

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Class Actions)

NO: 500-06-001067-202

9092-1651 QUÉBEC INC. d.b.a. **RESTAURANT ELIXOR**, a legal person having a principal establishment at 1795 Pierre-Péladeau Avenue, City and District of Laval, Province of Québec, H7T 2Y5

Applicant

- vs -

PROMUTUEL RÉASSURANCE d.b.a. **PROMUTUEL ASSURANCE**, legal person part of Groupe Promutuel Fédération de Société Mutuelles d'Assurance Générale having a principal establishment at 700-1010 De Sérigny Street, City of Longueuil, Province of Québec, J4K 5G7

Defendant

**APPLICATION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION AND TO
OBTAIN THE STATUS OF REPRESENTATIVE PLAINTIFF**
(Articles 571 and following C.C.P.)

**TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN AND FOR
THE DISTRICT OF MONTREAL, YOUR APPLICANT STATES:**

1. The Applicant is a well-known Laval restaurant carrying on business under the firm name and style Restaurant Elixor with over 50 employees, the whole as appears from an extract of the CIDREQ disclosed herewith as **Exhibit P-1**;
2. The Defendant, Promutuel Réassurance (hereinafter "**Promutuel**"), is an insurance company authorized to conduct business in the Province of Quebec, the whole as appears from an extract of the CIDREQ disclosed herewith as **Exhibit P-2**;
3. The Applicant subscribed to an all-risk commercial insurance policy with the Defendant Promutuel, as appears from the commercial insurance policy disclosed herewith as **Exhibit P-3 (Policy)**;
4. The Policy contains business interruption insurance, as appears from the section "*Assurance des bénéfiques bruts-formule régulière (pour les risques non industriels)*" (Form 5331-01 (90-06));

5. Notably, Form 5331-01 provides as follows:

“1. NATURE ET ÉTENDUE DES PROTECTIONS

Sous réserves des conditions, limitations et exclusions de la police, la présente assurance garantit l'Assuré, à concurrence du montant stipulé au Sommaire des protections, contre :

Les pertes de **bénéfice brut**, effectivement subies durant la **période de remise en état**, directement applicables à l'interruption des activités de l'entreprise de l'Assuré, devenue inévitable du fait d'un sinistre couvert ayant atteint les bâtiments, le matériel ou les marchandises se trouvant sur les **lieux assurés**.

Les pertes de **bénéfice brut** subies, pour une période maximale de deux semaines, si par ordre des autorités civiles, l'accès à des **lieux assurés** est interdit en raison d'un sinistre qui est intervenu sur une propriété avoisinante et qui découle d'un risque assuré par cette police.

Les dépenses assumées en vue de réduire l'indemnité payable en vertu des garanties ci-dessus, à concurrence du montant de la réduction ainsi réalisée.”;

6. There is no exclusion clause in Form 5331-01 (section 2), part of the Policy P-3, or anywhere else in the all-risk insurance policy (Exhibit P-3), which could exclude as a covered loss the business interruption loss sustained by Applicant and resulting from a pandemic or a health crisis causing the complete shut-down of all economic activities in the province of Québec, including those of the Applicant and class members;
7. Beginning in March of 2020, there was a global health pandemic resulting from the novel coronavirus (“**COVID-19**”);
8. As a result of COVID-19, many retail businesses in the province of Québec, including but not limited to restaurants and bars, were declared non-essential services by the Québec government and had to close;
9. The Quebec government considered that restaurant and bars premises presented a substantial risk for patrons, staff and the public, since the virus may be present on the premises, or could be brought into the premises and easily spread among the various people who attended the premises, either as patrons or staff;
10. The Applicant’s insured property was directly impacted by the crisis and ensuing governmental orders. On or around Monday, March 16, 2020, in accordance with the government’s order to combat COVID-19, the Applicant had to close its restaurant which has remained closed to this day, save and except for take-out and delivery services, the whole as appears from the March 16, 2020 decree issued by the government of Québec and disclosed as **Exhibit P-4**;
11. The Applicant communicated with his insurance broker to make a claim under the Policy, for business interruption insurance. However, before even receiving Applicant’s written claim, Promutuel refused to entertain any claim and advised it that it would not indemnify the Applicant for its business interruption losses, despite the fact that the Applicant is covered for this type of

loss under the Policy, the whole as appears from the March 24, 2020 letter of denial unilaterally issued by Promutuel and disclosed as **Exhibit P-5**;

