

ATTORNEY GENERAL OF THE STATE OF NEW YORK
ANTITRUST BUREAU

In the Matter of

**Investigation by LETITIA JAMES,
Attorney General of the State of New York, of**

**TOGG HOLDINGS, LLC, TOGG MOUNTAIN,
LLC, and John H. Meier,**

Respondents.

Assurance
No. 22-070

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“OAG”) commenced an investigation pursuant to Section 343 of the New York General Business Law, Section 63(12) of the New York Executive Law, the Donnelly Act, and Section 7 of the Clayton Act (“the OAG Investigation”) concerning potential harm to competition caused by Intermountain Management, Inc.’s (“Intermountain”) acquisition (“the Acquisition”) of Toggenburg Mountain (“Toggenburg”) from Togg Mountain, LLC, Togg Holdings, LLC (“the Togg Corporations”), and John and Christine Meier (“the Meiers”).¹ The OAG Investigation focused on the potential anticompetitive effects of the Acquisition on consumers in New York State. As part of the investigation, OAG, among other things, obtained testimony from market participants, gathered and analyzed relevant market data, and reviewed documents and information produced by Intermountain and John Meier’s ongoing skiing business, Greek Peak Mountain Resort (“Greek Peak”).

¹ Christine Meier was the majority shareholder of the relevant corporations but was largely uninvolved in the negotiation of the Acquisition and the day-to-day operations of any of the relevant Ski resorts.

This Assurance of Discontinuance (“Assurance”) contains the findings of the OAG Investigation and the relief agreed to by OAG, the Togg Corporations, and John Meier (collectively “Parties”).

OAG’s FINDINGS

1. The relevant product market is season pass skiing and snowboarding at ski resorts (“Season-Pass Skiing”). Ski resorts are facilities that offer downhill skiing, and some combination of additional amenities including restaurants, ski schools, pro shops, lounges, professionally operated ski-lifts, and ski patrols. The relevant geographic market is the Syracuse Metropolitan Statistical Area (“Syracuse Area”). Post-Acquisition, Intermountain is dominant in the relevant market, facing only limited competition.

2. Intermountain was founded in 2014. Prior to the Acquisition, Intermountain owned and operated two ski resorts in the Syracuse area: Song Mountain (“Song”), acquired by Intermountain’s predecessor entity in 2000; and Labrador Mountain (“Labrador”), acquired by Intermountain in 2014. Song, located in Tully, NY, provides many trails for skiing and snowboarding, and offers a full-service restaurant and a lounge. Labrador, in Truxton, NY, also offers many trails, as well as a full-service restaurant and a cafeteria.

3. Since Intermountain’s formation in 2014, it has operated Song and Labrador jointly and has offered a single season pass valid for admission at both facilities. Prior to the Acquisition, Intermountain sold over 7,000 season passes annually.

4. Toggenburg first opened in 1953 and was owned and operated by members of the Hickey family until 2015. Toggenburg offered many trails, and a full-service restaurant. Prior to the Acquisition, Toggenburg sold around 1,500 to 2,000 season passes annually.

5. John and Christine Meier, through the Togg Corporations, owned Toggenburg immediately prior to the Acquisition. In 2013, John Meier, together with a business partner,

Marc P. Stemerman, acquired Greek Peak. In 2015, John Meier acquired Toggenburg, again in partnership with Mr. Stemerman. John Meier purchased Mr. Stemerman's partnership interests around December 2019, and thus, through the Togg Corporations, became the sole owner of Toggenburg, and Greek Peak. John Meier later transferred majority ownership of the Togg Corporations to Christine Meier, but retained sole ownership of Greek Peak.

6. Season pass sales, along with the additional sales of incidentals (*e.g.*, lessons, dining, etc.) generated by season pass holders, account for a considerable amount of a ski resort's annual revenue. In addition to being a significant source of revenue, season pass sales volumes vary less from season to season than do day pass sales volumes. Thus, the season pass business is critical to the overall success of a ski resort.

