

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-06-001075-205

SUPERIOR COURT
(Class Actions)

BARRY NASHEN, domiciled at [REDACTED]
[REDACTED]

Applicant

-vs-

**STATION MONT TREMBLANT SOCIÉTÉ
EN COMMANDITE**, legal person having its
head office at 1000, chemin des Voyageurs,
Mont-Tremblant, District of Terrebonne,
Province of Quebec, J8E 1T1

and

ALTERRA MOUNTAIN COMPANY, legal
person having its head office at 3501 Wazee
Streer, Denver, Colorado, 80216, U.S.A.

Defendants

**AMENDED APPLICATION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
AND TO APPOINT 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 seeks authorization to institute a class action on behalf of the following class of which he is a member, namely:

Class:

All consumers who purchased a 2019-2020 “Tonik” ski pass for Mont-Tremblant (including persons who also purchased the “*Privilege Bundle*” / “*Tonik Forfait de privilèges*” add-on);

(hereinafter referred to as the “**Class**”)

or any other Class to be determined by the Court;

2. The Defendant, *Station Mont Tremblant Société en Commandite* (hereinafter “**SMT**”), owns, operates and manages the Mont-Tremblant ski resort, as it appears from an extract of the CIDREQ disclosed herewith as **Exhibit P-1**;
3. The Defendant, *Alterra Mountain Company* (hereinafter “**AMC**”) purchased the Mont-Tremblant ski resort in 2017 and has it listed as one of the AMC destinations on its website <https://www.alterramtnco.com/tremblant/>, an extract of which is disclosed herewith as **Exhibit P-2**;
4. In the course of their operations, the Defendants sell a ski pass called the “Tonik Pass” for \$499 plus taxes (for the Adults aged 18-69 price category), as it appears from their website https://www.tremblant.ca/planifiez/billets-passes/passes-de-saison-de-ski/passe-tonik?sc_lang=fr, an extract of which is disclosed herewith as **Exhibit P-3**;
5. For clarity, Class members include anyone who purchased a 2019-2020 Tonik Pass, including the following price categories:
 - Adult (18-69)
 - Senior (70+)
 - Master (80+)
 - Student (18-25)
 - Youth (13-17)
 - Child (5-12)
 - Peewee (0-4)
6. For the 2020-2021 version of the Tonik Pass, the Defendants advertise and sell the Tonik Pass by providing skiers with a calendar and promising them “117 fixed days on the snow” (in French: “*117 jours de glisse fixes et 3 jours flottants pour utilisation en tout temps, même durant la période des fêtes*”), Exhibit P-3;
7. For the 2019-2020 version of the Tonik Pass, the Defendants advertised and sold the Tonik Pass as including “113 fixed days on the snow” and provided the Applicant and Class members with the 2019-2020 calendar showing 119 “fixed days”, Applicant disclosing the calendar as **Exhibit P-4**;
8. Due to the current health situation, which is a *force majeure* event, the Defendants could not offer 27 of the “fixed days” they promised to Class members who purchased the 2019-2020 Tonik Pass. However, the Defendants have refused to refund Class members for the portion of the specific days that they purchased the Tonik Pass for and for which the Defendants could not perform their obligations;
9. On March 14, 2020, AMC issued a bilingual (English and French) statement on its website titled “*Alterra Mountain Company Closure Announcement*”, which included the following, as it appears from **Exhibit P-5**:

“After careful thought and deliberation of our duty in the face of the COVID-19 (Coronavirus) outbreak, and in what I believe is in the best interest of our guests, employees and local communities, Alterra Mountain Company **will suspend operations at our 15 North American ski resorts, starting the morning of Sunday, March 15, until further notice**. All lift operations, food and beverage, retail and rental services will be closed until further notice.

Alterra Mountain Company destinations are... Tremblant in Quebec...

Each resort will work directly with guests in canceling their visit **and will provide refunds** or credits to those who have hotel and other bookings during this closure period...

