

SUPREME COURT OF NEW YORK  
COUNTY OF ONONDAGA

THE PEOPLE OF THE STATE OF NEW YORK,

by and through LETITIA JAMES,  
Attorney General of the State of New York,

Plaintiff,

v.

INTERMOUNTAIN MANAGEMENT, INC.,

Defendant.

Index No. \_\_\_\_\_

**SUMMONS**

Index No. Purchased Oct. 21, 2022

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The bases of venue pursuant to CPLR § 503(a) is that a substantial part of the events giving rise to the claims asserted in the complaint occurred in Onondaga County.

Dated: New York, New York  
October 21, 2022

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Attorney General for the State of New York  
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**COMPLAINT**

The People of the State of New York (the “People”), by their attorney, LETITIA JAMES, Attorney General of the State of New York (the “NYAG”), bring this action for injunctive relief, equitable monetary relief, and civil penalties, under N.Y. Gen. Bus. L. § 340 *et seq.* and N.Y. Exec. Law § 63(12), against Intermountain Management, Inc. (“Intermountain”). This action is brought to enjoin and remediate Intermountain’s unlawful acquisition and closure of Toggenburg Mountain (“Toggenburg”), its sole competitor for season pass skiers (including snowboarders) within a 30-minute drive of downtown Syracuse (“the Syracuse Area”). Further, the instant suit seeks to unwind an unlawful noncompete agreement (including a provision to not hire Intermountain’s employees). The purpose of this action is to restore Toggenburg’s position as an independent competitor, eliminate the anticompetitive noncompete agreement, and restore competition in the relevant market.

Plaintiff, the People of the State of New York, by LETITIA JAMES, Attorney General of the State of New York, alleges:

## INTRODUCTION

1. In 2021, Intermountain acquired its only competitor in the relevant market, Toggenburg, from John H. Meier and Christine C. Meier (collectively “the Meiers”), Togg Mountain, LLC and Togg Holdings, LLC (collectively the “Togg Corporations”). This was a clear violation of New York’s antitrust law, the Donnelly Act.

2. But Intermountain did not stop there. To eliminate any ambiguity as to its anticompetitive intent, Intermountain announced on the same day as the deal closed that it was shutting down its newly acquired ski resort, which had been a mainstay in the Syracuse skiing community for a half century. Intermountain’s management believed that shutting down Toggenburg would force Toggenburg skiers to Intermountain’s other properties, Song and Labrador. By purchasing Toggenburg and then immediately shuttering it, Intermountain made clear its merger to monopoly was also intended to extinguish a competitor (a “killer acquisition”).

3. Moreover, and in further violation of the Donnelly Act, Intermountain, in connection with its unlawful acquisition of Toggenburg, paid the former owners of Toggenburg to agree not to compete with Intermountain or to hire any Intermountain employees for five years. This agreement was likewise unlawful.

4. Historically, there have been three options for skiers in the Syracuse Area: Song Mountain, Labrador Mountain, and Toggenburg. In 2014, Labrador and Song were consolidated under the ownership and operation of Intermountain, and the number of choices went from three to two.

5. Still, consumers continued to benefit from competition. This ongoing competition between Labrador/Song and Toggenburg was enhanced in 2015, when Mr. Meier and Marc Stemerman acquired Toggenburg from its founding family and continued operating it as a ski

alternative to the Intermountain resorts (while Christine Meier held a stakes in certain relevant corporations, she was largely uninvolved in the purchase, sale, and operation of, any Ski resorts). The new owners wasted no time investing in the resort, and by the start of the next ski season, Toggenburg's chairlifts and snowmaking infrastructure had been upgraded.

6. But behind the scenes, Intermountain's principal, Peter Harris, was plotting to eliminate Toggenburg, the only competitor in the relevant market to his Song and Labrador properties, by acquiring and closing the rival resort. Mr. Harris had long believed that an excess of choices for consumers was eroding the profitability of his business, and was determined not just to acquire Toggenburg, but to shut it down entirely, forcing loyal Toggenburg skiers to patronize the Intermountain resorts instead. Because ski resorts incur low incremental costs for incremental customers – that is to say, it costs little for an already-operating ski resort to provide ski services for one additional customer – the diverted skiers would generate nearly “pure” profit for Mr. Harris. Mr. Harris intended to render this loss of competition permanent by attaching a deed restriction to the Toggenburg property.

7. Intermountain made repeated attempts to purchase Toggenburg from Mr. Meier, which Mr. Meier described as an “annual ritual.” Intermountain's initial attempts to purchase Toggenburg were rebuffed. However, after Mr. Meier bought out his partner, Mr. Stemerman, Mr. Meier, and Mr. Harris engaged in fruitful negotiations and executed a memorandum of interest in July 2020, a letter of intent in November 2020, and a purchase agreement in March 2021. The deal closed the following summer, on August 3, 2021, for a total purchase price of \$2.25 million.

8. In a press release issued on August 3, 2021, Intermountain informed the public not only that it had acquired Toggenburg, but that it would close the facility immediately,

notwithstanding the prior season having been one of the “best . . . in 60 years.” Customers who had already purchased tickets for the upcoming Toggenburg 2021-22 season, were advised to move their business to Intermountain’s Song and Labrador facilities.

9. The 2021-22 skiing season – the first in nearly 70 years in which Toggenburg was not open – laid bare the anticompetitive calculus behind Intermountain’s acquisition of Toggenburg. Former Toggenburg skiers flocked in droves to Song and Labrador. Skiers did this in spite of the fact that Intermountain had raised prices, with no attendant improvement in the quality of the ski offering or amenities. Skiers were forced to make this switch simply because Intermountain had made itself the only option in the Syracuse Area. This is precisely the type of harm to competition that the Donnelly Act is meant to prohibit.

10. Today, Toggenburg lies idle. Its indoor equipment gathers dust, while its outdoor infrastructure sits exposed to the elements and unused. Ski lifts, in particular, are expensive machinery which require regular, specialized maintenance and inspection by trained professionals. On information and belief, Toggenburg’s lifts have not been kept in operational condition since the closure.

11. Intermountain is poised to continue profiting at the expense of consumers during the upcoming 2022-23 season, which will be the second season in a row without competition. This action is needed to prevent Intermountain from reaping further unjust gains and to restore competition by ensuring that Toggenburg is back up and running in the hands of an independent competitor, rather than literally rusting away, idle, in the grip of Intermountain.

12. This action also seeks to enjoin the anticompetitive noncompete agreement (and no-poach provision) Intermountain induced Mr. Meier to enter. By virtue of operation of the

noncompete, Mr. Meier is prevented from opening a competing ski resort, hiring Intermountain's employees, and soliciting business from Intermountain's customers and vendors.

13. This agreement helped to cement Intermountain's ski resort monopoly, and harmed workers by chilling competition in the labor market.

### **JURISDICTION AND PARTIES**

14. Plaintiff, the People of the State of New York, through the Attorney General, brings this action in its sovereign capacity and pursuant to the Donnelly Act, N.Y. Gen. Bus. Law §§ 340–342-c and New York's Executive Law § 63(12). New York sues to obtain injunctive relief, redress of injury to the State, its general economy, and its citizens, and seeks equitable monetary relief, including disgorgement and/or restitution, as well as costs, and civil penalties, for Intermountain's unlawful conduct.

15. This Court has subject matter jurisdiction over the claims asserted in this action pursuant to Article 6, Section 7 of the New York State Constitution, New York General Business Law § 342, and New York Executive Law § 63(12).

16. Intermountain is a domestic business corporation incorporated under New York Business Corporation Law § 402, with its principal place of business at 1 Song Mountain Road, Tully, New York 13159. Accordingly, this Court has general personal jurisdiction over Intermountain under CPLR § 301.

17. Alternatively, this Court has specific personal jurisdiction over Intermountain under CPLR § 302(a)(1), as Intermountain directly transacted business and/or contracted to supply goods and services within the State of New York and the causes of action alleged in this Complaint arise from such acts.

18. Venue is proper in this court under CPLR § 503(a) because a substantial part of the events giving rise to Plaintiff's claims occurred in Onondaga County.

### FACTUAL BACKGROUND

19. For decades, alpine (downhill) skiing has been among the most popular winter sports in the United States, including in New York.