7. For season pass holders, day passes are not reasonable substitutes.² Season passes are many times the price of a day pass, and as such they are an economical option only for skiers who know they will visit the same ski resort numerous times per season. Because of this, Season pass holders at Toggenburg, Song, and Labrador typically reside in the Syracuse area.

8. Because of their geographic proximity, Toggenburg, Song and Labrador have historically competed against each other. At all relevant times, Intermountain has closely competed with Toggenburg for season pass sales.

9. From at least 2015 until the Acquisition in 2021, Intermountain made numerous attempts to acquire Toggenburg. These efforts were motivated by the long-held belief of Intermountain's principal, Peter Harris, that there was "excess capacity" (*i.e.*, too many competitors) in the Syracuse Area market, which he could eliminate by acquiring and closing Toggenburg.

² Whether the acquisition harmed competition in the market for day passes is outside the scope of OAG's Findings as set forth herein.

10. The Meiers came to understand that Intermountain intended to close Toggenburg, but the Acquisition did not require Intermountain to close Toggenburg.

11. Intermountain's only business rationale for acquiring and then shuttering Toggenburg was, according to Mr. Harris, "to purchase market share without the associated expenses of opening another ski hill."

12. A critical assumption underlying this rationale was that many Toggenburg season pass holders would purchase a season pass at Intermountain, such that Toggenburg's closure would "drive th[ose] same guests to [Intermountain's] two mountains instead."

13. Analysis of available post-Acquisition transaction records indicates that Intermountain's assumption was correct, as many Toggenburg season pass holders switched to Intermountain's season pass in the ski season directly following Toggenburg's closure.

14. The high proportion of actual diversion of season pass sales from Toggenburg to Intermountain demonstrates that Intermountain is in the relevant market, that Toggenburg was the next best substitute to Intermountain's two-mountain offering, and that competition and consumers have been significantly harmed as a result.

15. Potential entrants into Season-Pass Skiing face significant barriers. In order to run a ski resort, operators need, among other things, (1) ownership or long-term leasehold over a large contiguous area within the Syracuse Area comprising a significant amount of hillside terrain suitably improved for the designation and maintenance of several skiing and snowboarding trails, (2) investment capital and ability to purchase either new fixed equipment, such as chair lifts, or used equipment at a reasonable price and proximity, and (3) local land-use, environmental, and other regulatory approvals.

16. OAG finds that a potential new Season-Pass Skiing competitor seeking to enter the Syracuse Area could not secure each of items (1) through (3) mentioned in paragraph 15 within a reasonable time.

17. Given the current entry barriers, OAG finds that Intermountain's monopoly power in the relevant market is unlikely to face serious challenges.

18. Accordingly, OAG finds that the Acquisition has substantially lessened and/or is likely to substantially lessen competition in the market for Season-Pass Skiing in the Syracuse Area, in violation of the Donnelly Act (Gen. Bus. Law § 340 *et. seq.*), the Clayton Act § 7 (15 U.S.C. § 18), and Executive Law § 63(12).

19. OAG further finds that, in connection with the Acquisition, Intermountain induced the Meiers, and the Togg Corporations through which they held and controlled Toggenburg, to enter a covenant, which the parties did in fact enter on or about August 3, 2021, by which the Meiers agreed not to compete against Intermountain for a period of five years ("the Noncompete Agreement"). The Noncompete Agreement limited the activities of the Meiers. The Noncompete Agreement had an exclusion providing that the "ownership, management, finance, control, participation and operation" of Greek Peak by the Meiers would not be considered violations of the Noncompete Agreement.

20. The Noncompete agreement contained provisions that forbade the Meiers from "directly or indirectly: . . . (iii) induc[ing] or attempt[ing] to induce any employee of Buyer [Intermountain] to leave the employ of Buyer; (iv) in any way interfer[ing] with the relationship between Buyer and any employee of Buyer; or (v) employ[ing], or otherwise engag[ing] as an employee, independent contractor, or otherwise, any employee of Buyer, without prior written consent of Buyer which consent shall not be unreasonably withheld."

