At a term of the of the Supreme Court of the State of New York, held in and for the County of Onondaga on September 18, 2024.

STATE OF NEW YORK
COUNTY OF ONONDAGA SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK, by and through LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

-against-

INTERMOUNTAIN MANAGEMENT, INC.,

Defendant.

DECISION

Index No.: 008588/2022
Motions # 2 and 3

APPEARANCES:

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ANTONACCI II, J.S.C.

Currently pending before the Court are two motions: (1) a motion filed by plaintiff, the People of the State of New York, represented by the New York State Office of the Attorney General (OAG), seeking an order granting it summary judgment and, inter alia, ordering the divestiture of certain property acquired by defendant Intermountain Management, Inc. (Intermountain) (NYSCEF Doc Nos. 50-129 [Motion # 2]); and (2) a motion filed by Intermountain, seeking an

order granting it summary judgment and dismissing the complaint (Doc Nos. 130-142 [Motion # 3]). Each party has also filed papers in opposition to the other's motion, and reply papers have followed (Doc Nos. 144-150, 151-156). The Court has considered these filings in rendering its determination (*see generally* CPLR 2219 [a]).

A. General Overview and Initial Pleadings

This an antitrust action brought by OAG, premised on Intermountain's allegedly anticompetitive acquisition and shuttering of a competitor's ski area. As discussed in greater detail below, at all relevant times, Intermountain has owned and operated two ski areas located in Cortland County: Song Mountain (Song) and Labrador Mountain (Labrador). This action concerns Intermountain's purchase and closure of Toggenburg Mountain (Toggenburg), located in Fabius, New York.

OAG's complaint interposes three causes of action. Count 1 alleges that Intermountain's acquisition of Toggenburg violates New York's Donnelly Act (General Business Law § 340 *et seq.*) by giving Intermountain a monopoly in the season pass skiing market in the relevant geographic market that OAG's complaint defines as the "Syracuse Area"—"all areas that can be accessed by car from downtown Syracuse in approximately 30 minutes or less" (Doc No. 1 at ¶¶ 43, 93). Even if the acquisition did not give Intermountain a monopoly in the strictest sense, OAG alleges that Intermountain's actions harmed consumers by giving it an undue concentration of market control without any procompetitive benefit (Doc No. 1 at ¶¶ 94-97).

Count 2 alleges that Intermountain also violated the Donnelly Act by entering into a "Non-compete Agreement (and No-poach provision)" with the seller of Toggenburg, John Meier (Doc No. 1 at ¶¶ 12, 98-103). OAG asserts that the provision prevents Meier from operating a competing

ski resort and hiring Intermountain employees—measures that amplify the anticompetitive affects of the acquisition and closure of Toggenburg (Doc No. 1 at ¶¶ 12-13).

Count 3 alleges that Intermountain's actions also amounted to a violation of New York Executive Law § 63 (12), which proscribes "repeated fraudulent or illegal acts" (Doc No. 1 at ¶¶ 104-107).

Intermountain filed an answer, denying virtually all of the complaint's allegations (*see generally* Doc No. 13).

B. The Parties' Motions for Summary Judgment

1. Material Facts Upon the Parties' Motions

The parties have each filed statements of material facts in support of their respective motions, as well as responses to those statements (*see* Doc Nos. 126, 150, 153 [Motion # 2]; Doc Nos. 142, 145 [Motion # 3]).[1] As a general matter, the Court notes that a statement of material facts, and the counterstatement filed by the responding party, have their greatest utility when they comply with the uniform court rules—namely, when they are short and concise, when they are supported by a citation to record evidence, and when they concern facts, rather than conclusions, argument, or hairsplitting for its own sake (*see generally* 22 NYCRR § 202.8-g [a]). These observations notwithstanding, the Court declines OAG's invitation to deem, in blanket fashion, any of its statements admitted based upon the purportedly insufficient counterstatements of Intermountain (*see generally* Doc No. 153 at 1). The Court has considered the parties' respective statements on both motions, as well as the record evidence cited in support of the parties' positions.

[1] These documents, and many of the supporting papers underlying them, were filed under seal with the Court's permission because they contain what the parties' agree to be commercially sensitive customer and financial data.

a. Downhill Skiing in Central New York and the Entities Central to the Dispute

Although the parties disagree on the legal import of the relevant facts, they do not meaningfully dispute the nature of downhill skiing as a recreational activity, the basic history of the facilities in question, or the transaction that gave rise to this action. Downhill skiing—also known as alpine skiing—is a popular sport in upstate New York, and the ski facilities at which it is enjoyed generally feature connecting trails, lifts, "snow-making infrastructure and grooming equipment to maintain desirable snow conditions" (Doc No. 126 at ¶¶ 1-2). Other amenities or services that are central to a full-service ski facility's success may include lodges, restaurants or cafeterias, locker rooms, and pro shops (Doc No. 126 at ¶ 3).

Downhill skiing is a seasonal activity, and a primary driver of the length of any given ski season, and the financial success of a given season, is the weather (*see generally* Doc No. 60 at 42-43 [investigative hearing testimony of Peter Harris]; Doc No. 63 at 57-59 [deposition of John Meier]). Depending upon winter weather conditions, a ski facility's season may consist of 100 days or more and begin as early as November and stretch to as late as April; in years with less favorable conditions, the season may be 60 days or less (Doc No. 60 at 42-43; Doc No. 63 at 26-27).

Ski areas typically offer access to their facilities in the form of day passes (or tickets) and season passes, and, naturally, the sale of passes is a significant source of a facility's revenue (*see e.g.* Doc No. 60 at 57-60; Doc No. 63 at 25-26). Season passes provide the purchaser unlimited access to a ski area for an entire season, and may cost as much as seven times as the price of a day pass (Doc No. 126 at ¶ 8).

The two individuals central to the transaction in question are Peter Harris and John Meier. Harris is Intermountain's majority shareholder and operator (Doc No. 126 at ¶ 54), and

Intermountain owns Song and Labrador (Doc No. 142 at ¶ 2). Song, located in Preble (about a 25-minute drive from downtown Syracuse), has 24 trails on 93 skiable acres, and its mountain features a 700-foot vertical drop (Doc No. 126 at ¶¶ 17-18; Doc No. 142 at ¶¶ 3-4). Harris has owned and operated Song since 2000 (*see e.g.* Doc No. 60 at 19, 27, 45). Labrador, located in Truxton (about a 30-minute drive from downtown Syracuse) and acquired by Intermountain in 2014, consists of 23 trails on 250 acres, and its mountain also has a 700-foot vertical drop (Doc No. 126 at ¶¶ 19-21; Doc No. 142 at ¶¶ 5-6). Intermountain offers a "combined" season pass which allows holders "to ski at either Song or Labrador Mountain" for the duration of the season (Doc No. 142 at ¶ 7; *see also* Doc No. 60 at 46, 51).

Meier (through corporate entities that he and his wife controlled) previously owned the ski area at the center of this action—Toggenburg Mountain (Doc No. 63 at 29; *see also* Doc No. 142 at ¶¶ 13-14). Toggenburg is located in Fabius, New York (Doc No. 142 at ¶ 8). An approximate 30-minute drive from downtown Syracuse, Toggenburg features 22 trails on 85 skiable acres and a 520-foot vertical drop (Doc No. 126 at ¶ 23; Doc No. 142 at ¶ 9). Meier acquired Toggenburg in or around 2015 from its previous owner, Eugene Hickey (Doc No. 56 at ¶¶ 4-5 [Hickey affidavit]).

Meier owns another ski area (Doc No. 63 at 86): Greek Peak Mountain Resort is located in Virgil, New York—about a 45-minute drive from downtown Syracuse—and has 38 trails on 220 skiable acres and a 952-foot vertical drop (Doc No. 126 at ¶¶ 24, 26; Doc No. 142 at ¶¶ 10-11, 15; Doc No. 61 at 63). The parties agree that it is the "closest full-service skiing facility to Syracuse that is not owned by Intermountain" (Doc No. 126 at ¶ 25). Greek Peak offers season passes for access to its mountain (Doc No. 142 at ¶ 12). In fact, Greek Peak is a "four-season resort" that also has a water park, a 151-room lodge, and facilities to host corporate and wedding events (*see*

e.g. Doc No. 63 at 28, 175, 298). Toggenburg, in contrast, was "exclusively a ski mountain" without the "other amenities" that Greek Peak boasted, and passes to Toggenburg were "far less expensive" (Doc No. 63 at 29-30).

b. Intermountain's Interest in, and Acquisition of, Toggenburg

Intermountain's interest in acquiring Toggenburg dates back to at least 2015, when Harris made an offer to its then-owner, Hickey, to "outbid any other offerors" (Doc No. 56 at ¶ 5). Despite Harris's aggressive interest, Hickey sold Toggenburg to Meier because he feared that Harris "intended to close Toggenburg" to the detriment of Syracuse-area skiers (Doc No. 56 at ¶ 5).

Although Meier acquired Toggenburg from Hickey, Harris's interest did not wane. Intermountain—whether through Harris or his business partner and minority shareholder, Richard Sykes—conveyed to Meier a desire to buy Toggenburg as early as 2017 (Doc No. 60 at 69-71, 74-75). In a February 2017 e-mail response to one such expression, Meier noted that he was "happy" with owning Toggenburg, given its "good brand, excellent location, Syracuse market share and, for what it is, a small, tight ski area in the suburbs of Syracuse, a marketing play for us, if nothing else" (Doc No. 60 at 75).

