 7.10 The Receiver understands from Canadian Niagara that it does not intend to sell the approximately 60% of the Units of the Hotel that it would acquire, but rather, it intends to work in conjunction with Marriott in order to operate a viable Hotel with a view to making a profit. Canadian Niagara, Marriott, and the Unit Owners have common interests in the long-term success of the Hotel.
- 7.11 The Receiver has also considered the impact of the transaction on employees at the Hotel, the numbers of whom range from a low of approximately 138 in winter, to a high of approximately 341 in summer. As noted, in the absence of closing the transaction or additional funding, the Hotel will need to be shut

down and the employees terminated. Successfully completing the transaction will result in the continued employment of most, if not all, the employees at a four seasons resort which is of significant economic benefit to local communities.

8.0 Neighbouring Properties

- 8.1 As noted above, a number of unresolved disputes with certain Neighbouring Properties (the “**Outstanding Neighbouring Property Issues**”) posed complications to the completion of any transaction for the sale of Assets of RRDI during the period that the Receiver was conducting its Institutional Sales Process in 2010.
- 8.2 The Outstanding Neighbouring Property Issues encountered by the Receiver were described in detail in the Eleventh Report, but can be summarized as follows:
- (a) The sewage treatment plant for the Hotel is located on neighbouring property owned by Wallace Marine, and is the subject of the STP Lease. Wallace Marine had taken the position that the STP Lease was in default, and that it was at risk.
 - (b) The Receiver had encountered issues with The Rock regarding the joint supply of water to the Hotel and the golf course (owned and operated by The Rock), through the use of a water taking system located on RRDI’s lands.
 - (c) The Receiver reported difficulties in respect of the Red Leaves Resort Association (the “**Association**”)¹³, of which RRDI is a member, with

¹³ The Resort Association was established by the *Red Leaves Resort Association Act, 2006*. It was established to provide common leisure and property-related services to the properties that were intended to form part of the larger Red Leaves Development. All property owners within the area designated by the Act are required to be members of the Association and to pay annual fees to the Association to fund these services.

respect to the scope of the Association's intended services and the fees payable to it. The Association is established by provincial statute and membership is mandatory. The Receiver wished to clarify the role of the Association and any obligations a potential purchaser might have to it.

8.3 In the negotiations with the Prior Purchaser, which involved a global resolution of issues with WestLB, certain agreements with the Prior Purchaser, KFE, the owners of the Neighbouring Properties, and other related parties were entered into in order to resolve the Outstanding Neighbouring Property Issues. As a result, among other things, the Receiver obtained the following:

- (a) A Water Supply Agreement for the sharing of the water supply from Lake Rosseau between The Rock and RRDI has been executed and approved by the Court. Attached hereto as **Appendix "J"** is a copy of the Water Supply Agreement.
- (b) A Confirmation and Estoppel Agreement dated March 18, 2011 has been provided to RRDI, by its Receiver, and any purchaser of the Assets of RRDI by Wallace Marine (the "**Confirmation and Estoppel Agreement**"), pursuant to which Wallace Marine has acknowledged that to its knowledge, and subject to certain environmental compliance issues (which have been resolved) (a) RRDI has complied with all of its covenants and agreements contained in the STP Lease, (b) there is no default or breach under the STP Lease on the part of RRDI or

Wallace Marine; and (c) the STP Lease is in good standing. Wallace Marine has also consented to an assignment of the STP Lease to a purchaser on certain conditions. Attached as **Appendix “K”** is a copy of the Confirmation and Estoppel Agreement.

- (c) Wallace Marine has also consented to RRDI having the right to extend the terms of the STP Lease through four extension options of five years each pursuant to a Ground Lease Amending Agreement dated March 18, 2011 (the “**Ground Lease Amending Agreement**”). Attached as **Appendix “L”** is a copy of the Ground Lease Amending Agreement.
- (d) The Receiver has also negotiated the basic terms of an agreement in respect of the Association regarding, among other things, the fees to be charged by the Association and the scope of its activities. This agreement would be effective until April 30, 2013. An undertaking to complete such agreement must be assumed by Canadian Niagara as purchaser of the Assets. Attached hereto as **Appendix “M”** is a copy of the undertaking executed March 18, 2011.
- (e) The Rock has agreed that Unit Owners and guests of the Hotel will be provided with the same access to tee times as any member of the general public. Attached hereto as **Appendix “N”** is a copy of the acknowledgement and undertaking executed March 18, 2011.
- (f) In addition, the Receiver has obtained from the Prior Purchaser, KFE and other related parties a written undertaking and consent not to

oppose the sale of the Purchased Assets or any vesting order sought in connection therewith to a purchaser other than the Prior Purchaser. Attached hereto as **Appendix “O”** is a copy of the undertaking and consent dated March 18, 2011.

- (g) The Receiver has also obtained from KFE and related parties an agreement and undertaking not to oppose the Receiver’s reasonable receivership activities. Attached hereto as **Appendix “P”** is a copy of the undertaking, consent, waiver and release dated March 18, 2011.

8.4 The agreements and undertakings executed by the various entities related to KFE (other than 8.3(f) and 8.3(g) above) were disclosed to all potential purchasers in the CBRE data site.

8.5 The resolution of the Outstanding Neighbouring Property Issues pursuant to the various agreements and undertakings outlined above permits the Receiver to convey the Purchased Assets to Canadian Niagara free of the burdens and complications of disputes and potential litigation. Canadian Niagara has advised the Receiver that it intends to contact the Neighbouring Properties in order to open a dialogue with respect to continued cooperation.