21. OAG has not identified any procompetitive justification for the Noncompete Agreement. There is no indication, for example, that any party to the Agreement believed that any goodwill Intermountain purchased in connection with the Acquisition was at risk of recapture by Mr. Meier in the absence of such agreements.

22. OAG finds that John Meier's and the Togg Corporations' entry into the Noncompete Agreement with Intermountain to be in violation of the Donnelly Act (Gen. Bus. Law § 340 *et seq.*), the Sherman Act § 1 (15 U.S.C. § 1), and Executive Law § 63(12).

23. OAG further finds that Mr. Meier previously entered two similar noncompete agreements in connection with earlier transactions involving Toggenburg.

24. The first, a November 6, 2015 agreement between Togg Holdings LLC., a corporation wholly owned and controlled at the time by Mr. Meier, and E. James Hickey ("Hickey Agreement"), executed contemporaneously with Mr. Meier and Mr. Stemerman's acquisition of Toggenburg Mountain from Mr. Hickey, broadly restricts Mr. Hickey from competing in any skiing or restaurant business within seventy miles of Toggenburg for a period of seven years.

25. The second, a November 21, 2019 agreement between Mr. Meier and his former business partner Mr. Stemerman ("Stemerman Agreement"), executed contemporaneously with Mr. Meier's purchase of Mr. Stemerman's outstanding membership interests in Greek Peak Holdings, LLC and Togg Holdings, LLC, broadly prevents Mr. Stemerman from competing in any skiing-related business within a fifty-mile radius of Greek Peak or Toggenburg for a period of five years.

26. OAG finds that both the Hickey and Stemerman Agreements are overbroad in duration and geographic scope and not reasonably tailored to any legitimate procompetitive justification.

27. Accordingly, OAG finds that Mr. Meier's (and/or the Togg Corporations', as applicable) entry into the Hickey and Stemerman Agreements was in violation of the Donnelly Act (Gen. Bus. Law § 340 *et seq.*), the Sherman Act § 1 (15 U.S.C. § 1), and Executive Law § 63(12).

28. Mr. Meier and the Togg Corporations neither admit nor deny OAG's Findings 1-27 above.

29. OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. THEREFORE, OAG is willing to accept this Assurance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding for potential violations of Executive Law § 63(12), the Donnelly Act (Gen. Bus. Law § 340 *et. seq.*), the Sherman Act § 1 (15 U.S.C. § 1), and the Clayton Act § 7 (*id.* § 18).

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

RELIEF

30. Mr. Meier represents that his wholly owned corporation, Greek Peak Mountain Resort, shall not in the future restrict its activities according to any term of the Noncompete Agreement. For the avoidance of doubt, Mr. Meier further represents that the Noncompete Agreement will be treated as null and void.

31. Mr. Meier (and/or the Togg Corporations, as applicable) shall terminate the Hickey and Stemerman Agreements within ten (10) days of this Assurance. Mr. Meier (and the Togg Corporations) represent they are not party to any other agreements relating to ski resorts with similar effects as the Hickey or Stemerman Agreements, either written or unwritten, that

affect the ability of others to compete, solicit customers or employees, or hire within New York state.

32. Until the date when OAG notifies Mr. Meier and the Togg Corporations that the OAG's Investigation is concluded, Mr. Meier agrees to continue to provide full, complete, and prompt cooperation with the OAG in related proceedings and actions, against any other person or entity. Mr. Meier and the Togg Corporations agree to use their best efforts to secure the full and truthful cooperation of current Greek Peak officers, directors, employees, and agents with the ongoing OAG Investigation and any related proceedings and actions.