In March 2018, Harris and Sykes sought to test the waters further, but they assumed that Meier "wouldn't talk to" them (Doc No. 60 at 95). They orchestrated a "faux buy"—as an apparent ruse, they recruited an attorney to meet with Meier and/or his business partner, Marc Stemerman, to explore their interest in selling Toggenburg (Doc No. 60 at 95-98). The attorney met with Meier and reported back to Sykes, who explained, in a May 2018 text message to Harris:

> [Wednesday, May 30, 2018 11:11:02 AM] Sykes: Katie talked with Meier for half hour. Tog not for sale only rumors. He would sell it for the right number, but not to a competitor. They had an offer from national company but did not pan out. Would not provide any info without full disclosure. He saidTog [*sic*] does not make any money,

> but is foot in the Syr market. Sounds pretty much what he told us !" (Doc No. 31 at NYOAG-0000880).

In a September 2018 e-mail to Meier and Stemerman, Harris stated, "If you're so inclined, I'm still interested in Togg. We could probably even pull it off this year[.] There's no reason we can't make some kind of interaction positive for all of us" (Doc No. 86 at GP01123). A couple days later, Meier forwarded the e-mail to his "top management of Greek Peak" (Doc No. 63 at 134), explaining Intermountain's regular overtures and Meier's view of the ski area market:

> "As you may know, Peter Harris has been interested in acquiring TOG for many years. During Jim Hickey's regime, he offered to pay 250K above whatever we were willing to pay.
>
> On several subsequent occasions, annual ritual, Peter has approached myself personally (3 times) during lunch in Cortland and visits to GP. I've laughed off the interest stating that TOG keeps him honest in the Syracuse market. Peter feels vulnerable with TOG owned by GP. I know that. We could create a very bad future for him if we wanted to. For instance, by cutting SP rates and daily pass rates. We could model out what several scenarios might do to our P & L at TOG. Over 3 year period, it could be choke off LAB/SONG strategy. Of course, it would certainly negatively impact our P & L (my guess on assumptions underpinning the pro forma). Something to discuss. By divesting TOG, we would in effect be writing off the Syracuse market IMO. So, we know that TOG presents some management challenges . . ." (Doc No. 86 at GP01122-01123).

In his deposition testimony, Meier explained that the "investment thesis behind acquiring Toggenburg" was to make a "marketing play to access our nearest biggest market for Greek Peak" (Doc No. 63 at 137). Toggenburg represented an approximate "30 percent market share" in Syracuse—a geographic area that Greek Peak had been "largely unsuccessful" in penetrating—and Meier hoped that acquiring it would, through "reciprocity," draw Syracuse skiers to Greek Peak (Doc No. 63 at 137-138). Explaining his e-mailed remark that selling Toggenburg would "in effect be writing off the Syracuse market," Meier testified that

> "Toggenburg, Labrador and Song are direct major competitors of one another, and selling it to the owner of – selling it to Intermountain, the owner of Labrador and Song, in effect we would be writing off that market, not to say that we couldn't continue and we will and have and will continue to do so, market to the metro Syracuse area and to that market, but it -- it definitely gave Intermountain significant market share" (Doc No. 63 at 139).

This overarching effort to draw business from Syracuse to Greek Peak was, according to Meier, unsuccessful (Doc No. 63 at 138). Meier noted that "[n]early 95 percent of [Greek Peak's] season pass holders . . . reside in places other than" the "Greater Syracuse area" (Doc No. 61 at 62 ["That's not our market"]) and, in Meier's experience, the acquisition of Toggenburg did not alter those circumstances. He noted his view that a significant factor for many customers was "proximity," particularly in the case of, for example, younger families who engage in night skiing: Toggenburg, even if less impressive in stature than Greek Peak, has the value of being nearby many central New York communities (Doc No. 61 at 85-86).

In late 2019, an opportunity for Intermountain arose: Meier, who had bought out a Greek Peak partner, became receptive to the proposition of selling Toggenburg (Doc No. 126 at ¶ 65; *accord* Doc No. 83 at NYOAG-000888 [text messages between Harris and Sykes]; Doc No. 60 at 117-119 [Harris]). In June 2020, Meier disclosed some financial information about Toggenburg to Harris by e-mail, including the fact that revenues had increased of the 2019-2020 season (Doc No. 60 at 136-139; Doc No. 85 at GP01119). In the e-mail itself, Meier noted, "Not that it matters, but our net is much better" (Doc No. 60 at 138). When asked why Toggenburg's recent profitability would not matter, Harris testified, "I don't know" (Doc No. 60 at 140). Harris acknowledged that, even if he already planned to close Toggenburg down at that point, he would still want to review historical financial information for Toggenburg because "[p]rofit and loss is important" (Doc No. 60 at 141-142).

Harris and Meier exchanged text messages on June 23, 2020, in which Harris thanked Meier for walking him around Toggenburg's grounds (Doc No. 60 at 158-159). In the same message, Harris noted that he was "thinking about the Attorney General" (Doc No. 60 at 160). When asked what this message meant, Harris testified that "Toggenburg had already sold passes for the [2020-2021] season in the spring prior to this," and that, if Meier sold Toggenburg to him, Harris "needed to determine what to do with those people"; they may not want a "pass at Lab or Song," and refunds to those season pass purchasers may be necessary (Doc No. 60 at 160). And, asked why those season pass purchasers would not simply spend their season at Toggenburg as planned, Harris stated, "Because plans weren't finalized" and Harris "had no idea whether the government would even let us open" in light of the COVID-19 pandemic (Doc No. 60 at 161).

In any event, Harris at some point decided that, if he succeeded in acquiring Toggenburg, he would close it down (Doc No. 60 at 165). He denied any recollection of when he made that decision, but acknowledged that it "could have" been before making a purchase offer (Doc No. 60 at 168). In an e-mail to his accountant dated June 17, 2020, Meier explained the prospective deal, Harris's intent to close Toggenburg, and Intermountain's unique posture as a buyer able to secure market dominance:

> "It appears that the owners of LAB/SONG want to acquire TOG from us. They have been inquiring for over a year. I finally agreed to consider but only if we walk away with $2M - 2.5M purchase. **Confidentially, their intent is to shut it down**. This is sad but I have to consider IF the price is right especially if it will de-lever GP balance sheet to closer to $10 M LT debt where it was pre-buyout. That is very interesting to me. I won't give it away and told them I would not sell for below $2 M. **This is a unique buyer as they will capture 90% market share.** So, this deal has nothing to do with multiple of EBITDA. **Its all about 90% of revenue dropping to their bottom line.** So, this buyer will pay more than any financial buyer would consider" (Doc No. 85 at GP01118 [emphasis added]).

A "memorandum of interest" to Meier and signed by Harris, dated July 7, 2020, reiterated Intermountain's interest in purchasing Toggenburg (Doc No. 82). The memorandum also confirmed Meier's assertion that Intermountain was willing to pay more for Toggenburg than other hypothetical buyers (Doc No. 82 ["It is believed by [Intermountain] principals that [Toggenburg] is more valuable to them than to any other unrelated parties. Therefore, [Intermountain] may likely be willing to pay in excess of Fair Market Value for [Toggenburg]"]).

Harris and the Meiers executed a letter of intent for the sale of Toggenburg, dated November 5, 2020 (Doc No. 132). In March 2021, they executed a "purchase and sale agreement," for the Toggenburg real property, for a purchase price of $750,000 (Doc No. 2), and an "asset purchase agreement," representing a $1.5 million purchase of machinery and equipment, furniture and fixtures, and a non-competition covenant (Doc No. 3). Thereafter, the parties also executed a separate "non-competition and confidentiality agreement," prohibiting the Meiers from competing within a 30-mile radius of Toggenburg's property for a period of five years (Doc No. 4 at ¶ 3). The non-competition agreement also prohibited the Meiers from soliciting Intermountain's customers or attempting to induce its employees to leave Intermountain (Doc No. 4 at ¶ 3). A separate clause specified that, notwithstanding these restrictions, "[t]he ownership, management, finance, control, participation and operation of the Greek Peak Mountain Resort . . . by the Meiers" would not "constitute or be deemed to be a breach of" these covenants (Doc No 4 at ¶ 3).

As the end of June 2021 neared, Harris communicated with a marketing firm regarding a press release, emphasizing the need to "put a positive spin on the transaction" and lay the groundwork for "talking points" for future interviews (Doc No. 84 at NYOAG-0003736; *accord* Doc No. 60 at 222). Harris testified that a "positive spin" was needed because he "knew there would be disappointed Toggenburg skiers" who would be learning that "Toggenburg was closing" (Doc No.

60 at 223). His e-mail contained a list of talking points, including that "Song and Labrador both have excess capacity so that increased traffic will be inconsequential," "CNY has excess ski area capacity. Now three ski centers, going to two ski centers," and "Anything else you or I can think of . . ." (Doc No. 84 at NYOAG-0003736-3737).

The sale of Toggenburg to Intermountain closed on August 3, 2021 (Doc No. 126 at ¶ 74).

c. Post-Transaction Events

The press release planned by Harris was disseminated on the same date that the sale closed. In relevant part, the final press release noted that Harris planned to "absorb Toggenburg's operations into that of Song and Labrador" (Doc No. 87 at 1). Harris was quoted as saying that his decision to close Toggenburg's business was not "one we took lightly or made easily," but was animated by his belief that "three ski resorts drawing from the same pool of skiers and snow boarders every year is a challenge" (Doc No. 87 at 2).