12. In particular, relying on forms 5305-03 and 5331-01 of the Policy, Promutuel alleges that it is entitled to deny in its totality the Applicant's insurance claim, *...puisque'il ne s'agit pas d'un sinistre couvert en vertu de votre contrat d'assurance* (Exhibit P-5);
13. Promutuel takes the position that: *Puis qu'il (sic) n'y a aucun dommage directement causé à un bien assuré se trouvant sur les lieux assurés, il ne s'agit pas d'un sinistre couvert en vertu de votre contrat...nous vous suggérons de vérifier auprès des instances gouvernementales si vous êtes admissibles à une aide financière. Nous vous recommandons de conserver toutes les factures ou pièces justificatives permettant d'appuyer votre demande d'aide gouvernementale* (Exhibit P-5);
14. The Applicant paid for business interruption insurance in the expectation that the Defendant would honor its contractual obligations in good faith if and when an unforeseen and unintentional occurrence were to take place resulting in an interruption of business causing business interruption losses. As a result of the COVID-19 crisis and the Quebec Government's decision to order the closure of all restaurants and bars (save and except, where possible, for take-out and delivery services), an unforeseen and unintentional occurrence has caused the interruption of the Applicant's business, as well as that of all other Class members;
15. The Defendant's grounds to deny altogether coverage under the Policy are fallacious, wrong, abusive and run contrary to the rules of contractual interpretation applying to an insurance contract in the province of Québec;
16. The Applicant has an insurable interest, it has sustained a loss covered under the Policy, the Policy is in force, the Applicant has made a claim with the Defendant in accordance with the terms of the Policy and Applicant is entitled to the fullest extent permitted to benefit promptly from the protection afforded by the Policy;
17. The business interruption losses sustained by the Applicant are an insured peril since a) it is not excluded and b) Defendant's alleged legal justification to avoid coverage is unfounded in fact and in law since Applicant's insured business premises and activities did sustain a loss or damage within the meaning of the Policy;
18. The Applicant is entitled to claim the benefit of coverage under the Policy for Business Interruption Insurance for itself and for the following group:

Class:

All businesses engaged in the operation of a restaurant and or bar, in the province of Quebec, who were forced to close their business operations or limit their operations to take-out and delivery services as a result of COVID-19 and ensuing governmental order, who sustained a loss as a result and who were denied coverage for Business Interruption Insurance by Promutuel Réassurance or who have yet to file a claim for Business Interruption Insurance as a result of a pre-emptive blanket denial of coverage by Promutuel.

(hereinafter referred to as the "**Class**");

I. CONDITIONS REQUIRED TO AUTHORIZE THIS CLASS ACTION AND TO APPOINT THE APPLICANT WITH STATUS OF REPRESENTATIVE PLAINTIFF (ARTICLE 575 C.C.P.):

A) THE FACTS ALLEGED APPEAR TO JUSTIFY THE CONCLUSIONS SOUGHT: *Applicant's direct cause of action against Promutuel*