20. Whether for recreation or for sport, alpine skiing is practiced almost exclusively at ski resorts, which host a number of runs or trails of varying degrees of difficulty, and provide services such as ski lifts, artificial snow making, snow grooming, and ski patrol, as well as pro shops, restaurants, and other amenities.

21. The relative attractiveness of a ski resort to skiers is largely a function of the number and variety of runs, the amount of skiable area comprised by those runs, and the so-called "vertical drop," or total vertical differential that a skier can descend.

22. Ski resorts earn revenue primarily through the sale of passes that give skiers access to the facilities. These passes come in two primary forms: day passes, which grant resort access for one day (or sometimes one weekend) only; or season passes, which grant access for an entire ski season (in New York, the ski season typically lasts from mid- to late November to early April).

23. Season-pass sales, along with the additional sales of incidentals (*e.g.*, lessons, dining) generated by season-pass holders, account for a considerable amount of ski resorts' annual revenue.

24. Season-pass sales are also strategically important. First, season-pass sales typically occur before the beginning of the ski season, or early in the season giving ski operators access to cash flow before the start of the season. Second, the volume of season passes sold

varies less from season to season than do day-pass sales volumes. This stabilizing effect makes strong season-pass sales critical to the overall success of a ski resort.

25. Prior to 2021, there were three ski resorts in the Syracuse Area: Song Mountain (“Song”), Labrador Mountain (“Labrador”), and Toggenburg.

26. Song is located at 1 Song Road, in the Town of Tully, a roughly 25-minute drive from downtown Syracuse. Song has 24 runs, 93 skiable acres, and a 700-foot vertical drop, as well as amenities including a full-service restaurant, “Heuga’s Alpine.”

27. Labrador is located at 6935 Route 91, in the Town of Truxton, a roughly 30-minute drive from Syracuse. It features 23 runs, 250 skiable acres, and a 700-foot vertical drop. Amenities include a full-service restaurant, “The Last Run,” as well as two cafeterias and a lounge.

28. In 2000, Song was acquired by South Slope Development Corporation (“South Slope”). Mr. Harris was the majority (76%) shareholder in South Slope, with four additional shareholders holding the remaining (24%) shares. In 2014, South Slope’s shareholders incorporated as Intermountain Management and acquired Labrador. Intermountain became the sole shareholder of South Slope and the shares that Mr. Harris and others held in South Slope were converted pro rata to shares of Intermountain.

29. Since its incorporation, Intermountain has, through its principal, Mr. Harris, operated Song and Labrador jointly, offering a single season pass valid for admission at both resorts.

30. Prior to the acquisition of Toggenburg, Intermountain sold over 7,000 season passes per year.

31. Toggenburg is located at 1135 Toggenburg Road, in the Town of Fabius, in Onondaga County, a roughly 30-minute drive from Syracuse. It featured 22 runs, 85 skiable acres, and a 700-foot vertical drop, and offered amenities such as the full-service restaurant “Foggy Goggle.”

32. As noted, Toggenburg was acquired from Jim Hickey by Mr. Meier and Marc Stemerman in 2015 for \$1.25 million (inclusive of a noncompete binding Mr. Hickey which was valued at \$100,000).

33. In November 2019, Mr. Meier acquired Mr. Stemerman’s interest in Toggenburg and Greek Peak.

34. Christine Meier was made the 51-percent owner of the direct corporate parent of Toggenburg; John Meier held the remaining 49 percent.

35. Prior to the acquisition, Toggenburg sold between roughly 1,500 and 2,500 season passes each year.

36. Because of their geographic proximity, Toggenburg, Song, and Labrador have competed with one another for season-pass customers as long as they have been in operation and under all owners.

#### **THE RELEVANT MARKET FOR SEASON-PASS SKIING IN THE SYRACUSE AREA**

37. The relevant product market at issue in this action is the market for season-pass skiing services and the relevant geographic market is the Syracuse Area.

##### **A. The relevant product market is season-pass downhill skiing**

38. The relevant product market is the sale of downhill ski resort season passes. Season passes grant the consumer access to the skiing lifts, trails, and other facilities at ski

resorts. Ski resorts offer downhill skiing on professionally groomed trails with available snowmaking equipment and infrastructure, and some combination of additional amenities including restaurants, ski schools, pro shops, a lounge, professionally operated ski-lifts, and ski patrols.

39. Smaller skiing facilities, sometimes referred to as “hills,” are not reasonably interchangeable for season-pass skiing at ski resorts. Sometimes these are “bunny slopes” for beginners and not sufficiently challenging or interesting for use by experienced skiers. Sometimes these are ski clubs featuring a limited number of trails that might be challenging or interesting enough for experienced skiers, but that lack many of the additional services or amenities that make ski resorts attractive. Such clubs are typically member-run, having few or no employees, and have towropes or T-bar lifts instead of chair lifts.

40. Day passes at ski resorts are not reasonably interchangeable with season passes because season passes are priced at the equivalent of many day passes. For example, Intermountain season passes are nearly ten times as expensive as a daily pass. Therefore, in the Intermountain case, consumers must expect to make *more than* ten visits to the ski resort in a single season (typically only lasting 3-4 months) to justify the additional expense.

41. For such consumers, buying a number of separate day passes equal to the total number of planned visits over the course of a season would be prohibitively expensive. Further, day passes must typically be purchased on the day of, requiring the consumer to visit the sales desk, potentially waiting on a long line, each time they visit the ski resort; season-pass holders can go straight from the parking lot to the ski lift. Thus, day passes are at best, a weak competitive constraint on season pass pricing; faced with a price increase for season passes, a typical consumer would be unlikely to switch to buying day passes.

42. The sale of season passes satisfies the well-accepted “hypothetical monopolist” test set forth in the Department of Justice and Federal Trade Commission’s Horizontal Merger Guidelines. A hypothetical monopolist selling season passes could likely impose a small but significant and non-transitory price increase without losing sufficient sales to render that price increase unprofitable.

**B. The relevant geographic market is the Syracuse Area.**

43. The relevant geographic market is the Syracuse Area, defined as all areas that can be accessed by car from downtown Syracuse in approximately 30 minutes or less. The Syracuse Area is a relevant geographic market for season-pass skiing because the vast majority of season-pass purchasers live within a 30-minute drive of Song, Labrador, and Toggenburg, and would not consider season passes at more distantly situated ski resorts to be a reasonable substitute for season passes at ski resorts in the Syracuse Area. Specifically, travel times from consumers’ residences must be short enough to enable repeated trips over the course of a ski season. In short, as one witness testified during NYAG’s investigation, “proximity drives the market.”

44. As confirmation that this driving distance reflects market reality, the parties used a 30-mile radius in their Noncompete. A 30-mile radius circle around Syracuse includes the same ski resorts as a 30-minute driving time. In relevant part, Greek Peak falls outside the market in either formulation.

45. Examples of ski resorts that are outside the relevant geographic market include Greek Peak in Cortland, NY, which is an approximately 45-minute drive from downtown Syracuse, and Woods Valley Ski Area in Rome, NY, which is an approximately hourlong drive.

46. The example of Greek Peak is particularly illustrative of the relevant geographic market boundaries, as it is the closest ski resort to Syracuse other than Toggenburg, Song, or

Labrador, and the additional driving distance (approximately 15 minutes) may not appear significant to the outside observer. In fact, this additional distance is meaningful to skiers, as evidenced by season pass skier use patterns at area ski resorts. Greek Peak drew less than 7 percent of its season passholders for the 2020-21 season from the Syracuse-Auburn Statistical Area (a rough proxy for a 30-minute driving radius from Syracuse), while Toggenburg and Intermountain each drew over 85 percent of their season passholders for the same period from this area. Greek Peak management has stated that Syracuse skiers are “not our market.”

47. Ski resorts are typically located outside relevant public transportation service boundaries, and the vast majority of season passholders travel by car. Accordingly, driving time is the appropriate measure of a ski resort’s geographic proximity, and hence whether it is in the geographic market.

48. An average driving distance of 30 minutes is an appropriate geographic limitation for customers in the Syracuse Area because consumers are generally unwilling or unable to make repeated trips of greater than 30 minutes over the course of a single season, and thus do not regard season passes at ski resorts located at such distances as reasonably interchangeable with season passes at ski resorts they can access in 30 minutes or less.