An article detailing an interview with Harris was published the next day in Ski Area Management (Doc No. 89 [Ex. 37]). The article noted that Toggenburg, Song, and Labrador are "located within a 12-mile radius of each other, all drawing guests from the Syracuse market and surrounding towns" (Doc No. 89 at 1). In the interview, Harris explained that "[t]he idea here is primarily to purchase market share without the associated expenses of opening another ski hill" (Doc No. 89 at 1). Harris was not opaque about his goal: his purpose was to "drive the same guests to two mountains instead of three," and he noted that he would not resell the property to any buyer who wished to reopen the mountain as a ski area (Doc No. 89 at 1-2)

Thus, Toggenburg was closed for the 2021-2022 ski season, and has been closed since Harris acquired it. According to Harris, for individuals who had already purchased a season pass

for that ski season, Intermountain "agreed on refunding"—that is, purchasers were sent a refund check (Doc No. 60 at 162, 219)

Following the acquisition, the Office of the Attorney General commenced an antitrust investigation "concerning potential harm to competition caused by [Intermountain's] acquisition" of Toggenburg (Doc No. 135 at 1 [Assurance No. 22-070]). Based upon its investigation—including "testimony from market participants" and review of documentation produced by Intermountain and Greek Peak, OAG found that the acquisition of Toggenburg had "substantially lessened and/or is likely to substantially lessen competition in the market for Season-Pass Skiing int eh Syracuse Area" (Doc No. 135 at ¶ 18). According to OAG's assurance of discontinuance, the finding was supported by, inter alia, the "high proportion of actual diversion of season pass sales from Toggenburg to Intermountain," as well as the significant "entry barriers" that potential entrants to the market face (Doc No. 135 at ¶¶ 14-15). Additionally, OAG found that the Meiers had been induced to enter a noncompete agreement that had no identifiable "procompetitive justification" in violation of the Donnelly Act and the Sherman Act (Doc No. 135 at ¶¶ 19-22). OAG also noted that Meier had previously entered into "two similar noncompete agreements" as part of earlier transactions involving Toggenburg: when he purchased it from Hickey in 2015, and when Meier purchased the interest of his former partner, Stemerman, in 2019 (Doc No. 135 at ¶¶ 23-25). These agreements were, according to OAG, overbroad in their duration and geographic reach (Doc No. 135 at ¶ 26).

As part of its discontinuance of its investigation with respect to Meier (who neither admitted nor denied the findings), OAG (among other things) imposed a $195,000 penalty and directed termination of the noncompete agreements with Hickey and Stemerman (Doc No. 135 at ¶¶ 31,

37).[2] The assurance also required that Meier continue to cooperate with the OAG's investigation (Doc No. 135 at ¶¶ 32-33).

Meier testified that, following the closure of Toggenburg, there was "much dissatisfaction" and "discontent" among its former customers (Doc No. 63 at 92). Seeing "an opportunity," for the 2022-2023 ski season, Greek Peak offered the "GOAT pass," an acronym for "greatest of all time" (Doc No. 63 at 92). This was a season pass to Greek Peak released just before Christmas and priced at $195 for a family of any size—a "[s]ignificant, ridiculously cheap discount" that was not offered again for the 2023-2024 ski season (Doc No. 63 at 93, 99; Doc No. 66 at 59-60 [deposition of Wesley Kryger]). A mailer offering the GOAT pass was sent to former Toggenburg customers as a "one-time only" offering (Doc No. 63 at 94). Meier testified that 952 families from Toggenburg purchased the GOAT pass, encompassing approximately 2,700 to 2,800 total passholders for the 2022-2023 season (Doc No. 63 at 96).

d. Expert Analyses

In support of their respective positions on their motions, the parties have each tendered an expert report concerning the alleged market and the effects flowing from Intermountain's acquisition and shuttering of Toggenburg. Kenneth Morales, a data scientist with OAG's Research and Analytics Department, filed an expert affirmation and report on behalf of the People and in support of their position that the area within a 30-minute drive of downtown Syracuse represented a cognizable geographic market (Doc No. 99). Relying on, inter alia, season passholder data provided by Intermountain and Greek Peak, and available sales data from Toggenburg (Doc No. 99, Morales Report, Appx. B ["Material Relied Upon"]), Morales made several observations:

[2] The Court notes that, under the terms of the assert purchase agreement for the sale of Toggenburg to Intermountain, $195,000 of the purchase price was allocated to the covenant not to compete with Intermountain (Doc No. 3 at § 1.4).

(1) Intermountain (i.e., Song and Labrador) and Toggenburg "drew customers primarily from the area in and around Syracuse";

(2) Before and after Toggenburg closed, "Greek Peak drew a small number of customers from Syracuse";

(3) Before Toggenburg closed, Toggenburg's "season passholders principally came from the areas east and southeast of downtown Syracuse. Intermountain's season passholders principally came from in, and around, Syracuse, including areas where Toggenburg drew many of its customers";

(4) After Toggenburg closed, Intermountain's "season pass base grew rapidly in zip codes where the majority of Toggenburg's customers had previously been before the closure," suggesting that "Toggenburg customers were diverted to Intermountain after the closure";

(5) "Collectively, prior to closure, Intermountain and Toggenburg accounted for 84% of Onondaga County Season passholders. Post-closure, Intermountain alone accounted for 83% of Onondaga [C]ounty season passholders. This is consistent with a high absorption of former Toggenburg customers at the Intermountain facilities";

(6) From review of the relevant data, Morales "directly observed a significant number of Toggenburg customers (from its 2021-22 presale), identified by full name and zip code, who appear to have been diverted to Intermountain";

(7) Due to the "timing of the closure and data limitations," Morales was unable to "directly observe the *full* extent of likely diversion, which is likely greater than" he reported. In order to "partially address this," Morales identifies "an even lager number of customers that were *likely* diverted";

(8) Using on "reasonable assumptions," Morales estimated that, "based on names and zip codes, *at least* 61% of Toggenburg's preclosure season passholders were diverted to Intermountain in the 2021-22 season due to the closure of Toggenburg Mountain"—a figure that Morales opines is "likely underinclusive"; and

(9) "Based on the set of customers [Morales] identif[ied] as having been diverted and using the Intermountain 2021-22 pricing," Morales calculated that "revenue in Intermountain's 2021-22 season

> attributable to diversion resulting from Toggenburg's closure is at least $464,741" (Doc No. 99, Expert Report at 4 § 2, Summary of Opinions).

In opposition, Intermountain retained economist Maria Garibotti, who prepared a "rebuttal report" (Doc No. 100). Garibotti's brief was to (1) "assess" the People's "arguments" that a relevant geographic market comprised the "Syracuse Area" as defined by the complaint—that is, "all areas that can be accessed by car from downtown Syracuse in approximately 30 minutes or less," and (2) evaluate the analyses and opinions offered by" Morales (Doc No. 100 at 3 ¶ 10, quoting Doc No. 1 at ¶ 43). Based upon her review of relevant data and filings, Garibotti opined, in part:

> (1) The geographic market proposed by the People is "too narrow," because the proposition underlying it—"that season pass holders are not willing to purchase a season pass at a mountain that is more than 30 minutes away from where they live"—is "unsupported by the data." According to Garibotti, about "two-thirds of Intermountain's season pass holders live more than 30 minutes from the mountain," and "[a]cademic literature" demonstrates that skiers are willing to travel "long distances." Garibotti asserts that, "[a]t minimum," the geographic market should include Greek Peak, which "draws a substantial number of skiers from the Syracuse Area," "competed fiercely for customers in the Syracuse Area,," and attracted former Toggenburg season pass holders after closure;
>
> (2) Morales's analyses are "not based on economics and cannot be used to assess the relevant market, competitive effects, or consumer harm from the transaction." First, Morales's analysis of " 'diverted' consumers ignores that Intermountain offered discounted prices to former Toggenburg pass holders during the 2021-22 season," and a proper analysis must "consider pricing"; and
>
> (3) Morales' analysis is also "incomplete" because he did not consider data from the 2022-2023 ski season, which was available. According to Garibotti, Intermountain "sold fewer season passes in the 2022-23 season than in 2021-22 and lost almost 40 percent of the 'diverted customers' identified in Mr. Morales's analysis." At the same time, Greek Peak pursued an "aggressive marketing campaign" and "more than tripled its share of season pass holders from Onondaga County" (Doc No. 100 at 4-5, Summary of Opinions).

The experts' reports are discussed further below.

2. The Parties' Arguments in Support of Their Motions

The People move for summary judgment. OAG contends that the facts establish a violation of antitrust principles, manifested in twin per se statutory violations: (1) an "unlawful agreement between horizontal competitors pursuant to which Toggenburg would exit the market and effectively hand over 100% of the Syracuse-Area season pass market to Intermountain"; and (2) the "No Poach" covenant which "chilled Greek Peak's hiring in the labor market" (Doc No. 51 at 22-23 [OAG's memorandum of law]). Under OAG's theory of the case, the relevant product market is season ski passes, and the relevant geographic market encompasses "all areas within a 30-minute drive of downtown Syracuse"—an area in which Intermountain's two mountains competed strongly with Toggenburg for skiers (Doc No. 51 at 23-26). As for the transaction itself, OAG urges that Intermountain's acquisition of Toggenburg was unabashedly anticompetitive: Intermountain paid $2.25 million for the express purpose of shuttering its competitor and driving Toggenburg customers directly to Song and Labrador, and the result confirms the thesis that Intermountain's two ski areas were the only reasonable substitutes in the area for Toggenburg's skiers (Doc No. 51 at 26-28).