19. Applicant's Policy with Promutuel, Exhibit P-3, is in good standing as it has always paid its premiums;
20. Pursuant to the Policy and in exchange for the premiums it received from the Applicant, Promutuel agreed to confer on the Applicant coverage for Business Interruption losses caused by an insured peril;
21. Specifically, the Applicant is insured for Operating losses – gross profit under section 1 of Form no. 5331-01 (Exhibit P-3);
22. Following the orders made by the Government, the Applicant was forced to close its restaurant on March 16, 2020 due to COVID-19 pandemic;
23. Nowhere in the Policy does Promutuel expressly exclude business interruption losses resulting from a pandemic or from a global shutdown ordered by the Government;
24. Promutuel nonetheless refused to indemnify the Applicant for Business Interruption losses;
25. The Applicant is aware that many other owners of restaurants holding a policy containing similar business interruption coverage and language have been told by their respective insurer and/or insurance broker that coverage was denied;
26. From March 16, 2020 to May 3rd, 2020, the Applicant alone has suffered a quantifiable loss of in excess of \$567,420.68 due to its business being closed since March 16, 2020 and this loss is covered by the Business Interruption Insurance Form no. 5331-01 of the Policy (Exhibit P-3);
27. As a result of the Quebec Government's decision to shut down the Applicant's restaurant, the Applicant has suffered and will continue to suffer for at least several more weeks or months a total business interruption, which will result in a very significant business interruption loss for the Applicant and for all other Class members;
28. In these circumstances, the Applicant is (and all other proposed class members are) justified in claiming and does hereby claim damages from Promutuel in an amount to be calculated using the formulas provided for in its insurance policy (P-3) as of March 16, 2020 and for the entire duration that its business activities will be interrupted due to COVID-19 and the governmental order (Exhibit P-4);

B) THE CLAIMS OF THE MEMBERS OF THE CLASS RAISE IDENTICAL, SIMILAR OR RELATED ISSUES OF LAW OR FACT:

29. The Defendant has failed to honor its contractual undertakings with respect to all class members similarly situated to the Applicant in an identical manner;
30. The Defendant is breaching its contractual obligations owed to Applicant and to all Class members;
31. The language of the Policy, which was drafted by the Defendant, is either identical or very similar for every member of the Class with respect to Business Interruption Coverage;

32. The interpretation of coverage and any exclusion Promutuel may purport to invoke is identical or very similar for every member of the Class;
33. The formula and procedure for calculating the insurance indemnity owed to every member of the Class is identical or very similar and may be dealt with once the Policy and the Business Interruption Coverage issue has been decided by this Honorable court;
34. The only individual question pertains to the business interruption loss actually sustained by the members of the Class and whether the peril which directly caused it is or is not covered under the Business Interruption Coverage Form of the Policy;

C) THE RECOURSES OF THE CLASS MEMBERS RAISE IDENTICAL, SIMILAR OR RELATED QUESTIONS OF FACT OR LAW, NAMELY:

35.
 - a) Is Promutuel contractually obliged to indemnify class members for Business Interruption losses incurred due to the COVID-19 pandemic, in accordance with the terms and conditions of its insurance policy interpreted in accordance with Québec law?
 - b) Are the Class members entitled to claim damages plus interest and the additional indemnity set out in the *Civil Code of Quebec* on these amounts, from the date of service of the Application for authorization?

D) THE COMPOSITION OF THE CLASS

36. The composition of the Class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings;
37. The Applicant's Principal has been in the restaurant industry for decades, knows many other restaurant owners affected by the insurers' apparent systematic denial of coverage by the insurance industry in general and he is well aware of their catastrophic fate and dire economic difficulties. As such, there are likely hundreds or thousands of Class Members in the same situation as the Applicant in the province of Québec;
38. The names and addresses of all persons included in the Class are not known to the Applicant, however they are known to the Defendant;
39. Class members are very numerous and are dispersed across the Province of Quebec;
40. Class members form a specialized field of commercial activity and the interpretation of the Applicant's Policy, in particular Form 5331-01, shall serve the interests of all other class members;
41. These facts demonstrate that it would be impractical, if not impossible, to contact each and every Class member to obtain mandates and to join them in one action;
42. In these circumstances, a class action is the only appropriate procedure for all of the members of the Class to effectively pursue their respective rights and have access to justice without overburdening the court system;

E) THE CLASS MEMBER REQUESTING TO BE APPOINTED AS REPRESENTATIVE PLAINTIFF IS IN A POSITION TO PROPERLY REPRESENT THE CLASS MEMBERS.