33. Cooperation shall also include, but is not limited to: (a) voluntarily, and promptly, producing, without service of subpoena, to the extent permitted by law or regulation, all information, documents, or other tangible evidence reasonably requested by OAG that relates to the OAG Investigation; (b) promptly providing to OAG an oral proffer describing all facts that are subsequently learned by Mr. Meier related to any noncompete agreement; (c) attending, if requested by OAG on reasonable notice, any proceedings (including but not limited to meetings, interviews, hearings, depositions, grand jury proceedings, and trials) and answering completely, candidly, and truthfully any and all inquiries relating to the subject matter of the OAG Investigation that may be put to Mr. Meier by OAG (or any deputies, assistants, or agents), without the necessity of a subpoena; (d) working, if requested by OAG, to ensure that current Greek Peak officers, directors, employees, and/or agents attend, on reasonable notice, any proceedings (including but not limited to meetings, interviews, hearings, depositions, grand jury proceedings, and trials) and answer completely, candidly, and truthfully any and all inquiries relating to the subject matter of the OAG Investigation that may be put to such persons by the OAG (or any deputies, assistants, or agents), without the necessity of a subpoena.

34. The cooperation set forth herein is subject to Mr. Meier's and the Togg Corporations' right to withhold documents or testimony on the grounds of privilege, work-product, or other legal doctrine, and Mr. Meier and the Togg Corporations do not waive any privilege, work-product, or other legal doctrine applicable to disclosure of information by cooperating with the OAG Investigation.

35. For four (4) years following the date of this Assurance, Mr. Meier and the Togg Corporations, or any entity they control in part or whole, shall promptly, within 15 days of becoming aware of a relevant offer, notify OAG if they intend to make an offer to acquire, or merge Greek Peak with, another ski resort business, or if they receive, solicit, or accept written offers to sell or merge any of their ski resorts from any party.

36. For four (4) years following the date of this Assurance, Mr. Meier and the Togg Corporations shall provide OAG with a certification affirming their compliance with the requirements set forth in this Assurance, to be submitted to OAG at the beginning of each year, starting on January 1, 2023. This certification shall be in writing and be signed by Mr. Meier. For the remaining three (3) years, a certificate of compliance shall be submitted to OAG on an annual basis. In any case where the circumstances warrant, OAG may require Mr. Meier to file an interim certification of compliance upon thirty (30) days' notice.

37. Mr. Meier and the Togg Corporations agree that they will pay a penalty by means of wire transfer payable to the State of New York in the amount of \$195,000 (one hundred ninety-five thousand dollars) within ten (10) days of this Assurance.

MISCELLANEOUS

Subsequent Proceedings:

38. Respondents expressly agree and acknowledge that OAG may initiate a subsequent investigation, civil action, or proceeding to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to Paragraph 44, and agree and acknowledge that in such event:

- a. any statute of limitations or other time-related defenses are tolled from and after the effective date of this Assurance;
- b. OAG may use statements, documents or other materials produced or provided by Respondents prior to or after the effective date of this Assurance;
- c. any civil action or proceeding must be adjudicated by the courts of the State of New York, and that Respondents irrevocably and unconditionally waive any objection based upon personal jurisdiction, inconvenient forum, or venue; and
- d. evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law pursuant to Executive Law § 63(15).

39. If a court of competent jurisdiction determines that Respondents have violated the Assurance, Respondents shall pay to OAG the reasonable cost, if any, of obtaining such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

Effects of Assurance:

40. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of Respondents. Respondents shall include any such

successor, assignment or transfer agreement a provision that binds the successor, assignee or transferee to the terms of the Assurance. No party may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of OAG.

41. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

42. Any failure by OAG to insist upon the strict performance by Respondents of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and OAG, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all provisions of this Assurance to be performed by Respondents.

Communications:

43. All notices, reports, requests, and other communications pursuant to this Assurance shall reference Assurance No. 22-070, shall be in writing, and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows: If to Respondents, to John Meier, or in his/her absence, to Christine Meier. If to OAG, to the person holding the title of Bureau Chief, Antitrust Bureau (at the email address to be provided to Mr. Meier via counsel by OAG).