As to the effects of the acquisition and immediate closure, OAG contends that Intermountain accrued an undue concentration in season pass skiers in the market, even if Greek Peak were included within the market as a reasonable substitute (Doc No. 51 at 30-31). Aside from the general lack of choice created by the acquisition, OAG points to evidence of individual instances in which, with the closure of Toggenburg, some skiers have stopped skiing or ski less, and notes that the anticompetitive intent of Intermountain is itself probative of anticompetitive effects (Doc No. 51 at 33). Moreover, in OAG's view, no procompetitive benefits support the conclusion that

Intermountain's acquisition of Toggenburg was redeemable (Doc No. 51 at 33-34; *see generally* Doc No. 151 [OAG's reply memorandum of law]).

In opposition to the OAG's motion (and in support of its own motion), Intermountain contends that the People have failed to plead and prove a relevant geographic market (Doc No. 147 at 8-12; *see also* Doc No. 141 at 10-13 [Intermountain's memorandum of law in support of its motion for summary judgment]). More particularly, Intermountain urges that the OAG's "assertion that Season Pass holders will only travel 30-miutes to ski is contradicted by the very geographic market stated in the Complaint"—that is, Morales' mapping reflected that "a large portion of [the] proposed geographic market lies further than a 30-minute drive to Song, Labrador, and Toggenburg" (Doc No. 147 at 9). In Intermountain's view, Morales is unqualified to offer an "economic analysis" necessary to establishing a geographic market and should be disregarded entirely (Doc No. 147 at 10; *see also* Doc No. 141 at 12-13). Pointing to Garibotti's report, Intermountain also contends that OAG's market thesis—that individuals are unwilling to purchase a season pass "more than 30-minutes away from where they live"—is "entirely unsupported by the data" (Doc No. 147 at 12; *see also* Doc No. 141 at 13-14).

Intermountain advances more general contentions about the manner in which the OAG has framed the legal analysis attending its claims. Intermountain urges that (1) even alleged per se violations of antitrust laws require showing a viable product and geographic market, and in any event, the "rule of reason" analysis applies here, (2) the OAG "forgets" that its suit was brought under the Donnelly Act, which should not be construed in light of Clayton Act precedent, and (3) the Donnelly Act requires "proof of a conspiracy" between two entities, which is not alleged here (Doc No. 147 at 12-17). Indeed, in support of its own motion, Intermountain takes the position that Intermountain's purchase of Toggenburg is "[n]ot [a]ctionable" under the Donnelly Act

because there was no "conspiracy" or "reciprocal relationship" between two or more entities; Intermountain acted unilaterally, inasmuch as the terms of its purchase did not require it to shutter Toggenburg (Doc No. 141 at 17-21).

Turning to the impacts on the market, Intermountain next contends that Greek Peak expanded its market share in the 2022-2023 ski season, competing against Intermountain, but Morales, "at the direction of counsel form the State," did not analyze that season's data in examining economic harm (Doc No. 147 at 17-19; *see also* Doc No. 141 at 15-17).

Finally, Intermountain claims that the Meiers are "free to operate Greek Peak in competition with Intermountain," undercutting OAG's claim that the noncompetition provisions relating to the acquisition amounted to an antitrust violation (Doc No. 147 at 18-20; *see also* Doc No. 141 at 23-26).

3. Oral Argument

The Court heard oral argument on the parties' respective motions. Although the parties' arguments largely dovetailed with their written advocacy, counsel ably crystallized their positions. As a result, a brief review of that discussion is warranted.

The People asserted, in the first instance, that they had established a per se violation of the Donnelly Act—that Intermountain had, in practical terms, "basically pa[id] a competitor to leave the market" (Oral Argument Transcript [Tr.] at 5; *accord* Tr. at 7, 44-45). Reviewed under that framework, the People urged, a close analysis of the relevant market is unnecessary (Tr. at 8). Even if the transaction did not amount to a per se antitrust violation, the People argued that they had established a violation under the "rule of reason"—that Intermountain had engaged in conduct that unreasonably restrained trade in a cognizable geographic market, and that no procompetitive benefits arose from the transaction (Tr. at 8-10).

As to defining a relevant geographic market—a point on which Intermountain's position is firmly staked—the People contended that, even if Greek Peak were included in the analysis (despite not qualifying as a ski area within a thirty-minute drive from downtown Syracuse), the same result would ensue. That is, even with the aberrational GOAT pass discount offered by Greek Peak for the 2022-2023 season (which amounted to a real-world market experiment), Intermountain (comprised of Song and Labrador) still held a monopolistic share of the season ski pass market (Tr. at 11-13; *accord* Tr. at 47).

For their part, counsel for Intermountain acknowledged that Harris "did purchase Toggenburg with the intention to close it," but opined that this fact was not "relevant" (Tr. at 19). Somewhat confusingly, however, Intermountain also appeared to suggest that intent was relevant if the Court accepted the explanation that Harris "bought Toggenburg and closed it with the intent of making his other mountains better" (Tr. at 21). Additionally, Intermountain noted that that carve-out for Greek Peak eliminated any impropriety that might have arisen from the noncompetition provisions of the sale (Tr at 22).

Returning to a central point of contention (assuming that Intermountain's conduct was not a per se antitrust violation), Intermountain challenged the proposed geographic market as illogically hinged upon a definition of how far people are willing to travel to a ski area—an examination that should focus not upon a radius from downtown Syracuse, but rather drive time from a ski area itself (Tr. at 28-30). The People retorted that this argument represented a "complete straw man" because the market, centered upon downtown Syracuse, was premised not upon any notion that individuals will travel only a brightline number of minutes to ski, but rather on "the area of effective competition where the harmed consumers live" (Tr. at 31-32). Although it was certainly true that a limited number of people residing in the northern part of the market (i.e., north of downtown

Syracuse) would drive more than 30 minutes to ski, this is because they were more than 30 minutes from *any* ski area (Tr. at 32). The geographic market was grounded in "where the competitive harm has occurred"—that being a "30-minute radius around downtown Syracuse" (Tr. at 32). Taking up that point again, counsel for Intermountain once more appeared to refocus the analysis upon a hypothesis of driving distance (Tr. at 36-37).

With respect to the actual market effects of Toggenburg's closure, Intermountain pointed out that Morales, the People's expert, did not consider season pass purchases from 2022-2023, which, according to Intermountain's expert Garibotti, reflected that Greek Peak "has begun to robustly compete in the Syracuse market" (Tr. at 34).

Intermountain also emphasized its position that there was no "meeting of the minds for an anticompetitive factor" (Tr. at 25). Reflecting its firm conviction on the limited reach of the Donnelly Act, Intermountain asserted that OAG's case "may have been a great complaint in federal court. Right? Under the Lincoln Act" (Tr. at 37).[3] Rounding out its position, Intermountain argued that, because the purchase agreement with Meier did not contractually require Harris to close down Toggenburg, the concerted action required by the Donnelly Act was lacking and dismissal was therefore required, even if the transaction would have run afoul of the Clayton Act's prohibitions against certain mergers and acquisitions (Tr. at 39 ["So . . . these actions by Peter Harris that sound horrible. Right? Well, maybe there's a lawsuit under the Clayton Act but we're here"]; *accord* T. 59-60 [arguing that the OAG "didn't completely prove a Donnelly Act claim and that, you know, a killer [acquisition] versus a monopoly, that's a wonderful Clayton Act complaint. Right?"]).

On that score, the People responded that, under New York precedent, the Donnelly Act is "construed in line with federal precedent unless there is a legislative indication that it should be

[3] The transcription of "Lincoln Act" appears to have been in error; Intermountain was distinguishing the Clayton Act, as made clear from its other remarks.

otherwise be construed and that is not the case here. So Clayton should come in under Donnelly" (Tr. at 40). Additionally, the People argued that federal precedent even under the Sherman Act, upon which the Donnelly Act is based, supported enforcement under these circumstances (Tr. at 41). In the People's view, the proposition that only Harris intended to close Toggenburg, and thus that his conduct may have violated the Clayton Act but not the Donnelly Act, would work an absurd result (Tr. at 41 ["I mean, what is Donnelly to mean if you have a situation where one competitor buys the other to lead another to construct a monopoly which is in . . . the plain language of the Donnelly Act"]). Additionally, the People advocated that Meier benefitted under the arrangement by obtaining a premium purchase price.

Although not dispositive, each party expressed its view that no issues of fact warranted a trial (Tr. at 51, 53, 55-56).

C. Discussion

The parties correctly recite the general standard attending motions for summary judgment. "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *accord Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324; *accord Zuckerman*, 49 NY2d at 562).

More substantively, the parties' papers reflect fundamental disagreements about the body of antitrust principles applicable to the case, both as a matter of law and in light of the People's

allegations and briefed arguments. The OAG contends that it has interposed Donnelly Act claims, that its basic contentions should be read in light of federal antitrust precedent in general, including jurisprudence under the Clayton Act, and that, under any reading, the Toggenburg transaction violated the Donnelly Act (*see e.g.* Doc No. 51 at 18-28; Doc No. 141 at 5 n 5-6). Intermountain urges a markedly more constrained approach: in its view, the People have not interposed a Clayton Act cause of action because the complaint does not contain the terms "Clayton Act," and federal merger enforcement law is inapplicable to Donnelly Act claims (*see e.g.* Doc No. 147 at 1, 8-10 & n 2, 15-17). Indeed, Intermountain takes the position that its acquisition entirely eludes antitrust scrutiny under the Donnelly Act because, although predicated on a written agreement, Intermountain's purchase and closure of Toggenburg was unilateral action rather than multiparty conspiracy (Doc No. 147 at 8, 16-17; Doc No. 141 at 7-8, 17-21).