49. A hypothetical monopolist of the Syracuse Area season-pass skiing market could profitably impose a small but significant and non-transitory increase in price. Such a price increase would not be defeated by substitution away from season-passes in the Syracuse Area, for example, by purchasing season-passes outside the Syracuse Area. Thus, this geographic market satisfies the hypothetical monopolist test.

### INTERMOUNTAIN'S ACQUISITION OF TOGGENBURG

50. Starting no later than 2015, Intermountain, through Mr. Harris and Mr. Sykes, made numerous efforts to acquire Toggenburg. These efforts were motivated by Mr. Harris's longstanding belief that the profitability of Intermountain's business was negatively affected by "excess capacity" – *i.e.*, too many competitors – in the Syracuse Area skiing market.

51. Intermountain's first known attempt to purchase Toggenburg came in 2015, at the same time that Mr. Meier and Mr. Stemerman were making a similar, and ultimately successful attempt.

52. Mr. Harris was undeterred by losing out to Mr. Meier in the 2015 Toggenburg sale. Little more than a year after Mr. Meier and Mr. Stemerman acquired Toggenburg, Mr. Harris began what would become an "annual ritual," in Mr. Meier's words, of attempting to pry Toggenburg from its new owners.

53. In early 2017, Mr. Harris cited purported rumors that Toggenburg was for sale as a basis for expressing his interest to Mr. Meier. Mr. Meier demurred, writing to Mr. Harris that he was "real happy with the [Toggenburg] acquisition," which had given him a "Syracuse market share."

54. Again, in early 2018, Mr. Harris and Mr. Sykes used a "rumor" that Toggenburg was for sale as a pretext for an overture to Mr. Meier and Mr. Stemerman. And once again, Mr. Meier responded that Toggenburg was "strategically important" and that he "c[ouldn't] imagine a scenario in which [he and Mr. Stemerman] would sell."

55. This time, Mr. Harris and Mr. Sykes went further, staging a "faux buy," in which a local attorney approached Mr. Meier with a feigned interest in buying Toggenburg, in order to test whether Meier was truly unwilling to sell. However, Mr. Meier similarly rebuffed the actor, explaining that Toggenburg was a "foot in the Syr[acuse] market" and that he would not sell it to

a competitor. In September 2019, Mr. Harris again made an overture to acquire Toggenburg, this time in response to Mr. Stemerman sharing an article via email, with Mr. Harris writing “I’m still interested in Togg.” Mr. Stemerman and Mr. Meier again demurred.

56. Finally, in November 2019, Intermountain saw its opening. At a meeting over breakfast at a local restaurant on November 21, 2019, Mr. Sykes reiterated Intermountain’s interest in acquiring Toggenburg to Mr. Meier. As Mr. Sykes wrote in an email to Mr. Harris describing the meeting: “[Mr.] Meier just bought out Greek partner and looking at buying another company. He may have his hands full. For first time he said maybe regarding selling Togg.”

57. By June 2020, after initial discussions were postponed by the onset of the COVID pandemic in March 2020, Mr. Meier and Intermountain were in earnest negotiations. Mr. Harris conducted an “under cover” site visit of Toggenburg, received Toggenburg financial data from Mr. Meier, and started building a detailed business case for the acquisition with Mr. Sykes.

58. From the outset, this business case was simple: Intermountain would acquire Toggenburg for the sole purpose of closing it down and diverting its former business to Intermountain in the form of pure profit. Mr. Meier understood the competitive significance of Toggenburg to Intermountain, stating that his ownership of Toggenburg “keeps [Mr. Harris] honest in the Syracuse market,” that Mr. Harris “feels vulnerable with [Toggenburg] owned by [Greek Peak],” that “[w]e could create a very bad future for [Mr. Harris] if we wanted to,” and that “[b]y divesting TOG, we would in effect be writing off the Syracuse market.”

59. The business case was also made clear in an email that Mr. Sykes sent to Mr. Harris in June 2020: “We need to review the P&L to determine as best we can the amount of

revenue we feel will move to Song and Lab.” An estimate by Mr. Sykes suggested Intermountain would capture 75 percent of Toggenburg’s season pass revenue as “incremental profit.”

60. Intermountain’s owners made no secret of their plan to close Togg after they acquired it. After his initial site visit, Mr. Harris [told Mr. Meier] that they needed to figure out “how to handle Togg’s [upcoming] 2020-21 [season] pass holders” – *i.e.*, given the expectation that Toggenburg would shut down, rendering the season passes worthless and their purchasers demanding refunds.

61. Ultimately, the deal did not close prior to the 2020-21 season and thus there was no need to refund 2020-21 Toggenburg season-pass holders. The same issue did in fact arise, however, with respect to 2021-22 season-pass holders, leading Intermountain to secure Mr. Meier’s agreement not to change prices substantially for 2021-22 season passes, in order to simplify the subsequent issuance of refunds by Intermountain.

62. Mr. Harris made no effort to hide his plan from Mr. Meier. In July 2020, Mr. Meier wrote to his accountant that “[c]onfidentially their intent is to shut it down,” adding that Intermountain was “a unique buyer as they will capture 90% market share,” and that “this deal has nothing to do with multiple of EBITDA” but was “all about 90% of revenue dropping to their bottom line.”

63. On July 7, 2020, Intermountain sent Mr. Meier a memorandum of intent offering to buy Toggenburg for \$2 million.

64. On November 16, 2020, Mr. Meier signed a non-binding letter of intent reflecting an increased purchase price of \$2.25 million. This reflects an 80-percent premium over what Mr. Meier had paid only five years earlier, reflecting the fact that “this deal has nothing to do with” earnings and that Intermountain would “pay more than any financial buyer would consider.”

65. In December 2020, Mr. Harris shared drafts of a Purchase and Sale Agreement and Asset Purchase Agreement with Meier.

66. The Purchase and Sale Agreement and Asset Purchase Agreement were finalized and signed by the parties on March 18, 2021. A true and correct copy of the Purchase and Sale Agreement is annexed to this Complaint as Exhibit 1 hereto; a true and correct copy of the Asset Purchase Agreement is annexed to this Complaint as Exhibit 2 hereto.

67. The Purchase and Sale Agreement reflected the sale of the real property on which Toggenburg was located, accounting for \$750,000 of the total \$2.25 million purchase price.

68. The Asset Purchase Agreement reflected the sale of all other Toggenburg property (so-called “business assets”), accounting for the remaining \$1.5 million of the total purchase price. The transaction closed on August 3, 2021, representing the culmination of a long-term desire by Intermountain. On that same day, Intermountain issued a press release announcing the closure. The press release contained a variety of self-serving justifications developed as part of an engagement with a public relations firm to, in Mr. Harris’ words, “put a positive spin on the transaction.” The next day, an article in *Ski Area Management*, a trade publication, published an article including some commentary from Mr. Harris indicating “Harris would not entertain offers from potential buyers who want to reopen the mountain as a ski area, and there would be a covenant on the property preventing that.” Just two weeks later, Mr. Harris contacted the *Wall Street Journal* to advertise the land for sale. The quick timing of this all confirms that Mr. Harris’ entire objective was to shut down Toggenburg and gain the ability to make that shut down permanent via the insertion of a restrictive covenant.

69. Online commentary posted as part of a petition signed by nearly 1,000 people objecting to the closure noted that an Intermountain “principal” had indicated “for decades that

he was going to buy Toggenburg and close it. Now he has for price of a nice house and less than his antique Ferrari.”

70. Mr. Meier met with a prospective buyer around the same time and discussed the outlines of a deal, but those negotiations were disrupted by COVID-19. Any hope that Mr. Meier might find an alternative buyer was cut off when Intermountain induced Mr. Meier to enter a “No-shop” commitment.

71. Intermountain further induced Mr. Meier to enter a covenant, styled as a “Non-Competition and Confidentiality Agreement” (hereinafter “Covenant”), imposing two principal anticompetitive restraints on Mr. Meier. A true and correct copy of the Covenant is annexed to this Complaint as Exhibit 3 hereto.

72. In the first, the Noncompete Agreement, Mr. Meier agreed not to compete against Intermountain within a 30-mile radius for a period of five years from the Acquisition.

73. The Noncompete includes a purported exemption for “ownership, management, finance, control, participation and operation of” Greek Peak by Mr. Meier. Yet this exemption is at best partial or ambiguous.