43. The Applicant requests that it be appointed the status of representative plaintiff for the following main reasons:

- a) The Applicant is a member of the Class and has a personal interest in seeking the conclusions that it is seeking;
- b) The Applicant (and its President) are competent, in that it has the potential to be the mandatary of the claim if it had proceeded under article 91 of the *Code of Civil Procedure*;
- c) The Applicant's President is in contact with numerous restaurant and bar owners, and intends to apprise members of the Class of the progress of the present class action;
- d) The Applicant cares about insurance coverage for his business and knows the importance of insurance coverage for his business but that of all restaurateurs and bar owners;
- e) The Applicant's interests are not opposed to those of other Class members;

44. Additionally, the Applicant respectfully adds that:

- a) The Applicant has acted diligently with respect to this matter, as it has communicated with its insurance broker, submitted an insurance claim to Promutuel Réassurance, obtained a copy of its insurance policy, consulted the undersigned attorneys regarding its application and interpretation, and decided to institute a class action, instead of an individual action, in order to advance the rights of all members of the Class instead of only its own;
- b) Its President has the time, energy, will and determination to assume all the responsibilities incumbent upon him in order to diligently carry out the action;
- c) It has cooperated and will continue to fully cooperate with its attorneys, who have experience in insurance law;
- d) Its President read this Application prior to its court filing and reviewed the exhibits in support thereof;
- e) Its President understands the nature of the action;
- f) Its President is well aware of the dire financial difficulties of all restaurateurs and bar owners in the Province of Québec who may be the last to be authorized by the Government of Québec to reopen;

F) THE REPRESENTATIVE PLAINTIFF CONSIDERS THAT THIS MATTER IS OF THE UTMOST URGENCY AND THAT THE ONLY FUNDAMENTAL QUESTION FOR THIS HONORABLE COURT TO DECIDE IS OF A DECLARATORY NATURE.

45. Applicant, like the vast majority of restaurateurs and bar owners, are hurting financially as a direct result of the COVID-19 pandemic and the country's complete shutdown;

46. Many restaurants and bars are running out of liquidity, may not even survive this financial crisis and looming recession and the baseless and highhanded denial of coverage by the defendant insurer, like all other insurers, is causing extraordinary harm to the Applicant and Class members;
47. The relief sought by Applicant and by the Class members will only or primarily necessitate that the terms of the Policy be interpreted by this honorable court so as to determine whether Class members are or are not entitled to insurance coverage as a result of the COVID-19 pandemic;
48. This question can be decided first and without delay, leaving the calculation of the indemnity owed to each Class member to be decided separately, in accordance with the clear terms of the Policy;

II. DAMAGES

49. By refusing to indemnify the Applicant and other Class members for Business Interruption Insurance related to COVID-19, the Defendant is violating its contractual obligations towards them;
50. As set forth in paragraph 28 above, the Applicant's damages amount to in excess of \$570,000.00 at present and they will increase with the continued shutdown. Given the uncertain duration of the COVID-19 pandemic, it is impossible for the Applicant to precisely quantify its damages at the present time and similarly it is possible to estimate the damages for the totality of the class members;
51. In light of the foregoing, the Applicant is entitled to claim damages on behalf of all Class Members in accordance with the formula set forth in the insurance policy;

III. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

52. The action that the Applicant wishes to institute on behalf of the members of the Class is an action in damages;
53. The conclusions that the Applicant wishes to introduce by way of an originating application are:
 - GRANT** the class action of the Representative Plaintiff and the members of the Class against the Defendant;
 - DECLARE** that the business interruption losses caused by COVID-19 are covered under the Policy and, in particular, the terms of Business Interruption Insurance (Form 5331-01) issued by Defendant to Class Members;
 - DECLARE** that Defendant's denial of the claim made by Plaintiff is wrongful and constitutes an abuse of right;
 - CONDEMN** the Defendant to pay the Representative Plaintiff and the Class Members an amount equal to their business interruption losses during COVID-19, beginning on March 16, 2020, calculated using the formulas in the Policy and Form, said amount estimated to be as of this moment \$570,000.00 for the Representative Plaintiff, the whole with interest and the additional indemnity provided by law as well as such other damages as this Honorable Court may award in connection with any finding of wrongful or abusive denial of insurance coverage by Defendant;