"New York's antitrust law represents a public policy of the first magnitude" (*Aimcee Wholesale Corp. v Toma Prods., Inc.*, 21 NY2d 621, 625 [1968]). General Business Law § 340 (1), the statute containing the essentials of the Donnelly Act, provides:

> "Every contract, agreement, arrangement or combination whereby
>
> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
>
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby
>
> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void."

The statute was "obviously inspired by" the federal Sherman Act (15 U.S.C. § 1 *et seq.*), to which it is "strikingly similar" (*State v Mobil Oil Corp.*, 38 NY2d 460, 463 [1976]). The Court of Appeals has directed that the Donnelly Act "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result" (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 335 [1988]). " 'The true test of legality' under § 1 of the Sherman Act 'is whether the *restraint imposed* is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition' " (*U.S. v Apple, Inc.*, 791 F3d 290, 321 [2d Cir 2015], quoting *Bd. of Trade of City of Chi. v United States*, 246 US 231, 238 [1918]). The Sherman Act—and by extension, the Donnelly Act—"prohibits any concerted action in restraint of trade or commerce, even if the action does not threate[n] monopolization" (*American Needle, Inc. v Nat'l Football League*, 560 US 183, 191 [2010] [internal quotation marks omitted])

Generally speaking, " '[a] party asserting a violation of the Donnelly Act is required to (1) identify the relevant product market; (2) describe the nature and effects of the purported conspiracy; (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question; and (4) show a conspiracy or reciprocal relationship between two or more entities' " (*Radon Corp. of Am., Inc. v Natl. Radon Safety Bd.*, 125 AD3d 1537, 1538 [4th Dept 2015], *rearg denied* 129 AD3d 1557 [4th Dept 2015], quoting *Newsday, Inc. v Fantastic Mind, Inc.*, 237 AD2d 497, 497 [2d Dept 1997]).

"While most trade practices are analyzed under a 'rule of reason' standard—that is, it must be shown that under the circumstances there is an unreasonable restraint of trade—some activities are deemed so pernicious to competition that they are found to be per se unreasonable" (*People v Rattenni*, 81 NY2d 166, 171-72 [1993], citing *Northern Pac. Ry. Co. v United States*, 256 US 1, 5

[1958] ["[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"]). This per se category of restraints, which "eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work" and provides "clear guidance for certain conduct," includes "horizontal agreements among competitors to fix prices" or "to divide markets" (*Leegin Creative Leather prods, Inc. v PSKS, Inc.*, 551 US 877, 886 [2007], citing *Texaco Inc. v Dagher*, 547 US 1, 5 [2006] and *Palmer v BRG of Ga., Inc.*, 498 US 46, 49-50 [1990]). A horizontal agreement is one "between competitors at the same level at the market structure" (*Anderson News, L.L.C. v American Media, Inc.*, 680 F3d 162, 182 [2d Cir 2012], quoting *United States v Topco Assocs., Inc.*, 405 US 596, 608 [1972]), and per se liability is reserved for agreements "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality" (*Dagher*, 547 US at 5 [internal quotation marks omitted]).

Thus, under state courts' formulation of the Donnelly Act's elements (*see Radon Corp. of Am., Inc.*, 125 AD3d at 1538), an antitrust claim pursuant to the Donnelly Act or the Sherman Act "must allege [and establish] both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market" (*Global Reins. Corp. U.S. Branch v Equias Ltd.*, 18 NY3d 722, 731 [2012] [citations omitted]). Notably, however, " 'the sweep of Donnelly may be broader than that of Sherman insofar as the Donnelly Act proscribes 'arrangements' in addition to contracts, combinations, and conspiracies,' " which has been understood to encompass "a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms, 'contract, 'combination' or 'conspiracy' " (*Taxi Tours Inc. v Go New York Tours, Inc.*, 41 NY3d 991, 994 [2024], quoting *Mobil*

Oil Corp., 38 NY2d at 464). Entirely one-sided conduct, such as a municipality's decision to enact an ordinance (*Commonwealth Elec. Inspection Servs., Inc. v Town of Clarence*, 6 AD3d 1185, 1186 [4th Dept 2004]), or a company's practice of providing rebates to some of its dealers but not to others as a form of vertical price fixing (*Mobil Oil Corp.*, 38 NY2d at 465-466), will not suffice. But legally distinct entities acting pursuant to an agreement or arrangement, express or tacit, need not be animated by identical motives (*see Apple, Inc.*, 791 F3d at 317; *Spectators' Commc'n Network Inc. v Colonial Country Club*, 253 F3 215, 220 [5th Cir 2001]).

Federal antitrust law also includes the Clayton Act (15 USC § 12 *et seq.*). "Section 7 of the Clayton Act prohibits mergers and acquisitions 'where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition' " (*Fed. Trade Commn. v Tapestry, Inc.*, 1:24-CV-03109 (JLR), __ FSupp3d __, 2024 WL 4647809, *4 [SD NY Nov. 1, 2024], quoting 15 USC § 18). The phrase "may be substantially to lessen competition" demonstrates congressional concern "with probabilities, not certainties" (*Brown Shoe Co. v United States*, 370 US 294, 317 [1962]), and "proof of certain harm" is not required (*United States v AT&T, Inc.*, 916 F3d 1029, 1032 [DC Cir 2019]).

In assessing claims under section 7, which provides enforcement agencies with authority to act pre-merger, courts generally apply a "three-part burden shifting framework": (1) the plaintiff ordinarily makes a prima facie case by "showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition"; (2) the defendant may rebut this presumption by "producing evidence to cast doubt on the accuracy of the [plaintiff]'s evidence as predictive of future anti-competitive effects"; and (3) "if the [defendant] successfully rebuts the *prima facie* case, the burden of production shifts back to the [plaintiff] and merges with the ultimate burden of persuasion, which

is incumbent on the [plaintiff] at all times" (*New York v Deutsche Telekom AG*, 439 FSupp3d 179, 198-199 [SD NY 2020], quoting *Chi. Bridge & Iron Co. N.V. v FTC*, 534 F3d 410, 423 [5th Cir 2008]).[4]

As noted above, one piece of Intermountain's argument that its actions elude Donnelly Act liability is that Intermountain was not expressly required to shutter Toggenburg as a term of the sale from Meier, and thus this allegedly culpable conduct was unilateral. The second component of Intermountain's contention is that, even if its actions in buying Toggenburg with the express intent of closing it violated the Clayton Act—a proposition that Intermountain appeared to acknowledge was more than a possibility at argument (Tr. at 38-40)—it still has no liability in this action because the conduct is not within the Donnelly Act's ambit and the OAG did not expressly interpose a cause of action for a Clayton Act violation.

For reasons explained in the OAG's papers in support of its motion for summary judgment and in opposition to Intermountain's motion, the Court finds this reasoning unpersuasive. Intermountain's position, while cleverly sculpted, requires an unduly restrictive application of the Donnelly Act and a tunnel-visioned accounting of the agreement between, and intent of, Harris and Meier. Through the parties' written agreements, illuminated by their deposition testimony and the other documentary evidence manifesting their mutual understandings of the arrangement, OAG has demonstrated the concerted action required to support a claim, and the Court concludes that

[4] Although the language of this legal framework assumes a pre-merger posture, enforcement agencies may seek to enforce section 7's procompetitive imperatives "any time when the acquisition threatens to ripen into a prohibited effect" (*U.S. v E.I. du Pont de Nemours & Co.*, 353 US 586, 597 [1957]; *see also Concord Boat Corp. v Brunswick Corp.*, 207 F3d 1039, 1051 [8th Cir 2000] ["[W]hile the primary thrust of § 7 is to prohibit and thus to forestall anti-competitive and monopolistic acquisitions, completed acquisitions and post-acquisition conduct may amount to a violation of § 7"] [quotation marks omitted]).

the transaction involved is not beyond the reach of antitrust enforcement as interposed by the People here.

First, under the circumstances presented, the conduct alleged and established constituted the "contract, agreement, arrangement or combination" required by the statute (General Business Law § 340 [1]). As a starting point, it is beyond dispute that written agreements memorialized the sale of Toggenburg to Intermountain, which runs two competing ski areas in close geographic proximity, in exchange for a substantial payment; the agreements also included noncompete restrictions, for which Intermountain paid almost $200,000 (Doc No. 2 [purchase and sale agreement]; Doc No. 3 [asset purchase agreement]; Doc No. 4 [non-competition and confidentiality agreement]). Although the noncompetition agreement purported to permit the operation of Greek Peak, it otherwise prohibited the Meiers from opening a competing business within a 30-mile radius of Toggenburg (Doc No. 4 at ¶ 3 [a]).

Second, and more broadly, the deposition testimony and other documentary evidence proffered by the People, recounted at greater length above, illuminates the full contours of the parties' mutual understanding of the arrangement's import. Harris had sought to acquire Toggenburg dating back to Hickey's sale of the property to Meier in or around 2015 (Doc No. 56 at ¶¶ at 4-5 [Hickey affidavit]). So keen was Intermountain's interest in acquiring their rival that, in 2018, they orchestrated a meeting that they referred to as a "faux buy," which yielded from Meier an assertion that he was unwilling (at that point) to sell to a competitor, and that, while not profitable, Toggenburg represented his "foot in the Syr[acuse] market" (Doc No. 31 at NYOAG-0000880). Later that year, Harris made another overture via e-mail; sharing it with his staff, Meier claimed that Toggenburg represented a threat to Intermountain, and pointed out that, if he and his partners

divested Toggenburg, they "would in effect be writing off the Syracuse market" (Doc No. 86 at GP01122-01123).