9.0 *Recommendation of the Receiver and Alternatives to Sale*

9.1 The Receiver recommends that the Court approve the sale to Canadian Niagara since it represents the best offer received pursuant to the Sales Process and is in the best interests of the stakeholders generally.

9.2 The Receiver is of the view that:

- (a) the Sales Process Protocol, as approved by the Court, has been complied with, and the process has been a fair and effective process for maximizing realization on the Assets;
- (b) the Assets have been appropriately marketed;
- (c) the terms of the Purchase Agreement, including the purchase price consideration, are fair and commercially reasonable and are superior to all other offers; and
- (d) the integrity of the Sales Process has been maintained throughout.

9.3 On the basis of all of the foregoing, the Receiver believes that the transaction with Canadian Niagara is the best available alternative for stakeholders when compared to all of the offers generated by the Sales Process, taking into account, among other things, the priority interests of the Syndicate in the repayment of a portion of its Receiver's Borrowings, the interests of Unit Owners in respect of their investments, and the interests of Marriott in maintaining its financial interests in the Hotel Management Agreement and the Related Marriott Agreements.

- 9.4 Furthermore, there is no alternative currently available to the Receiver other than the completion of a sale of the Assets.
- 9.5 As set out in previous reports, the Receiver does not have the financing to continue to operate the Hotel in the longer term. The Receiver advised in its Fifteenth Report that WestLB will not support or fund any further borrowings by the Receiver. The current operations of the Hotel on their own do not generate sufficient revenue during the fall and winter seasons to support the Hotel's operating expenses.
- 9.6 As noted above, the outside closing date for the sale to Canadian Niagara is October 10, 2011. To the extent that a transaction cannot be completed before funds are needed to finance continued operations, or to the extent that financing is not immediately made available to the Receiver, the Receiver will have no choice but to take steps to shut down the operations of the Hotel. This would have a devastating impact on all stakeholders.
- 9.7 The Receiver is of the view that the sale to Canadian Niagara, a hotel owner/operator with a long track record of success, pursuant to a Sales Process that was conducted fairly and in accordance with the Court approved Sales Process Protocol, is the best and only viable alternative, on balancing the interests of all stakeholders.
- 9.8 The Receiver recommends that the Court approve the sale to Canadian Niagara substantially on the terms and conditions as set out in the Purchase Agreement filed with this Report.

10.0 Other Ancillary Relief

10.1 In order to facilitate the closing of the transaction with Canadian Niagara, and prepare for its discharge soon thereafter, the Receiver also seeks certain ancillary relief as follows:

- (a) as Canadian Niagara is assuming the Assumed Liabilities as defined in the Purchase Agreement, the Receiver seeks a release in favour of RRDI and the Receiver in respect of such Assumed Liabilities;
- (b) furthermore, as Canadian Niagara is assuming the RPMAs, the Receiver seeks a declaration that it and RRDI shall have no further liability under the RPMAs to Unit Owners;
- (c) the Receiver also seeks a declaration that on the closing of the Purchase Agreement, at which time Canadian Niagara will become the majority owner of Units in the Condominium Corporation, neither the Receiver nor RRDI will have any further obligations to the Condominium Corporation or to Unit Owners as a Declarant, including any obligation to conduct a turn-over meeting under the *Condominium Act*;
- (d) as noted above, in connection with the Fresh Start/RPMA Agreement, the Receiver was directed by certain Unit Owners to pay those funds that were paid by McCarthys to the Receiver on account of Incentives, and which have been held by the Receiver on their behalf, to the Condominium Corporation, in return for a credit from the Condominium Corporation to be applied to their respective future

obligations to pay common expenses. The Receiver requests an order confirming such payment and releasing the Receiver from any further obligation in respect of such funds;

- (e) the Purchase Agreement provides that any property tax refunds that may be received in respect of the real property of RRDI pursuant to an ongoing tax appeal, that relate to the period prior to July 16, 2011, are the property of RRDI, and not Canadian Niagara. In order to facilitate this agreement, the Receiver seeks an Order directing the Township of Muskoka Lakes to remit such refunds to RRDI if and when payable;
- (f) as Marriott has agreed to waive the Introduction Fee, the Receiver is requesting a declaration that no such fee is payable on the sale to Canadian Niagara;
- (g) the summary of the terms of the agreement with the Prior Purchaser, the Purchase Agreement and the Bid Analysis all contain information that the Receiver wishes to maintain confidential, in order that the integrity of the Sales Process is protected. The Receiver therefore requests an order sealing Confidential Appendices “I”, “II” and “III” to this Report pending further Order of the Court; and
- (h) the Receiver intends to bring a motion to approve its fees, those of its legal counsel, and those of its independent legal counsel during the week of August 22, 2011, and seeks to set a timetable for such motion.

Vesting Order

10.2 All parties whose interests are to be vested out pursuant to the Sale Approval Order have been provided with notice of this motion. The construction lien claims registered on title to the property of RRDI in favour of all construction lien claimants have been assigned to WestLB or otherwise resolved, other than the two noted above in this Report, who have been given notice of this motion.

11.0 Conclusion

- 11.1 Based on the foregoing, the Receiver seeks orders substantially in the form of the draft orders attached as Schedules A and B to the Notice of Motion seeking approval of the sale to Canadian Niagara.

* * *

All of which is respectfully submitted, this 11th day of July, 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