Representations and Warranties:

44. OAG's Antitrust Bureau represents that the Antitrust Bureau has no other investigation or action against John Meier, Christine Meier, the Togg Corporations, Greek Peak, or any other company owed by any of the foregoing concerning Toggenburg, the Acquisition, or any known associated noncompete agreements which only include the 2021 agreement with Intermountain Management, the Stemerman Agreement, and the Hickey Agreement.

45. OAG has agreed to the terms of this Assurance based on, among other things, the representations made to OAG by Respondents and their counsel and OAG's own factual investigation as set forth in Findings, Paragraphs 1-26 above. Respondents represent and warrant that neither they nor their counsel has made any material representations to OAG that are inaccurate or misleading. If any material representations by Respondents or their counsel are later found to be inaccurate or misleading, this Assurance is voidable by OAG in its sole discretion.

46. No representations, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Respondents in agreeing to this Assurance.

General Principles:

47. Unless a term limit for compliance is otherwise specified within this Assurance, Respondents' obligations under this Assurance are enduring. Nothing in this Agreement shall relieve Respondents of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

48. Respondents shall not in any manner discriminate or retaliate against any of their employees, including but not limited to employees who cooperated or are perceived to have cooperated with the investigation of this matter or any future investigation related to enforcing this agreement.

49. Respondents agree not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any finding in the Assurance or creating the impression that the Assurance is without legal or factual basis. Nothing in this paragraph affects

Respondents' right to take legal or factual positions in litigation or other proceedings in which OAG is not a party.

50. Nothing contained herein shall be construed to limit the remedies available to OAG in the event that the Respondents violate the Assurance after its effective date.

51. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.

52. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

53. Respondents acknowledge that they have entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

54. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

55. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

56. This Assurance may be executed in multiple counterparts by the parties hereto. All counterparts so executed shall constitute one agreement binding upon all parties, notwithstanding that all parties are not signatories to the original or the same counterpart. Each counterpart shall be deemed an original to this Assurance, all of which shall constitute one agreement to be valid as of the effective date of this Assurance. For purposes of this Assurance, copies of signatures shall be treated the same as originals. Documents executed, scanned and transmitted electronically and electronic signatures shall be deemed original signatures for

purposes of this Assurance and all matters related thereto, with such scanned and electronic signatures having the same legal effect as original signatures.

57. The effective date of this Assurance shall be October ²¹, 2022.

LETITIA JAMES
Attorney General of the State of New York
28 Liberty Street
New York, NY 10005

By: 
Benjamin Cole, Esq.
Assistant Attorney General, Antitrust Bureau

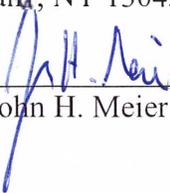
Tal Matar Elmatad, Esq.
Assistant Attorney General, Antitrust Bureau

Amy McFarlane, Esq.
Deputy Chief, Antitrust Bureau

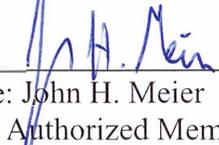
Elinor R. Hoffmann, Esq.
Chief, Antitrust Bureau

Chris D'Angelo, Esq.
Executive Deputy Attorney General for
Economic Justice

JOHN H. MEIER
2177 Clute Road
Cortland, NY 13045

By: 
John H. Meier

Togg Holdings, LLC

By: 
Name: John H. Meier
Title: Authorized Member

Togg Mountain, LLC

By: John H. Meier

Name: John H. Meier

Title: Authorized Member

STATE OF New York)
) ss:
COUNTY OF Chemung)

On the 18th day of October in the year 2022 before me personally came John Meier to me known, who, being by me duly sworn, did depose and say that they reside at 2177 Clute Rd, Cortland; and signed their names to said instrument.

Sworn to before me this
18th day of October 2022.


NOTARY PUBLIC

PATRICIA D. KETTER
Notary Public, State of New York
Chemung County No. 01KE6292105
Commission Expires October 28, 2025