To Meier, Toggenburg represented a "marketing play"—an attempt to access the nearest large market that Greek Peak had not successfully tapped into (Doc No. 63 at 137-138). An overwhelming majority of Greek Peak's season pass holders resided places other than the greater Syracuse area (Doc No. 61 at 62). Meier recognized Labrador and Song as direct competitors with Toggenburg, and selling Toggenburg to Intermountain would give it "significant market share" (Doc No. 63 at 139). And, for his part, Meier saw the deal as an opportunity to reduce his long term debt at Greek Peak at a purchase price not attainable from any disinterested market buyer (Doc No. 85 at GP01118).

Eventually, Meier decided he was willing to sell Toggenburg to Intermountain—for the right price. Even before he apparently had a firm offer in hand, an email to his accountant revealed Meier's awareness that Intermountain was buying Toggenburg for the purpose of closing it (Doc No. 85 at GP01118 ["Confidentially, their intent is to shut it down"]). Meier knew Intermountain to be "a unique buyer" willing to pay a premium because the purchase and shuttering would allow Intermountain to "capture 90% market share," with revenue "dropping to their bottom line" (Doc No. 85 at GP01118). That sentiment was made clear in Harris's own July 7, 2020 "Memorandum of Interest," in which Harris touted Intermountain as "willing to pay in excess of Fair Market Value" because Toggenburg "is more valuable to [Intermountain] than to any other unrelated parties" (Doc No. 82 at ¶ 8). This memorandum also tacitly acknowledged what the parties already knew: that Toggenburg was being purchased by Intermountain in order to close it down. This fact is reflected in Harris's proposed options for remunerating people who had already invested in a season pass at Toggenburg for the coming season (Doc No. 82 at ¶ 11).

Harris also planned a press release, well in advance of the purchase's closing date, to put a "positive spin" on the imminent news that Toggenburg would be simultaneously shut down (Doc No. 60 at 222-223; *see also* Doc No. 84 at NYOAG-0003736). The press release, and a subsequent interview with Harris, made plain both (1) his understanding that his two ski areas drew from the "same pool" of customers as nearby Toggenburg, and (2) his purpose had been to buy "market share" without the actually operating Toggenburg as another option in the market (Doc No. 87 at 2; Doc No. 89 at 1). Intermountain paid $2.25 million for Toggenburg and shut it down the same day as the closing of the sale.

Based upon the evidence submitted by the parties, the Court concludes that the People have demonstrated, prima facie, that there existed a contract within the meaning of the Donnelly Act. Although the purchase agreements did not explicitly provide that Intermountain would close down Toggenburg, it would have made little sense for the parties to memorialize such a requirement as part of the acquisition. And, in any event, both parties understood that Toggenburg's closure, and the Meiers' exclusion from operating a ski resort within a 30-mile radius, were indispensable components to Harris's ultimate purpose of driving former Toggenburg skiers to Song and Labrador, bolstering his revenue without the expense of running Toggenburg. The direct and circumstantial evidence marshaled by the People (*see generally Gelboim v Bank of America of America Corp.*, 823 F3d 759, 781 [2d Cir 2016] [explaining, in the context of a motion to dismiss, that a conspiracy may be established in part by circumstantial evidence]) established the requisite "reciprocal relationship of commitment between two . . . legal or economic entities" (*Taxi Tours, Inc.*, 41 NY3d at 994, quoting *Mobil Oil Corp.*, 38 NY2d at 464).[5] Stated otherwise, Intermountain's actions

[5] To the extent that this Decision cites case law arising at the motion to dismiss posture rather than upon a motion for summary judgment, the Court is cognizant of that fact, and bears in mind that the parties' respective burdens here are to establish the absence of an issue of material fact. As noted above, each party has expressed the view that no question of fact exists.

were not unilateral in nature. Meier obtained a purchase price that would not have been forthcoming from any other buyer; Harris paid a premium for the ability to compress the number of options in the regional ski market from three ski areas to two—the two that he already operated (Doc No. 60 at 230; Doc No. 84 at NYOAG-0003736-3737).

Intermountain's other overarching argument—that the transaction, even if proscribed by the Clayton Act, is not within the ambit of the Donnelly Act—is also unconvincing. As an initial matter, the Court concludes that a state court evaluating the merits of a Donnelly Act claim may properly consider relevant federal jurisprudential guidance arising under the Clayton Act, particularly where, as here, the challenged agreement or arrangement unreasonably restraining competition involves a merger or acquisition (*see generally Reading Intern., Inc. v Oaktree Capital Mgt LLC*, 317 FSupp2d 301, 333 n 22 [SD NY 2003] [observing that, "given that claims for relief have been sustained based on Clayton Act-type violations, there is no reason to depart from the general mandate to interpret the New York statute in light of equivalent federal antitrust precedent"]).

More to the point, however, OAG's allegations and evidence, which concern a relatively uncomplicated universe of facts, present circumstances directly in line with the Donnelly Act's statutory text. The People allege that Intermountain took part in a contract, agreement, or arrangement that unduly restrained competition in the offering of a relevant product (Doc No. 1 at ¶¶ 1-2, 4-6, 9). The fact that the agreement at issue was, at least in part, in the form of an acquisition that may also have been within the regulatory reach of the Clayton Act does not immunize Intermountain from Donnelly Act enforcement. After all, both section 1 of the Sherman Act (upon which the Donnelly Act is modeled) and section 7 of the Clayton Act are "understood [to] prevent transactions likely to reduce competition substantially" (*U.S. v Rockford Mem. Corp.*, 898 F2d 1278, 1283 [7th Cir. 1990]; *see generally Vantico Holdings S.A. v Apollo Mgt.*, 247 FSupp2d 437, 458 [SD

NY 2003] [observing that "there is no substantive difference between the standards underlying a violation of § 7 and § 1"]). Thus, irrespective of whether a trial court adjudicating a Donnelly Act claim ought to rely upon Clayton Act jurisprudence, the circumstances presented here fall within the contemplation of the Donnelly Act.[6]

Having concluded that the People have established the existence of a contract, agreement, or arrangement under the Donnelly Act, the question that follows is whether the People have established an entitlement to a judgment that the contract, agreement, or arrangement amounted to an unreasonable restraint on trade. For the reasons identified in the OAG's memoranda of law in support of its own motion and in opposition to Intermountain's motion, the Court answers this question in the affirmative. The undisputed facts surrounding the context, purpose, and nature of the acquisition and immediate closure of Toggenburg establishes a per se violation of the Donnelly Act. Indeed, in the Court's view, the understanding reached by the parties amounted to an impermissible market allocation.

The per se rule is applied in limited circumstances, namely, where there are restraints "that would always or almost always tend to restrict competition and decrease output, have manifestly anticompetitive effects, and lack any redeeming virtue" (*US Airways, Inc. v Sabre Holdings Corp.*, 938 F3d 43, 54 [2d Cir 2019] [internal quotation marks and brackets omitted], quoting *Leegin*, 551 US at 886). "One of the classic examples of a per se violation of § 1 is an agreement between

[6] In its opposition memorandum of law, Intermountain cites an article prepared by the New York State Bar Association's Commercial and Federal Litigation Section Antitrust Committee (Doc No. 147 at 16). Although it cites the paper for the proposition that few cases have directly applied Clayton Act case law to a Donnelly Act claim, Intermountain appears to disregard the paper's other points—namely, that the Sherman Act itself has long provided a "solid basis for state law merger enforcement," and that the Donnelly Act has textual commonalities with both the Sherman Act and the Clayton Act that lend support to its merger and acquisition enforcement power (New York State Bar Association, Commercial and Federal Litigation Section of the New York, Antitrust Committee, *Experiments in the Lab: Donnelly Act Diversions From Federal Antitrust Law*, at 47-51 [May 2010] [https://nysba.org/app/uploads/2020/02/DonnellActDiversions-CorrectedGinsburgversion.pdf] [last accessed Feb. 8, 2025]).

competitors at the same level of the market structure to allocate territories in order to minimize competition," which represents a "naked restraint[] of trade with no purpose except stifling of competition" (*U.S. v Topco Assoc., Inc.*, 405 US 596, 608 [1972], quoting *White Motor Co. v United States*, 372 US 253, 263 [1963]). "Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct" (*Northwest Wholesale Stationers, Inc. v Pacific Stationary and Printing Co.*, 472 US 284, 290 [1985], quoting *Natl. Coll. Athletic Assn. v Bd. of Regents of Univ. of Oklahoma*, 468 US 85, 103-104 [1984]).