74. In the second, the No-poach provision, Mr. Meier agreed not to solicit or recruit any of Intermountain’s employees, including even entry-level employees, during the same five-year period.

75. According to the Asset Purchase Agreement, \$195,000 of the total \$2.25 million purchase price that Intermountain paid Mr. Meier was in consideration of the Noncompete Agreement (including the No-poach provision).

**ACQUIRING AND CLOSING TOGGENBURG HAS GIVEN INTERMOUNTAIN  
MONOPOLY POWER IN THE SYRACUSE-AREA SEASON-PASS SKIING MARKET  
AND HARMED COMPETITION AND CONSUMERS**

76. Prior to the acquisition, Toggenburg was Intermountain's only competitor in the market for season-pass skiing in the Syracuse Area.

77. Accordingly, when Intermountain acquired – and promptly shuttered – Toggenburg, it eliminated its only competitor. Intermountain now enjoys complete and unfettered dominance in its market.

78. The destruction of competition via merger to monopoly and a “killer acquisition” was not merely some consequence of Intermountain's actions – it was the unambiguous, explicit purpose. As noted above, Mr. Sykes made an economic projection in connection with the acquisition that exclusively considered a scenario in which Toggenburg would be closed. The amount that they were willing to pay would depend on “the amount of revenue we feel will move to Song and Lab.”

79. In public statements directly following consummation of the deal, Mr. Harris admitted that Intermountain's “primary” objective was “to purchase market share without the associated expenses of opening another ski hill,” and “to drive the same guests to [Intermountain's] two mountains instead.”

80. Preliminary analysis of Intermountain's post-acquisition transaction records confirms that this is exactly what happened. NYAG estimates that a significant proportion of Toggenburg's 2021-22 season-pass holders switched to Intermountain as a result of the closure.

81. Potential entrants in season-pass skiing face significant barriers. In order to compete in the relevant market, a third party would 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 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.

82. A potential competitor seeking to enter the Syracuse Area could not secure each of items (1) through (3) mentioned in paragraph 81 within a time that could prevent consumer harm.

83. Given the current entry barriers, entry is unlikely in the foreseeable future, and that Intermountain's monopoly over season pass ski sales in the Syracuse Area is likely to continue unabated absent the instant action.

**THE NONCOMPETE COVENANT (AND NO-POACH PROVISION) RESTRAIN  
TRADE WITHOUT ANY PROCOMPETITIVE JUSTIFICATION**

84. Intermountain and Mr. Meier entered into a Noncompete which harms competition in the relevant market. Such agreements are presumptively illegal unless reasonably necessary to facilitate an otherwise legitimate transaction and no more burdensome than necessary to do so. As the underlying transaction is illegal, the Noncompete did not support an otherwise legitimate transaction and is therefore illegal.

85. Further, as the intention was to close Toggenburg, the Noncompete does not protect any legitimate interest in the future operation of Toggenburg necessary to protect in order to facilitate the transaction. Post-transaction, the only effect is to limit competition with Intermountain's pre-transaction mountains, Song and Labrador, a wholly illegal purpose. Therefore, the noncompete was illegal.

86. This agreement contains an exemption for certain actions taken by Mr. Meier at Greek Peak, but failed to provide a blanket immunization for *any* action taken by Greek Peak. Internal Greek Peak text messages confirm that this immunization was insufficient with Mr.

Meier concluding that certain actions by Greek Peak would be “tap dancing on the line.” Thus, to the extent the Noncompete reached Greek Peak (by virtue of Mr. Meier’s role), it was illegal.

87. Further, the Noncompete lasts five years, covers nearly 3,000 square miles of New York State, and covers a wide range of activities, all of which are far in excess of what would have been necessary to facilitate the transaction even if had not been illegal.

88. The No-Poach provision was *per se* illegal, as these types of restrictive covenants are always presumed to harm competition in the labor market.

89. Intermountain has not provided any procompetitive justification for the Noncompete Agreement or No-Poach provision. There is no indication, for example, that Intermountain believed that any goodwill it purchased in connection with the Acquisition was at risk of recapture by Mr. Meier in the absence of such an agreement.

90. The No-Poach likely similarly harmed competition by chilling the ability of workers of all sorts – from janitors, to ski instructors, to ski patrol, to cafeteria workers – to obtain employment.

## CAUSES OF ACTION

### COUNT 1

#### **Unlawful Acquisition of Toggenburg in Violation of New York’s Donnelly Act, Gen. Bus. L. § 340 *et seq.***

91. The People restate, re-allege, and incorporate by reference each of the allegations set forth in paragraphs 1 through 90 above as if fully set forth herein.

92. Intermountain’s acquisition of Toggenburg from Mr. Meier violates the Donnelly Act, N.Y. Gen. Bus. L. § 340 *et seq.*, which prohibits, *inter alia*, “[e]very 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 [c]ompetition 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.”

93. The acquisition and closure of Toggenburg gave Intermountain complete, unchallenged dominance in the market for Season-Pass Skiing in the Syracuse Area, and thus established or maintained Intermountain’s monopoly within the meaning of the prohibition set forth in Gen. Bus. L. § 340.

94. In the alternative, even if the Toggenburg acquisition and closure did not establish or maintain Intermountain’s monopoly, it harmed, and continues to harm, consumers by eliminating a competitor without any procompetitive justification and thus constitutes an unreasonable restraint of trade prohibited by Gen. Bus. L. § 340.

95. To prevent these ongoing harms and any recurrence, the State of New York requests that that Court issue an order enjoining Defendants’ anticompetitive conduct and ordering such other and further equitable relief as this Court may deem appropriate to restore competitive conditions and lost competition and to prevent future violations, including divestiture of Toggenburg or divestiture of Intermountain’s other ski properties.

96. The State of New York requests that the Court use its inherent equitable powers to order appropriate restitution and/or disgorgement to remedy the harms inflicted since the implementation of this scheme.

97. The State of New York also requests that the Court order civil penalties and an assessment under the Donnelly Act, pursuant to Gen. Bus. Law §§ 342 and 342-a.

**COUNT 2****Unlawful Noncompete Agreement (and No-poach provision) in Violation of New York's Donnelly Act, Gen. Bus. L. § 340 *et seq.***

98. The People restate, re-allege, and incorporate by reference each of the allegations set forth in paragraphs 1 through 97 above as if fully set forth herein.

99. Intermountain's entry into the Noncompete Agreement (and No-poach provision) constitutes an unlawful restraint of competition in violation of the Donnelly Act, Gen. Bus. L. § 340 *et seq.*

100. The No-Poach provision is a naked restraint of trade, is therefore *per se* unlawful. Furthermore, it is not ancillary to any legitimate agreement.

101. In the alternative, even if a full rule of reason applies, the Agreement is overbroad in substance, geographic scope, and duration and lacks any legitimate procompetitive justifications, and is thus an unreasonable restraint of trade within the prohibition of Gen. Bus. L. § 340.

102. To prevent these ongoing harms and any recurrence, the State of New York respectfully requests that that Court issue an order enjoining Defendants' anticompetitive conduct and ordering such other and further equitable relief as this Court may deem appropriate to restore competitive conditions and lost competition and to prevent future violations, including rescission of the Noncompete Agreement (and No-poach provision).

103. The State of New York also respectfully requests that the Court order civil penalties and an assessment under the Donnelly Act, Gen. Bus. Law §§ 342 and 342-a.

**COUNT 3****Illegality in Violation of New York Executive Law § 63(12)**

104. The People restate, re-allege, and incorporate by reference each of the allegations set forth in paragraphs 1 through 103 above as if fully set forth herein.

105. Intermountain's conduct violates Section 63(12) of New York's Executive Law, in that Intermountain engaged in repeated and/or persistent illegal acts – violations of Section 340 *et seq.* of the Donnelly Act – in the carrying on, conducting, or transaction of business within the meaning and intent of Executive Law § 63(12).

106. The State of New York respectfully requests that the Court enjoin the Intermountain's anticompetitive conduct and order such other and further equitable relief as this Court may deem appropriate 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).

107. The State of New York also respectfully requests that the Court order that Defendant disgorge its unjust gains and provide appropriate restitution.