10. The Defendants have refused to provide restitution according to law and to refund Class members for the unused days that were specifically advertised and offered by the Defendants and specifically paid for by the Class members;
11. This class action seeks restitution in the form of a reimbursement of the “fixed” ski days paid for by Class members and which the Defendants could not perform due to superior force (pursuant to articles 1693, 1694 and 1699 C.C.Q. and section 270 C.P.A.), or a reduction of the class members’ obligations pursuant to section 272(c) C.P.A., for the Defendants’ failure to comply with sections 10, 11, 11.1, 16, 40, 41 and 42 C.P.A.;

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

A) THE FACTS ALLEGED APPEAR TO JUSTIFY THE CONCLUSIONS SOUGHT:

12. On April 16, 2019, the Applicant purchased the 2019-2020 Tonik ski pass for \$567.25 (including taxes), as it appears from his receipt disclosed herewith as **Exhibit P-6**;
13. The Defendants advertised the 2019-2020 Tonik Pass as providing skiers (including the Applicant) with 113 “fixed days” on the snow, as it appears from a screen grab of the tremblant.ca website from December 21, 2019 disclosed herewith as **Exhibit P-7**;
14. The Applicant purchased this specific Tonik Pass because it offered these “fixed days” for skiing and because some of the best skiing is often in the months of March and April (the Applicant is aware of this because he has been skiing at Mont-Tremblant for the past 20 years);

- 14.1 This year, in particular, the Applicant intended on skiing twice a week - or more - during the Spring skiing season (March and April 2020), due to the fact that he went into semi-retirement after selling 80% of his business effective February 1, 2020. He wanted to use some of his extra free time to ski at Mont-Tremblant;
- 14.2 In addition to the free time that the Applicant now had as a result of his semi-retirement, his annual two-week mid-March ski trip in Europe was delayed from mid-March to mid-April this year due to the schedules of his ski friends living in France. Therefore, for this year (i.e. 2020) his mid-March to mid-April skiing days at Mont-Tremblant were going to be much higher compared to previous years;
15. The Defendants also provided the Applicant with a calendar showing that the Tonik Pass actually offers 119 “fixed days” (see Exhibit P-4: *Passe Tonik Calendrier 2019-2020*);
16. Additionally, on December 22, 2019, the Applicant paid the Defendants \$93.55 to purchase the “*Tonik Forfait de privilèges*” (in English the “*Privilege Bundle*”), which is an exclusive offer to Tonik Pass holders (it is an “add-on” to the Tonik Pass) which includes certain pre-paid items added to his Tonik Pass, such as 20 coffees or hot chocolates valid at certain Mont-Tremblant cafeterias, Applicant disclosing his receipt as **Exhibit P-8**;
17. As of March 15, 2020, the Defendants were no longer able to honour their obligations pursuant to their agreements with the Applicant by reason of superior force (Exhibit P-5). As of this date, there were 27 “fixed days” remaining on the Tonik Pass Calendar (Exhibit P-4), which the Applicant paid for but was unable to use;
18. Also, as of March 15, 2020, the Applicant had only used 7 of the 20 coffees or hot chocolates he had pre-paid for with his purchase of the “*Tonik Forfait de privilèges*”, Applicant disclosing his account history as **Exhibit P-9**;
19. As result, the Defendants must provide the Applicant with restitution (or a partial reimbursement) in the form of a refund proportional to the 27 “fixed days” which he paid for (March 15 to April 19, 2020) but for which they could not provide him the services for;
- 19.1 The Applicant is entitled to a reduction of his obligations pursuant to s. 272(c) C.P.A. because the Defendants did not deliver the goods or to perform the service stipulated in the contract for the remaining 27 “fixed days”, contrary to s. 16 C.P.A.;
- 19.2 A reduction of the Applicant’s obligations is also appropriate because as a result of the health situation, the Defendants could not offer the 27 “fixed days” and therefore could not comply with sections 40-42 C.P.A.;
20. The Applicant has attempted to request restitution or at least a partial reimbursement from the Defendants in the amount of \$128.71 (representing 22.69% of the 119 “fixed days”), but the Defendants refuse to refund him. Instead

of restitution or a partial reimbursement, the Defendants have offered him (and all Class members) a discount of \$50.00 towards a purchase of the 2020-2021 Tonik Pass, which is wholly inadequate and not what is provided for by law in a situation of superior force;