Taken in its totality, the Court concludes that the arrangement between the parties amounted to an agreement to allocate markets, artificially reducing options for season pass skiers and stifling competition to Intermountain.[7] As illustrated by the testimonial and documentary evidence discussed above, the arrangement was effectuated by Intermountain buying out a geographically proximate competitor at a considerable price, shutting down the competitor facility itself, and, to leave no doubt, contractually prohibiting the Meiers from engaging in any competition not related to Greek Peak within a 30-mile radius of Toggenburg or soliciting Intermountain employees. One is not left to wonder why Intermountain took these steps. Harris's deposition testimony and other documentary communications shared between the parties make clear that Intermountain expressly desired to eliminate a choice long available to area skiers so that those skiers would be driven to Song and Labrador, creating an opportunity for significantly increased profits without the costs

[7] Neither party identifies any factually similar case in which an antitrust defendant did exactly what Intermountain did here—namely, purchase what was undisputedly a competitor firm in the same business and of a relatively comparable size and market presence, for the purpose of immediately closing that firm down and, in essence, telling its former patrons to go to the purchaser's own existing businesses instead. Whether this is because businesses of Intermountain's size tend not to often draw antitrust enforcement scrutiny, or because their owners tend not to be so transparent in their ambitions—or perhaps both—the Court is uncertain. In any event, however, it is difficult to fathom how even this portion of the arrangement was anything other than an anticompetitive restraint on trade within the meaning of the Donnelly Act.

associated with keeping Toggenburg open (*see generally* Doc No. 60 at 241 [referring to his post-closure press release, Harris testified that "Song, Lab and Tog" drew "from the same pool of skiers and snowboarders every year," presenting a challenge]). And for his part, Meier, knowing Intermountain's intention, ceded his position in close geographical proximity to Song and Labrador, turning his focus to Greek Peak, which offers a range of amenities not available at the other facilities and at a higher cost. Although he could still advertise for Greek Peak, Meier recognized that this transaction compensated him for bringing an end to his concrete competitive presence near Intermountain's ski areas.

Intermountain's tactics were particularly effective in restraining competition given the industry involved in this case. A competitor cannot enter the market without the topography necessary to operate a commercial ski area, including one of a size and quality necessary to draw a base of customers seeking to invest in a seasonal ski pass. Buying Toggenburg for the purpose of closing it was a particularly blunt way of—in Harris's clinical economic phrasing—directing "traffic" to his facilities with "excess capacity" (Doc No. 133 at 1).

As for the noncompetition provisions attending the transaction, the Court notes that "no-poach" agreements lacking a connection to a legitimate collaboration are also reflective of per se anticompetitive activity. Here, the noncompetition provisions did not create efficiencies in service of a productive joint venture such that it would qualify as a proper ancillary restraint, but rather furthered the competitive suppression for which Intermountain was explicitly paying (*see Deslandes v McDonald's USA, LLC*, 81 F4th 699, 703 [7th Cir 2023]; *cf. generally Aya Healthcare Services, Inc. v AMN Healthcare, Inc.*, 9 F4th 1102, 1110-1111 [9th Cir 2021]; *Rothery Storage & Van Co. v Atlas Van Lines, Inc.*, 792 F2d 210, 229 [DC Cir 1986]).

Although Intermountain contends that the noncompetition provisions are of no moment because they do not apply to Greek Peak and did not prevent Greek Peak from hiring Intermountain employees (Doc No. 141 at 21-22, 25), these claims are, on this record, unconvincing. First, irrespective of the exemption for Greek Peak's operation, the provision in question prohibited the Meiers from "induc[ing] or attempting to induce any employee of [Intermountain] to leave" its employ (Doc No. 4 at ¶ 3 [a] [iii]). Second, the clause purporting to exempt Greek Peak's "ownership, management, finance, control, participation, and operation" from restrictive covenants (Doc No. 4 at ¶ 3, final sentence]) did not provide a clear assurance that, as part of its operations, it could also solicit Greek Peak employees. As the People note, there is a substantial difference between continuing to operate an existing business and soliciting the employees of another one. Indeed, Wesley Kryger, Greek Peak's president, testified that he was advised following the sale agreement that Greek Peak could not solicit even Toggenburg employees (Doc No. 66 at 9, 62).[8]

Moreover, a letter addressed to the Meiers and signed by Harris, dated September 26, 2022, states in part, "It is important to note that Greek Peak . . . is not a party to the Non-Competition Agreement and, therefore, is not bound by the Non-Competition provisions provided in the Non-Competition Agreement" (Doc No. 134). The letter declared Intermountain's position that "Greek Peak Mountain Resort is free to compete with Intermountain Management, Inc.[,] including the hiring of employees" (Doc No. 134). Based on the date indicated, the letter was sent at a time when OAG's antitrust investigation was ongoing. Whether the letter was purely self-serving or its purpose was to gratuitously emphasize Greek Peak's ability to solicit Intermountain employees,

[8] Additionally, as noted above, the noncompetition provisions prohibited the Meiers from operating any "Competitive Business" within a 30-mile radius of Toggenburg for five years (Doc No. 3 at ¶ 3 [a])—a significant restriction that, irrespective of the Meiers' ultimate intentions, ensured that they could not bring their experience to bear by operating any nearby ski area.

the letter lends little support to the notion that the "no-poach" provision, or Greek Peak's exemption from it was clear and unambiguous.

Based upon the undisputed facts presented, the Court concludes that the People have met their initial burden of establishing, prima facie, that the arrangement reached by Intermountain and the Meiers—including the written agreements and the parties' manifest mutual understandings surrounding them—constituted an unreasonable restraint on trade (General Business Law § 340 [1]; *see generally Zuckerman*, 49 NY2d at 562). The restraints employed by Intermountain are of that sort that "always or almost always tend to restrict competition and decrease output," and, in the antitrust calculus, "lack any redeeming virtue" (*Leegin Creative Leather Prods., Inc.*, 551 US at 886 [internal quotation marks and ellipses omitted]).

In opposition to the People's motion, Intermountain has failed to raise an issue of material fact. The per se rule is harsh in its application in part because it deprives the defendant of the opportunity to illustrate procompetitive benefits that may vindicate the charged conduct (*see Northwest Wholesale Stationers, Inc.*, 472 US at 289). Here, the Court's concern on this score is somewhat allayed by the fact in neither its opposition to the People's motion nor its own motion papers has Intermountain identified a procompetitive benefit to its actions. As discussed above, Intermountain's contentions that its conduct was purely unilateral or otherwise outside the reach of the Donnelly Act are, in the Court's view, unavailing. Additionally, to the extent that Intermountain contends that OAG was required to advance a relevant market definition for purposes of the per se analysis but failed to do so (*see e.g.* Doc No. 147 at 13-15; *contra* Doc No. 144 at 7), the Court disagrees for the reasons set forth in OAG's memoranda of law (*see e.g.* Doc No. 51 at 22-26; Doc No. 151 at 5-7).

As an alternative holding to its per se analysis, the Court concludes that, even if a more discerning level of scrutiny were applied, the People have nonetheless established that the arrangement here, viewed in totality, violated the Donnelly Act. Positioned between a determination that a particular agreement is per se unlawful and a full-blown rule of reason analysis is the so-called "quick look" standard. "'Quick look' is essentially an abbreviated form of rule of reason analysis, to be used in cases in which the likelihood of anticompetitive effects is so obvious that 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets' " (*Madison Sq. Garden, L.P. v Natl. Hockey League*, 270 Fed Appx 56, 58 [2d Cir 2008], quoting *Cal. Dental Assn. v FTC*, 526 US 756, 770 [1999]). This represents "an intermediate standard" and "applies in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint" (*Deutscher Tennis Bund v ATP Tour, Inc.*, 610 F3d 820, 830 [3d Cir 2010], *cert denied* 562 US 1064 [2010] [internal quotation marks omitted]). "[U]nder quick look, once the defendant has shown a procompetitive justification for the conduct, 'the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis' " (*Bogan v Hodgkins*, 166 F3d 509, 514 n 6 [2d Cir 1999], *cert denied* 528 US 1019 [1999]).

Applying this abbreviated analysis, the Court concludes that OAG has alleged and established a cognizable product market (season ski passes) and geographic market (the area within a driving distance of 30 minutes from downtown Syracuse) (*see generally* Doc No. 1 at ¶¶ 43-48; Doc No. 51 at 23-26). The basis for OAG's definition of this geographic area was a logical one: during the times in question, the majority of season pass holders for Intermountain's two facilities and Toggenburg came from this area and, "reciprocally, the majority of Syracuse-Area season pass

purchasers skied at Intermountain [facilities] or Toggenburg" (Doc No. 51 at 23-24; *see also* Doc No. 99 at 7-8, 11 [Morales report]). Morales, a data scientist analyzing the season passholder data, found that, for the 2020-2021 ski season, Intermountain's two ski areas drew a 64% share of season passholders from the Onondaga County area (an area statistically comparable with the 30-minute drive time radius used for defining the market for purposes of the analysis); Toggenburg drew 20% of the season pass holders from this region.[9] The following season (2021-2022)—the first season that Toggenburg was closed, Intermountain drew an 83% share of season passholders from Onondaga County—a number very close to the combined Intermountain/Toggenburg total from the prior year, supporting the inference, in simple terms, that many season skiers formerly at Toggenburg moved to Intermountain's facilities (Doc No. 99 at 11). Greek Peak's share of the draw from Onondaga County increased one percentage point to 6% (Doc No. 99 at 11).

Morales also reviewed Intermountain's growth from what had been Toggenburg's top 5 zip codes before Harris shut it down (*see* Doc No. 99 at 12 ["Intermountain's customer draw grew heavily in areas that used to be Toggenburg mainstays. Pre-closure, the majority of Toggenburg's customer base resided in the top three of these zip codes. The three zip codes where Intermountain's customer base was among the most dramatic were in those same three Toggenburg zip codes from its 2020-21 pre-closure season. . . . [A]s a point of comparison, the final column [of Table 2] shows that Greek Peak's passholder counts increased very little in areas where Toggenburg was strongest after the closure"]).

As discussed at length in this Decision, the proposition that Song, Labrador, and Toggenburg competed for skiers in the same geographic market is also supported by the logic of Harris's pursuit of Toggenburg. Both Harris and Meier recognized each other's ski areas as competitors.

[9] Greek Peak drew 5% (Doc No. 99 at 11).

Harris's forthright thesis in closing Toggenburg was to "drive the same guests to two mountains instead of three" (Doc No. 89 at 1-2).