#### PRAYER FOR RELIEF

108. **WHEREFORE**, New York General Business Law § 342 authorizes this Court to issue a permanent injunction for violations of New York's Donnelly Act; and New York General Business Law § 341 authorizes this Court to award penalties for violations of the Donnelly Act, Plaintiff demands judgment against Intermountain as follows:

- a. Adjudging and decreeing that Intermountain has violated the Donnelly Act, Gen. Bus. L. §§ 340 *et seq.*
- b. Adjudging and decreeing that Intermountain has violated N.Y. Exec. L. § 63(12);
- c. Enjoining Intermountain's illegal conduct;
- d. Ordering the divestiture of Toggenburg (or another Intermountain resort);
- e. Ordering the rescission of the Noncompete Agreement (and No-poach provision);
- f. Awarding New York all equitable relief, including equitable monetary relief such as disgorgement and restitution, as the Court finds necessary to redress and prevent recurrence of Intermountain's violations of the Donnelly Act and Executive Law § 63(12);

- g. Awarding maximum New York civil penalties, pursuant to N.Y. Gen. Bus. Law § 341, for each violation;
- h. Awarding New York an additional allowance of twenty thousand dollars, pursuant to N.Y. Gen. Bus. Law § 342;
- i. Awarding New York costs and fees associated with this action; and
- j. Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York  
October 21, 2022

LETITIA JAMES  
Attorney General for the State of New York

By:   
Benjamin J. Cole  
Tal M. Elmatad  
Assistant Attorneys General

Elinor R. Hoffman  
Bureau Chief, Antitrust Bureau  
Amy McFarlane  
Deputy Bureau Chief, Antitrust Bureau  
28 Liberty Street  
New York, New York 10005  
Tel. (212) 416-8482

# Exhibit 1

**PURCHASE AND SALE AGREEMENT**

AGREEMENT made this 17<sup>th</sup> day of March, 2021 (the "Effective Date"), by and among TOGG MOUNTAIN, LLC, a New York limited liability company doing business at 2000 NYS Route 392, Cortland, New York 13045 ("Togg Mountain") and TOGG HOLDINGS, LLC, a New York limited liability company doing business at 2000 NYS Route 392, Cortland, New York 13045 ("Togg Holdings") (collectively herein referred to as "Seller"), JOHN MEIER and CHRISTINE C. MEIER (collectively herein referred to as "Meier") with a business office at 2000 NYS Route 392, Cortland, New York 13045 and INTERMOUNTAIN MANAGEMENT INC., a New York corporation duly organized and existing under the laws of the State of New York with a business address of 1 Song Mountain Road, Tully, New York 13159 ("Buyer").

WHEREAS, the Seller owns property located at 1135 Toggenburg Road, Fabius, New York, together with all buildings, improvements and fixtures thereon including, without limitation, five (5) ski lifts and full restaurant known as the Foggy Goggle Restaurant, commonly known as Toggenburg Mountain Winter Sports Center (hereinafter the "Premises"); and

WHEREAS, Seller's current use of the Premises is as a winter sports center and any other legal uses; and

WHEREAS, contemporaneously with the execution of this Agreement, the parties have executed an Asset Purchase Agreement for the business assets of Seller.

NOW, THEREFORE, in consideration for the foregoing, and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, Seller, Meier and Buyer agree as follows:

1. Real Property to be Conveyed. Seller agrees to sell and Buyer agrees to buy on the terms and conditions set forth in this Agreement, the following:

1.1 Premises. Fee simple title to that certain real estate, together with all mineral and timber rights, all buildings and improvements thereon, and including parcels of land comprising approximately 157± acres, known as tax parcels #117.-01-07.0, 117.-01-07.2, 117.-01-08.0, 117.-01-10.0, 117.01-11.0, 117.-01-09.0, 117.-02-08.4 as described in the deeds attached hereto and made a part hereof as Exhibit A (the "Premises"). The Premises shall include all buildings and other improvements thereon and all strips or gores of land adjoining the real property and rights of Seller in and to any and all streets, roads, highways, alleys, driveways, easements and rights-of-way, open or proposed, appurtenant thereto, and any unpaid award for damages to the Premises by reason of any change of grade in any street, road or avenue.

2. Purchase Price. The purchase price to be paid by the Buyer to Seller is Seven Hundred Fifty Thousand and 00/100 Dollars (\$750,000.00) ("Purchase Price"), to be paid as follows:

- 2.1 By Buyer depositing the sum of Ten Thousand and 00/100 Dollars (\$10,000.00) within forty eight (48) hours after a fully executed original of this Agreement and original of the Asset Purchase Agreement are furnished to the Buyer (the "Deposit") which Deposit is to be held in escrow by Mackenzie Hughes LLP, 440 South Warren Street, Suite 400, Syracuse, New York (the "Escrow Agent"), without interest, to be applied to the Purchase Price in the event the transactions close, or to be returned or paid to Buyer in the event that the title to the Premises cannot be transferred to the Buyer due to either (i) the inability of the Seller to deliver the quality of title as hereinafter provided, or (ii) a termination by Buyer as provided for in this Agreement, or (iii) forfeited to Seller in the event a closing does not occur for any other reason.
  - 2.2 The sum of Seven Hundred Forty Thousand and 00/100 Dollars (\$740,000.00) shall be paid to Seller by Buyer in verified funds at Closing subject to adjustments as provided for herein.
  - 2.3 Allocations. Prior to Closing, the parties shall agree on an allocation of the Purchase Price among land, structures and site improvements.
3. Closing Date. Closing shall take place on or about May 15, 2021 after the conditions precedent to Closing are fully satisfied or waived by Buyer. Possession of the Premises shall be delivered to Buyer on the date of Closing ("Closing Date").
4. Apportionment and Expense. The following items shall be prorated as of 11:59 p.m. on the date immediately preceding the Closing Date. The provisions of this section shall survive the Closing.
- 4.1 Items to be Prorated. Real property taxes and assessments;
  - 4.2 Responsibility for Other Expenses. The Buyer shall pay the recording fees of the deed and mortgage recording tax. The Seller shall pay the transfer tax pursuant to New York Tax Law Section 1402, the cost of filing the New York State Real Estate Transfer Tax Return, all recording fees relating to the clearing of all mortgages and liens of record, all recording fees relating to the recording of title affidavits and other customary expenses of Seller.
5. Representations, Warranties and Covenants.
- 5.1 Seller's and Meier's Representations and Warranties. Each of Seller and Meier represents and warrants to the Buyer the following (which representations and warranties shall be true and correct as of the date hereof, Closing and thereafter):
    - (a) Title. Seller holds good and marketable fee simple title to the

Premises.

- (b) Existence; Authority. Seller has been duly formed and organized under the laws of the State of New York and is in good standing under the laws of such state, and is duly qualified to do business in the State of New York. The execution and delivery of, and Seller's performance under, this Agreement are within Seller's powers and have been duly authorized by all requisite action. The person(s) executing this Agreement on behalf of Seller have the authority to do so. This Agreement constitutes the legal, valid and binding obligation of Seller and is enforceable against Seller in accordance with its terms, subject to laws applicable generally to creditor's rights. Performance of this Agreement will not result in any breach of, or constitute any default under, or result in the imposition of any lien or encumbrances upon the Premises under, any agreement or other instrument to which Seller is a party or by which Seller or the Premises is bound.
- (c) Litigation. There is no pending or threatened litigation or administrative proceedings which, if resolved adversely to Seller, would adversely affect title to the Premises or any part thereof or the ability of Seller to perform any of its obligations hereunder or the use of the Premises by the Buyer as it is presently being used or otherwise materially and adversely affect the Premises.
- (d) Defects; Violations; Condemnation Proceedings. With respect to the Premises, Seller has not received any written notice from any insurance company, governmental agency or any other person of (i) any condition, defect, or inadequacy affecting the Premises that, if not corrected, would result in termination of insurance coverage or materially increase its costs, (ii) any pending or threatened, condemnation or eminent domain proceedings, or (iii) any proceedings that could or would cause the change or other material modification of the zoning classification or other legal requirements applicable to the Premises or any part thereof which would materially and adversely affect the Premises. There does not exist any court order nor does there exist any restriction or restrictive covenant (save and except matters of public record and all laws, statutes, ordinances and regulations of applicable governmental authorities) or other private or public limitation which is reasonably likely to materially and adversely affect Buyer's use of the Premises.
- (e) Mechanic's Liens. There are no unpaid charges, debts, liabilities, claims or obligations of Seller arising from the construction,

occupancy, ownership, use or operation of the Premises which could give rise to any mechanics', materialmen's or other statutory liens against any of the Premises that will not be paid by Seller prior to the Closing.