ORDER that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation in accordance with the policy formulas;

CONDEMN the Defendant to bear the costs of the present action including the cost of exhibits, notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

RENDER any other order that this Honorable Court shall determine;

54. The interests of justice favor that this Application be granted in accordance with its conclusions;

IV. JURISDICTION

55. The Applicant suggests that this class action be exercised before the Superior Court of Quebec, in the district of Montreal, because many Class members have businesses situated and insured in this district, and because the Defendant has a place of business in this district and because multiple class action proceedings raising related issues are before this court;

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

AUTHORIZE the institution of a class action in the form of an originating application in damages;

APPOINT the Applicant with the status of Representative Plaintiff of the persons included in the Class herein described as:

Class:

All businesses engaged in the operation of a restaurant and or bar, in the province of Quebec, who were forced to close their business operations or substantially reduce their operations solely for take-out and or delivery services as a result of COVID-19 and the ensuing governmental order, who sustained a loss as a result and who were denied coverage for Business Interruption Insurance by Promutuel Réassurance or who have not yet filed a claim for Business Interruption Insurance as a result of a pre-emptive blanket denial of coverage by Defendant.

IDENTIFY the principal questions of fact and law to be treated collectively as the following:

- a) Is Promutuel contractually obliged to indemnify Class members for Business Interruption losses due to COVID-19, in accordance with the terms and conditions of its insurance policy interpreted in accordance with Québec law?
- b) Are the Class members entitled to claim damages plus interest and the additional indemnity set out in the *Civil Code of Quebec* on these amounts, from the date of service of the Application for authorization?
- c) Was the refusal of Defendant to honor its obligations under the insurance policy wrongful and abusive?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Representative Plaintiff and the members of the Class against the Defendant;

DECLARE that the business interruption losses caused by COVID-19 are covered under the Business Interruption Insurance (Form 5331-01 or any similar form) issued by Defendant to Class Members;

CONDEMN the Defendant to pay the Representative Plaintiff and the Class Members an amount equal to their business interruption losses during COVID-19, beginning on March 16, 2020, calculated using the formulas in the Policy and in Form 5331-01, said amount presently estimated to be in excess of \$570,000.00 for the Representative Plaintiff, the whole with interest and the additional indemnity provided by law;

ORDER that the claims of individual Class members be the object of collective liquidation, if the proof permits and alternately, by individual liquidation in accordance with the policy;

CONDEMN the Defendant to bear the costs of the present action including the cost of exhibits, notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

RENDER any other order that this honorable court shall determine;

DECLARE that all members of the Class that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgment to be rendered herein;

ORDER the publication of a notice to the members of the Class in accordance with article 579 C.C.P. within sixty (60) days from the judgment to be rendered herein in the "News" sections of the Saturday editions of La Presse+, Le Journal de Montréal and the Montreal Gazette;

ORDER the Defendant to send an Abbreviated Notice by e-mail to each Class member, to their last known e-mail address, with the subject line "Notice of a Class Action";

ORDER the Defendant to supply class counsel, within thirty (30) days of the judgment rendered herein, all lists in their possession or under their control permitting to identify Class members, including their names, addresses, phone numbers and email addresses;

RENDER any other order that this Honorable Court shall determine;

THE WHOLE with costs including publication fees.

Montreal, May 13, 2020

SPIEGEL SOHMER INC.



Per: **Mtre. Laurent Debrun**
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NO : 500-17-

**SUPERIOR COURT
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL**

**9092-1651 QUÉBEC INC. DBA RESTAURANT
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Defendant

**APPLICATION FOR AUTHORIZATION TO INSTITUTE
A CLASS ACTION AND TO OBTAIN THE STATUS
OF REPRESENTATIVE PLAINTIFF, SUMMONS AND
NOTICE OF PRESENTATION**
(Articles 571 and following C.C.P.)

ORIGINAL

Mtre. Laurent Debrun **Our file: 723910-1018**

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