21. The Applicant also requested a refund of the unused portion of the “*Tonik Forfait de privilèges*” add-on, but the Defendants refused to reimburse him. The Applicant hereby requests a refund of \$21.23 (representing 22.69% of the 119 “fixed days”);
22. The Applicant is entitled to restitution or to at least a partial reimbursement and does hereby claim the total sum of \$149.94 from the Defendants, solidarily, on his behalf and on behalf each of the Class members;
- 22.1 Lastly, given the Defendants’ conduct following the institution of this class action and their failure to reimburse the Applicant up until present, the Applicant hereby claims the additional amount of \$100 for himself and per Class member in punitive damages;
- 22.2 Punitive damages are appropriate in this case, especially when comparing the conduct of the Defendants with other corporations who actually fully refunded season passes that were prepaid at the beginning of the season and cut short due to COVID-19. For instance, when the Montreal Canadiens’ season was cancelled prematurely on March 12, 2020 with four (4) “fixed” regular season games remaining, the club offered its season pass holders the option of a **100% cash reimbursement** for the games not played, or a **150% credit** towards the price of season tickets for the following year, as it appears from a copy of the email sent by the Sales and Development department to all of their season ticket holders, communicated herewith as **Exhibit P-11**;

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

23. The recourses of the Class members raise identical, similar or related questions of fact or law, namely:
 - a) Are Class members entitled to restitution or at least to a partial reimbursement, and, if so, in what amount?
 - b) Are Class members entitled to punitive damages of \$100 each pursuant to the C.P.A.?
24. All Class members are in the same position as the Applicant vis-à-vis the Defendants;
25. The situation is the same for all Class members, regardless of how much they paid for their Tonik Pass (depending on their age category), as the 2019-2020 Tonik calendar (Exhibit P-4) applies the same to all of them;

C) THE COMPOSITION OF THE CLASS

26. 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;
27. The Applicant conservatively estimates the number of persons included in the Class to be in the thousands;
28. On its website (Exhibit P-2), AMC states that Mont-Tremblant has a capacity of 27,230 skiers per hour and that it has 1164 snowguns (these snowguns also demonstrate that skiing could easily continue into the month of May in Mont-Tremblant);
29. According to a March 24, 2018 La Presse article titled "*Les nouvelles «passes» de Tremblant ne passent pas*", the Tonik pass is one of the only two ski passes that the Defendants offer since AMC's purchase of the Mont-Tremblant ski resort, Applicant disclosing **Exhibit P-10**;
30. The names and addresses of all persons included in the Class are not known to the Applicant, however, are all in the possession of the Defendants since Class members must provide their information before purchasing the Tonik pass;
31. Class members are very numerous and are dispersed across the province, across Canada and elsewhere;
32. 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;
33. 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;

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

34. The Applicant requests that he be appointed the status of representative plaintiff for the following main reasons:
 - a) He is a member of the Class and has a personal interest in seeking the conclusions that he proposes herein;
 - b) He is competent, in that he has the potential to be the mandatary of the action if it had proceeded under article 91 of the *Code of Civil Procedure*;
 - c) His interests are not antagonistic to those of other Class members;

35. Additionally, the Applicant respectfully adds that:
- a) He contacted and mandated his attorneys to file the present application for the sole purpose of having his rights, as well as the rights of other Class members, recognized and protected so that they can receive restitution according to the law;
 - b) He has the time, energy, will and determination to assume all the responsibilities incumbent upon him in order to diligently carry out the action;
 - c) He cooperates and will continue to fully cooperate with his attorney;
 - d) He has read this Application prior to its court filing and reviewed the exhibits in support thereof;
 - e) He understands the nature of the action;

II. DAMAGES

36. Despite initially promising to refund their clients (Exhibit P-5), the Defendants have refused to provide restitution to skiers who purchased the Tonik Pass and add-ons;
37. In light of the foregoing, the following damages may be claimed solidarily against the Defendants:
- a) Reimbursement of 22.69% of the price paid for the Tonik Pass (based on the different pricing categories by age); and
 - b) Reimbursement of 22.69% of the price paid for the *Tonik Forfait de privilèges* add-on to the Tonik Pass (in the case of Class members who purchased an add-on).

III. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

38. The action that the Applicant wishes to institute on behalf of the members of the Class is an action in restitution or for a reduction of obligations pursuant to s. 272(c) C.P.A., as well as punitive damages;
39. The conclusions that the Applicant wishes to introduce by way of an originating application are:

ALLOW the class action of the Representative Plaintiff and the members of the Class against the Defendants;

CONDEMN the Defendants, solidarily, to pay the Representative Plaintiff the amount of \$149.94 in restitution or as a reduction of obligations;

CONDEMN the Defendants, solidarily, to pay the Class members restitution or a

partial reimbursement in the form of a refund representing 22.69% of the purchase price for the 2019-2020 Tonik Pass (and add-ons such as the *Tonik Forfait de privilèges*) and **ORDER** that this condemnation be subject to collective recovery;

CONDEMN the Defendants, solidarily, to pay the Representative Plaintiff and all Class members \$100 each on account of punitive damages;

CONDEMN the Defendants, solidarily, to pay interest and the additional indemnity on the above sums according to law from the date of service of the Application to authorize a class action and **ORDER** that this condemnation be subject to collective recovery;

ORDER the Defendants, solidarily, to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

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

CONDEMN the Defendants, solidarily, 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;

IV. JURISDICTION

40. The Applicant requests that this class action be exercised before the Superior Court of the province of Quebec, in the district of Montreal, because he is a consumer and resides in this district (art. 3149 C.C.Q. and s. 11.1 C.P.A.) and because many of the Class members reside in Montreal;
41. Pursuant to article 3148(1) C.C.Q., the Applicant has standing to represent an international class and the Superior Court of Quebec is the appropriate forum.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

AUTHORIZE the bringing of a class action in the form of an originating application in restitution or for a reduction of obligations pursuant to s. 272(c) C.P.A., as well as punitive damages;

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

Class:

All consumers who purchased a 2019-2020 "Tonik" ski pass for Mont-Tremblant (including persons who also purchased the "*Privilege Bundle*" / "*Tonik Forfait de privilèges*" add-on);

or any other Class to be determined by the Court;

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

- a) Are Class members entitled to restitution or at least to a partial reimbursement, and, if so, in what amount?
- b) Are Class members entitled to punitive damages of \$100 each pursuant to the C.P.A.?

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

ALLOW the class action of the Representative Plaintiff and the members of the Class against the Defendants;

CONDEMN the Defendants, solidarily, to pay the Representative Plaintiff the amount of \$149.94 in restitution or as a reduction of obligations;

CONDEMN the Defendants, solidarily, to pay the Class members restitution or a partial reimbursement in the form of a refund representing 22.69% of the purchase price for the 2019-2020 Tonik Pass (and add-ons such as the *Tonik Forfait de privilèges*) and **ORDER** that this condemnation be subject to collective recovery;

CONDEMN the Defendants, solidarily, to pay the Representative Plaintiff and all Class members \$100 each on account of punitive damages;

CONDEMN the Defendants, solidarily, to pay interest and the additional indemnity on the above sums according to law from the date of service of the Application to authorize a class action and **ORDER** that this condemnation be subject to collective recovery;

ORDER the Defendants, solidarily, to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

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

CONDEMN the Defendants, solidarily, 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;

DECLARE that all members of the Class that have not requested their exclusion,

be bound by any judgement 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 judgement 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 judgement to be rendered herein in the “News” sections of the Saturday editions of La Presse, the Journal de Montréal, the Montreal Gazette and any other appropriate newspaper;

ORDER that said notice be published on the Defendants’ website, Facebook page and Twitter account, in a conspicuous place, with a link stating “Notice of a Class Action”;

ORDER the Defendants to send an Abbreviated Notice by regular mail and by e-mail to each Class member, to their last known physical and e-mail address, with the subject line “Notice of a Class Action”;

RENDER any other order that this Honourable Court shall determine;

THE WHOLE with costs including publication fees.

Montreal, September 18, 2020

(s) LPC Avocat Inc.

LPC AVOCAT INC.

Mtre Joey Zukran

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ORIGINAL

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