- (f) **Governmental Requirements.** Seller has received no written notice from any governmental authority asserting a violation of any uncured restrictive covenants, deed restrictions or zoning requirements or other applicable Governmental Requirements affecting the Premises, including any mining permits affecting the Premises.
- (g) **Streets and Highways.** Seller has received no written notice of any existing plans to widen, modify or realign any street adjoining the Premises.
- (h) **No Encumbrances.** There are no easements, rights of way, gas, timber, mineral rights or other encumbrances except as set forth in the Search and Seller warrants that, on and after the execution of this Agreement, it will not encumber the Premises without the Buyer's prior written consent.
- (i) **Absence of Untrue Statements.** No representations or warranty contained herein by or on behalf of the Seller, nor any statement or certificate furnished hereunder or in connection herewith, contains or will contain an untrue statement of a material fact or omits or will omit to state a material fact necessary to make the statements contained therein not misleading.
- (j) **Seller is in compliance with, and has received no notice of default with respect to all contractual arrangements pertaining to the Premises.** Neither Seller nor any person or entity related to Seller is a party to any (i) written contract for the employment of any individual employee at the Premises, or (ii) contract with any labor union affecting the Premises. Seller covenants and agrees not to enter into any contracts affecting the Premises after the date of this Agreement without the prior written consent of the Buyer.

5.2 **Seller's Covenants.** Seller hereby covenants and agrees with the Buyer that, after the date of this Agreement and until the earlier of the termination of this Agreement or the Closing or thereafter:

- (a) **No Assignment or Transfer.** Seller shall not convey the Premises except to the Buyer or its permitted assigns, and Seller shall not make any material alterations to any portion of the Premises except

as otherwise expressly permitted under this Agreement.

- (b) Maintenance of the Premises. Prior to the Closing Date, Seller shall maintain the Premises in substantially the same manner as Seller has maintained the Premises prior to the date hereof.
  - (c) No Solicitation. Seller, on behalf of itself, its agents, contractors and representatives, agrees that during the term hereof, it will not market the Premises or accept any offers to purchase or otherwise acquire the Premises from any party other than the Buyer.
  - (d) Condemnation; Injury; Damages. Promptly upon obtaining knowledge of the institution of any proceedings for the condemnation or eminent domain of the Premises, or any portion thereof, or any other proceedings arising out of injury or damage to the Premises, or any portion thereof, Seller will notify the Buyer of the pendency of such proceedings and provide the Buyer with the pertinent details thereof.
  - (e) Governmental Requirements; Litigation. Seller will advise the Buyer promptly of any litigation, arbitration or administrative hearing concerning or affecting the Premises or the ownership and/or operation thereof. Seller represents to Buyer that there are no zoning violations affecting the Premises.
- 5.3 The Buyer's Representations and Warranties. The Buyer represents and warrants to Seller and Meier as follows (which representations and warranties shall be true and correct as of the date hereof and as of the Closing);
- (a) Authority. The Buyer has duly and validly authorized and executed this Agreement, and has full right, title, power and authority to enter into this Agreement and to carry out all of its terms; and
  - (b) No Violation; Consent. The execution and delivery by the Buyer of, consummation of the transactions provided for in, and compliance by the Buyer with all of the provisions of this Agreement will not violate the organizational documents of the Buyer or do not require any approval or consent of any trustee or holders of any of its debt.
- 5.4 Meier's Representations and Warranties. Meier represents and warrants to Buyer as follows (which representations and warranties shall be true and correct as of the date hereof and as of the Closing);
- (a) Ownership. John Meier and Christine C. Meier are the sole

members and managers of each of Togg Mountain and Togg Holdings.

- (b) Authority. John Meier and Christine C. Meier, as the sole members and managers of each of Togg Mountain and Togg Holdings, have the full right, title, power and authority to authorize each of Togg Mountain and Togg Holdings to enter into this Agreement and to carry out all of its terms as Seller.

6. Transfer of Title. The transfer of title ("Closing") shall take place at a date to be determined by Buyer and Seller on or about May 15, 2021. Closing shall be held at the offices of Mackenzie Hughes LLP, 440 South Warren Street, Suite 400, Syracuse, New York or such other location as the parties may agree.

7. Title Examination and Objections, Transfer of Title and Sale Documents.

- 7.1 Searches. Upon thirty (30) days' notice from Buyer or Buyer's attorney, Seller will provide Buyer's attorney with the following:

At Seller's expense, tax and U.S. District Court searches dated or re-dated after the date of this Agreement with local tax certificate for county, city and school taxes and county searches under the Uniform Commercial Code for the Seller and any previous owners of the Premises for the past five (5) years and Certificates of Good Standing for Seller, which searches shall be re-dated as of the date of transfer of title. Said title search shall be in the form of an updated abstract of title prepared by an abstract corporation duly qualified to do business in the State of New York, covering a period of at least forty (40) years and beginning with a warranty deed, demonstrating that Seller holds good and marketable title to the Premises free and clear of all liens and encumbrances except as may be provided for herein.

Seller to obtain, at its cost and expense, a survey map showing all improvements, courses and distances of all boundaries and the relation of the Premises to a monument or other fixed point, which survey shall in sufficient detail show and identify any and all encroachments, street lines, fences, easements, rights of way, building lines or setbacks, improvements, driveways, parking areas, overhead transmission lines, underground transmission lines, ski lifts, utility, sewer, gas and water lines, and utility poles, dated after the date of this Agreement and certified as requested by Buyer.

7.2 Title Examination, Objections to Title.

- (a) Buyer may obtain a preliminary title report and title commitment, describing the Premises and if so obtained will furnish to Seller's

attorneys a copy thereof within twenty (20) Business Days of Buyer's attorneys' receipt of the materials identified in 7.1 of this Agreement. Seller shall make payments prior to or at Closing of any fixed dollar costs, such as outstanding mortgages, liens, taxes or judgments.

- (b) If Seller is unable to convey good and marketable title to the Premises at Closing, subject to and in accordance with the provisions of this Agreement, then, except as hereinafter provided, Buyer may elect, by written notice to Seller, to either:
    - (i) terminate this Agreement by notice, in the manner herein provided, delivered to the Seller, in which event the Escrow Agent shall immediately return to the Buyer the Deposit. This Agreement shall wholly cease and terminate and neither party shall have any further claim against the other by reason of this Agreement, and the lien, if any, of the Buyer against the Premises shall wholly cease; or
    - (ii) proceed with the purchase provided Seller is willing to pay the premium for a title insurance policy for the Buyer in the amount of the Purchase Price and Buyer confirms Buyer's acceptance of the title insurance policy, title company and that said title company agrees in writing to re-insure the Premises at standard rates in the future.
  - (c) Notwithstanding anything to the contrary contained herein, Buyer may accept such title as Seller may be able to convey, without reduction of the Purchase Price or any credit or allowance against the same and without any other liability on the part of Seller. If Buyer elects to do so, Seller shall have no right to terminate this Agreement.
- 7.3 Foreign Buyer. Buyer agrees to execute and deliver to Seller on Closing a Certification of Non-Foreign Status contemplated by Section 1445 of the Internal Revenue Code.
- 7.4 TP-584. Buyer and Seller shall each execute and deliver at Closing an appropriate TP-584 form required by the New York State Department of Taxation and Finance.
- 7.5 Authority. Evidence reasonably acceptable to the Title Company authorizing the consummation by Seller of the transactions contemplated hereby and the execution and delivery of the closing documents on behalf of Seller.