Intermountain's misgivings with Morales' passholder data do not compel a different conclusion, particularly upon a quick look review.[10] First, Intermountain repeatedly calls the People's market definition "illogical" but, in doing so, goes out of its way to recast that definition as one defined by a thirty-minute drive to any given mountain (Doc No. 147 at 4, 11, 12). This muddying of the waters is unconvincing. Irrespective of the fact that some consumers will, individually, travel greater distances to ski—sometimes out of preference, sometimes out of sheer necessity because they do not live near a mountain—the People's market definition was premised on the fact that a high proportion of the season pass holders from the three mountains at issue live in the "Syracuse Area," and thus that the "competitive harm" inflicted by the arrangement was visited largely upon people from the "Syracuse Area." By the same token, the mere fact that some skiers may live south of Intermountain's facilities (rather than north, in the Syracuse Area) does not render the People's geographic market an improper one.

Intermountain's expert, Garibotti, also devotes a significant portion of her report to the proposition that, according to 'academic research," "many season pass holders are willing to drive more than 30 minutes" (Doc No. 138 at 10-11). Setting aside this unnecessary recasting of the market definition, the primary criticism of the geographic market provided by Garibotti, is that the market is "too narrow" and, "[a]t minimum," should include Greek Peak (Doc No. 138 at 4). As OAG explains, even if Greek Peak is included within the relevant market for purposes of this analysis—despite the experiential recognition by Meier and Harris that Greek Peak was not really

[10] For reasons identified by OAG (Doc No. 144 at 14), the Court need not dwell on Intermountain's dismissive claim that Morales' analysis of passholder data amounts to "[n]o [e]xpert [s]upport" (Doc No. 147 at 9-11; Doc No. 141 at 11-13), particularly in light of its conclusion that Intermountain's arrangement amounted to a per se violation or, at most, a highly suspect transaction warranting "quick look" scrutiny.

a competitive factor in the battle between Song, Labrador, and Toggenburg for season ski pass customers—it does not change the strong market concentration in favor of Intermountain in the 2021-2022 season after Toggenburg closed (Doc No. 99 at 11; Doc No. 144 at 12-13).

Intermountain's more substantive argument for including Greek Peak within the geographic market is premised on the season pass purchasers it drew for the 2022-2023 ski season (*see e.g.* Doc No. 138 at 15, 20-22). That ski season, however, was the one in which Greek Peak, seizing on perceived discontentment at Toggenburg's sudden closure, offered its anomalistic "GOAT pass"—a season pass for any size family that was up to 90% off its typical list price and was not offered again (Doc No. 63 at 93, 99). The very fact that Greek Peak created an offering so far below its usual prices in a Hail Mary effort to attract customers from beyond its typical market for a season suggests that its product is *not* seen as a readily available substitute by season ski pass purchasers in the Syracuse Area, and that consideration of the 2022-2023 Greek Peak data would not accurately portray the relevant market. This one-time offering, during which Intermountain maintained a 69% share of the season pass sales draw from Onondaga County (Doc No. 138 at 22), does not so drastically alter the People's underlying point about the challenged conduct as to compel a different outcome.

Based upon its quick look of the relevant market data presented by the parties and, again, bearing in mind the suspect nature of the arrangement reached between Harris and the Meiers, the Court concludes that the People have demonstrated, prima facie, that this arrangement constituted an antitrust violation. The "quick look" analysis then looks to assess the defendant's

procompetitive justifications for the challenged conduct (*see Apple, Inc.*, 791 F3d at 330; *Bogan*, 166 F3d at 514 n 6). In their memoranda, Intermountain identifies none.[11]

Even before the deal closed, Harris was aware that he needed to develop a "positive spin" on the acquisition and closure of Toggenburg (Doc No. 84 at NYOAG-0003736). Among Harris's brainstorming prompts to his marketing firm were "CNY has excess ski area capacity. Now three ski centers, going to two ski centers" and "[w]ill improve the *CNY ski scene*" (Doc No. 84 at NYOAG-0003736). Harris testified that the first of these notes referred to the fact that "these three ski resorts" were "in a 12-mile triangle"—a fact that, again, reinforced their geographical and competitive proximity, and implied a pro-Intermountain benefit to closing Toggenburg rather than a procompetitive benefit (Doc No. 60 at 245). The second note, concerning improvement to the "CNY ski scene," referred to the "idea" that the transaction would "allow [Harris] to improve Song and Labrador" and their "very expensive infrastructure" (Doc No. 60 at 229). As his testimony makes clear, Harris was simply referring to the fact that driving Toggenburg's customers to nearby Song and Labrador would improve Intermountain's own bottom line; while this was the very point of Harris's arrangement, it does not represent a procompetitive benefit to the region's ski community (Doc No. 60 at 253-254).

As a result, the Court arrives at the same conclusion under a "quick look" analysis: the arrangement here contravened the Donnelly Act.

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[11] In addition to the fewer ski area options resulting from Toggenburg's closure, OAG has also filed documentary evidence of various customer complaints about conditions at Song and/or Intermountain since the transaction (Doc No. 51 at 16, citing Doc No. 72 [Ex. 20] [in an email to Harris from January 2022, patron Adam Clark referred to "ridiculous" lines and the fact that Harris "knew there would be significantly more people this year"], Doc No. 79 [Ex. 27 at INT-00007183] [reflecting some degree of scheduling difficulties for a group organizer, who was advised that Labrador was already "booked up" and "too busy" with schools already scheduled], Doc No. 80 [Ex. 28 at INT-00007518] [email to Song Mountain from a school organizer referring to the mountain being "overbooked" and some students missing their lessons due to long lines], *id.* at INT-00007465 [email in which a customer referred to "very frustrated customers," lines that "are way too long," and a double chair lift not "ever working consistently"]).

Plaintiff's third cause of action alleges that, by the same conduct discussed throughout this Decision, Intermountain violated Executive Law § 63 (12) (Doc No. 1 at ¶¶ 104-105). As a result, the People seek an order enjoining Intermountain's "anticompetitive conduct," as well as any further equitable relief to "restore competitive conditions and lost competition and to prevent future violations including divestiture of Toggenburg (or another Intermountain resort) and rescission of the Noncompete Agreement (and No-poach provision)" (Doc No. 1 at ¶ 106). The statute, which permits OAG to seek equitable relief, provides in relevant part that

> "Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of . . . [General Business Law § 130], and the court may award the relief applied for or so much thereof as it may deem proper. The word 'fraud' or 'fraudulent' as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term 'persistent fraud' or 'illegality' as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term 'repeated' as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person. . . ."

"Any conduct which violates state or federal law or regulation is actionable under Executive Law § 63(12)" (*Fed. Trade Commn. v Shkreli*, 581 FSupp3d 579, 627-628 [SD NY 2022]), and the statute has been "used . . . to remedy antitrust violations" (*New York v Feldman*, 210 FSupp2d 294, 300 [SD NY 2002]).

The Court has concluded that the arrangement at issue constituted a violation of the Donnelly Act, and it appears that, inasmuch as Toggenburg remains closed, the competitive circumstances created by Intermountain "persist" within the meaning of the statute (*see* Executive Law §

63 [12]; *see generally Fed. Trade Commn. v Vyera Pharmaceuticals, LLC*, 479 FSupp3d 31, 45 [SD NY 2020] [observing, on a motion to dismiss, that the complaint adequately alleged that the "illegality persists" within the meaning of the statute]). Intermountain's principal position is that the Executive Law cause of action should be dismissed because it is not liable under the Donnelly Act—a proposition that the Court rejects. As a result, Intermountain has identified no other question of fact or principle of law requiring denial of the People's motion for summary judgment on this cause of action.

Nevertheless, it is not immediately clear, based upon the information presently before the Court and in light of the passage of time, what form the most fitting remedy may take. The parties' papers have largely addressed the question of liability in the antitrust context. Moreover, the parties have alluded to the fact that the Toggenburg property has sat unused, and its condition and value are at this point uncertain. The remedies available to forge a resolution appropriate to the harm caused are broad, and indeed, OAG seeks divestiture, disgorgement, and imposition of a $1,000,000 penalty (Doc No. 51 at 34). The Court is loath, however, to levy harsh monetary or equitable relief for its own sake and without more thorough and current reports on these issues from the parties.

As a result, the Court denies Intermountain's motion for summary judgment, and grants OAG's motion for summary judgment on the issue of liability with respect to each of the complaint's causes of action (*see generally e.g. Mazda v Carfax, Inc.*, 13-CV-2680 [AJN], 2016 SL 7231941, *5 [SD NY 2016], *affd* 726 Fed Appx 66 [2d Cir 2018]; *Addino v Genesee Valley Medical Care, Inc.*, 593 FSupp 892, 895-901 [WD NY 1984]). The People's request for injunctive and other equitable relief is denied without prejudice. The Court will schedule further proceedings and

take additional briefing with respect to the issue of an appropriate remedy under the present circumstances.

The People are directed to file a proposed order in conformance with this Decision within fourteen (14) days, to be filed in unredacted and unsealed form. Additionally, this Decision will be filed under seal, consistent with the parties' filling of their motion documents in largely redacted or sealed form. Nevertheless, the parties are directed to confer with respect to what, if any, redactions to this Decision are warranted prior to its unsealing. The parties are directed to file a letter stating their respective positions on these issues within fourteen (14) days of the date of this Decision.

This constitutes the Decision of the Court.

Dated: February 24, 2025 **ENTER,**

HON. ROBERT E. ANTONACCI II, J.S.C.