- 7.6 Further Assurances. At the Closing, the parties shall execute and deliver such other instruments and documents as may be necessary in order to complete the Closing of the transactions contemplated hereunder, the form and content of which shall be reasonably acceptable to them.
- 7.7 Tax Bills and Assessment. Within ten (10) days of the parties' execution of this Agreement, Seller will furnish Buyer with a statement of current property assessed value and copy of bills for real estate taxes and assessment for the last full year for the Premises.
- 7.8 Environmental Reports; Title Policies; Existing Surveys; Engineering Reports; Closing Documents received by Seller on the Purchase of Premises. Upon thirty (30) days' notice from Buyer or Buyer's attorney, Seller will provide Buyer's attorney with copies of all environmental reports, title policies, existing surveys, engineering reports and closing documents on the Premises received by Seller in connection with the purchase of the Premises by Seller.
8. Closing Conditions.
- 8.1 Closing Conditions for Buyer's Benefit. The obligations of the Buyer to consummate the transactions contemplated hereby are subject to the following conditions, any of which, if not fulfilled by the Closing or as otherwise provided herein, shall entitle the Buyer (at its option) to terminate this Agreement (and return of any Deposit) as provided below:
- (a) Absence of Judicial Action. The transactions contemplated under this Agreement to be effected on the Closing Date shall not have been restrained or prohibited by any injunction or order or judgment rendered by any court or other governmental agency of competent jurisdiction and no proceeding shall have been instituted and be pending in which any creditor of Seller or any other person seeks to restrain such transactions or otherwise to attach any of the Premises, provided that any such proceeding or action contemplated by this Section shall not be deemed to include any proceeding or action brought by, through or under the Buyer.
  - (b) Representations and Warranties. All representations and warranties made by Seller herein shall be true and correct in all material respects.
  - (c) Absence of Litigation. Seller shall have received no written notice of any litigation pending or threatened against the Premises the loss of which would have a material adverse effect on the Premises.

- (d) Covenants of Seller. All of the covenants and agreements herein on the part of Seller to be complied with or performed on or before the Closing Date shall have been fully complied with and performed, and there shall exist no default or breach by Seller under this Agreement and/or the Asset Purchase Agreement.
  - (e) Execution. Neither the Premises nor any part thereof or any interest therein shall have been taken by execution or other process of law in any action against Seller.
  - (f) Closing of the Asset Purchase Agreement. The Closing of the Asset Purchase Agreement shall be completed and consummated contemporaneously with the Closing of this Agreement.
  - (g) Satisfied or Waived Contingencies. The contingencies set forth herein for Buyer's benefit are either satisfied or waived by Buyer as determined by Buyer in its sole and absolute discretion.
- 8.2 Closing Conditions for Seller's Benefit. The obligations of Seller to consummate the transactions contemplated hereby are subject to the following conditions which, if not fulfilled by the Closing or as otherwise provided herein, shall entitle Seller, at its option, to terminate the Agreement.
- (a) Covenants of the Buyer. All of the covenants and agreements herein on the part of the Buyer to be complied with or performed in all material respect, on or before the Closing Date and there exists as of the Closing Date no material breach hereunder by the Buyer.
  - (b) Representations and Warranties. All representations and warranties made by the Buyer herein shall have been and remain true and correct in all material respects on the Closing Date.
  - (c) Absence of Judicial Action. The transactions contemplated under this Agreement to be effected on the Closing Date shall not have been restrained or prohibited by any injunction or order or judgment rendered by any court or other governmental agency of competent jurisdiction.

9. Environmental Contingencies.

- 9.1 Seller covenants, represents and warrants that Seller has no knowledge of any lawsuits, notices of violation or other regulatory, administrative, judicial or legal proceedings commenced or pending against Seller in connection with, either directly or indirectly, the environmental conditions at the Premises. At the time of execution of this Agreement, Seller has no knowledge of any Hazardous Materials on, in or under the Premises, nor does Seller have any knowledge of the existence of any underground storage tanks located on, in or under the Premises. Hazardous Materials are defined as: (1) any "hazardous waste" as defined by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Section 6901 et seq.), as amended from time to time, and regulations promulgated thereunder ("RCRA"); (2) any "hazardous substance" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. Section 9601 et seq.), as amended from time to time, and regulations promulgated thereunder ("CERCLA") (including petroleum-based products as described therein); (3) other petroleum and petroleum-based products; (4) asbestos in any quantity or form which would subject it to regulation under any applicable Hazardous Materials Law (hereinafter defined); (5) polychlorinated biphenyls; (6) any substance, the presence of which on the Premises is prohibited by any Hazardous Materials Law; (7) any "extremely hazardous substance" or "hazardous chemical" as those terms are defined in the Emergency Planning and Community Right-To-Know Act (42 U.S.C. Section 11001 et seq.) as amended from time to time, and regulations promulgated thereunder ("EPCRA"); (8) any "chemical substance" as that term is defined in the Toxic Substances Control Act (15 U.S.C. Section 2601) as amended from time to time, and regulations promulgated thereunder ("TSCA"); (9) any hazardous substances identified under the law of the state in which the Premises is located; and (10) any other substance, including toxic substances, which, by any Hazardous Materials Laws, requires special handling in its collection, storage, treatment, management, recycling or disposal. "Hazardous Materials" shall mean all governmental requirements, including, without limitation RCRA and CERCLA, relating to the handling, storage, existence of or otherwise regulating any hazardous wastes, hazardous substances, toxic substances, radioactive materials, pollutants, chemicals, contaminants, or industrial substances or relating to the removal or remediation of any of the foregoing.
- 9.2 Buyer shall have the right prior to Closing (as defined herein below), at its expense, to retain an environmental consultant to perform a Phase I Environmental Assessment, in accordance with ASSTM E-1527-05 standards to identify environmental conditions at the Premises. The Seller shall cooperate with Buyer in completing the Phase I, including providing

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information and documents as may be required. If the results of such Phase I Environmental Assessment recommend a Phase II Environmental Investigation then Buyer may either complete the Phase II Environmental Assessment or terminate this Agreement and Buyer's Deposit shall be immediately returned to Buyer. Buyer shall restore the Premises to their condition before any Phase II testing. Seller shall provide Buyer with a copy of all environmental reports prepared by Seller's environmental consultant concerning its assessment of the Premises (the "Seller's Environmental Reports") made prior to Seller's purchase of the Premises and/or prepared for Seller's lender and/or environment reports furnished to Seller prior to its purchase of the Premises. Buyer shall provide Seller with a copy of all reports prepared by Buyer's environmental consultant concerning its assessment of the Premises (the "Buyer's Environmental Reports") within ten (10) Business Days of Buyer's receipt of the Environmental Report.

- 9.3 If in Buyer's sole opinion, the Phase I or Phase II Reports indicate that (i) there is a violation of any applicable Hazardous Material Law, rule or regulation, (ii) the Premises contains any amount of Hazardous Materials or other contaminants or (iii) the Premises presents any environmental concern, Buyer may cancel this Agreement and Buyer's Deposit shall be immediately returned to Buyer.

10. Broker. Seller and Meier and Buyer each represent and warrant to each other that neither one of them has used the services of any finder or a broker in connection with this transaction.

11. Contingencies.

- 11.1 This Agreement is subject to and contingent upon the completion of the following to Buyer's satisfaction as determined solely by Buyer in its sole discretion:
- (a) Buyer obtaining the approval, beyond any applicable cure period(s), of all public and governmental authorities as to all matters relating to zoning, DEC permits, SRBC registration, ski lift licenses and any other current permits or licenses for the operation of Toggenburg Mountain Winter Sports Center. Seller shall execute such documents, make such appearances and do such other things as Buyer may reasonably request in connection therewith, provided that Seller shall not be obligated to incur any cost or expense in connection therewith. Seller further agrees to dedicate or grant any easement for public ways and utilities.
  - (b) Buyer's satisfactory review, in its sole and absolute discretion, of any and all covenants, easements, leases, agreements, conditions,

- wetlands and restrictions affecting the Premises.
- (c) Buyer's satisfactory review, in its sole and absolute discretion, of the results of any of the Buyer's inspections, investigations, tests and studies including, without limitation, such inspections, investigations, tests and studies related to the physical, geological, septic system and environmental condition of the Premises; and
  - (d) Buyer receiving a commitment from a commercial bank or other lending institution for financing the purchase of the Premises under this Agreement and the purchase of the Purchased Assets under the Asset Purchase Agreement upon terms and conditions acceptable to Buyer, in its sole and absolute discretion, within ninety (90) days from the Effective Date.
  - (e) The contemporaneous closing by Seller and Buyer of the transactions contemplated under the Asset Purchase Agreement entered into by Seller, Buyer and Meier of even date of this Agreement.

11.2 Time to Satisfy Contingencies and Right to Terminate. Except for the closing of the transactions contemplated under the Asset Purchase Agreement, Buyer shall have 90 days from the Effective Date to satisfy or waive the contingencies herein ("Initial Contingency Period"). Buyer and Seller shall act in good faith and use due diligence to satisfy all conditions for which they are responsible.

12. Seller's Default: Upon thirty (30) days prior notification in writing by Buyer to Seller of any breach of the terms and provisions of this Agreement, Seller, at Seller's own expense, shall do, or commence to do, and diligently pursue any act necessary to cure or remedy any such breach. If Seller fails within thirty (30) days following Buyer's notice thereof to cure, Buyer may, in Buyer's sole discretion, elect to proceed to cure or remedy or attempt to cure or remedy the breach. In that event, Buyer shall receive a credit to decrease the amount owing to Seller at the Closing equal to all monies reasonably expended by Buyer. In the event that the alleged default cannot reasonably be cured within thirty (30) days and the Seller commences to cure the default within the thirty (30) day time frame and diligently continuously pursues said cure, then Seller shall have a reasonable additional period of time in which to cure such alleged default.

13. Buyer's Default. Upon thirty (30) days prior notification in writing by Seller to Buyer of any material breach of the terms and provisions of this Agreement, Buyer, at Buyer's own expense, shall do, or commence to do, and diligently pursue any act reasonably necessary to cure or remedy any such breach. If Buyer fails within thirty (30) days following Seller's notice thereof to cure, or commence to cure, or otherwise remedy the breach, Seller may proceed to cure or remedy or attempt to cure or remedy the breach. In the event, Seller shall receive a credit to increase the amount owing to Seller at the Closing equal to all monies reasonably expended by

Seller. In the event that the alleged default cannot reasonably be cured within thirty (30) days and the Buyer commences to cure the default within the thirty (30) day time frame and diligently continuously pursues said cure, Buyer shall have a reasonable additional period of time in which to cure such alleged default.

14. Risk of Loss. The risk of substantial casualty loss or damage to the Premises, until the Closing Date, shall be assumed by the Seller. Upon such loss or damage to the Premises, Buyer shall have the election of terminating this Agreement without further liability hereunder or of completing the purchase and taking an assignment from Seller of Seller's rights, including insurance claims, for such casualty. Such election shall be made by Buyer within forty five (45) days from the date of loss. If an election is made by Buyer to terminate, this Agreement shall be deemed to have terminated as of the date of such election.

15. Eminent Domain. If, during the term of this Agreement, all or any portion of the Premises shall be taken by eminent domain, or is the subject of eminent domain proceedings threatened or commenced, Seller shall promptly notify Buyer thereof, and shall immediately provide Buyer with copies of any written communication from any condemning authority. If any of said events occur then, in that event, Buyer shall have the right to terminate the Agreement, in which event, this Agreement shall become null and void and the Deposit returned to Buyer. If any of said events occur and Buyer still desires to Close, (a) if the transfer to the condemning authority has not taken place prior to Closing, the entire Premises shall be conveyed to Buyer at Closing hereunder; and (c) if Seller has received payment for such condemnation or taking prior to the Closing hereunder, the amount of such payment shall be a credit against the Purchase Price for the Premises payable by Buyer; if Seller has not received such payment at the time of Closing, Seller shall assign to Buyer all claims and rights on account of or arising out of such taking.

16. Entire Agreement. This Agreement, when accepted, shall constitute the entire agreement between the Parties hereto relating to said sale and purchase and supersedes all prior or other agreements and representations in connection with said sale and purchase and this Agreement cannot be changed, except in writing signed by Meier, Buyer and Seller. All the terms, covenants, provisions, conditions and agreements hereinabove set forth or provided for shall be binding upon and inure to the benefit of the Parties and their respective heirs, distributees, executors, administrators, successors and assigns.

17. Choice of Law. This Agreement shall be governed by, enforced and interpreted in accordance with the substantive internal laws of the State of New York applicable to agreements to be made and to be performed solely within such State, without giving effect to any conflict or choice of law purposes, which might otherwise be applicable. Any lawsuits or other legal action must be commenced in Onondaga County, New York State.

18. Notices. All notices, requests, demands and other communications which are required or may be given under this Agreement shall be in writing and shall be deemed to have been duly given: (i) upon receipt if personally delivered; (ii) when transmitted with confirmation of transmission if transmitted by email or facsimile; (iii) the day after it is sent, if sent for next day delivery to a domestic address by recognized overnight courier services (e.g., Federal

Express); and (iv) upon receipt, if sent by certified or registered mail, return receipt requested. In each case notice shall be sent:

If to Seller: Togg Mountain, LLC and Togg Holdings, LLC  
Attn: John Meier  
1580 Lake Road  
Elmira, NY 14903

With a copy to: John R. Alexander, Esq.  
Sayles & Evans  
One West Church Street  
Elmira, NY 14901

If to Buyer: Intermountain Management Inc.  
Attn: Peter Harris 1 Song Mountain  
Road P.O. Box 1001 Tully, New  
York 13159

With a copy to: Edward J. Moses, Esq.  
Mackenzie Hughes LLP  
440 South Warren Street, Suite 400  
Syracuse, New York 13202

19. Further documents. Each party agrees to execute from time to time before or after the Closing of this Agreement such other and further documents as may be reasonably necessary to carry out the intent of this Agreement.

20. Seller's Closing Documents. The Premises shall be conveyed and transferred by Seller to Buyer on the Closing Date by the following instruments; the parties shall agree upon the instrument no later than five (5) Business Days prior to the Closing Date:

- 20.1 Warranty Deed. A warranty deed with lien covenants in proper statutory form for recording, duly executed by Seller and acknowledged ("Deed") or as to convey the Buyer good and marketable title in fee simple to the Premises, free and clear of all claims, liabilities, obligations, security interest, liens, judgments and encumbrances except as specifically provided otherwise herein and such other documents as may be appropriate or necessary to convey the real property interest intended to be conveyed.
- 20.2 Keys and Security Code. Any and all keys and security code in the possession of the Seller to locks located on the Premises.
- 20.3 FIRPTA. An affidavit required by Section 1445 of the Internal Revenue Code of 1986, as amended ("Code"), and the Regulations pursuant thereto,

- and acceptable to the Buyer ("FIRPTA Affidavit").
- 20.4 Closing Statement. A Closing Statement showing all closing costs and expenses of each party, all credits, debits and all pro-rations and showing the net amount due from Buyer at Closing.
- 20.5 Other Documents, Instrument or Agreements. Any other documents, instruments or agreements called for hereunder which have not previously been delivered or which are reasonably necessary to close the transaction as contemplated by this Agreement, including updated and current certificates/approvals valid through the date of Closing issued by appropriate governmental authorities evidencing compliance with all applicable laws, ordinances, regulations and codes relating to the present use of the premises and/or required for the transfer of the premises.
21. Miscellaneous. The captions in this Agreement are inserted for reference only and in no way define, describe or limit the scope or intent of this Agreement or any of the provisions hereof.
- 21.1 This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns.
- 21.2 Neither party may assign its interests in this Agreement, or this Agreement, without the prior written consent of other party. However, Buyer may assign the Agreement to an entity to be formed by the Buyer, but such assignment shall not relieve Buyer of its obligations hereunder.
- 21.3 This Agreement may be executed in any number of counterparts. It is not necessary that all parties sign all or any one of the counterparts, but each party must sign at least one (1) counterpart for his Agreement to be effective. A facsimile or electronic signature shall be considered a valid original signature.
- 21.4 Capacity. Each individual and entity executing this Agreement hereby individually represents that he and/or it has the capacity set forth on the signature pages hereof with full power and authority to bind the party on whose behalf he and/or it is executing this Agreement to the terms hereof.
- 21.5 No Amendment or Waiver. This Agreement shall not be altered, amended, changed, waived, terminated or otherwise modified in any respect or particular unless the same shall be in writing and signed by the parties hereto. No waiver by any party of any breach hereunder shall be deemed a waiver of any other or subsequent breach.
- 21.6 Parties. Except as otherwise provided in this Agreement, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and

to their respective heirs, executors, administrators, legal representatives, successors and assigns.

- 21.7 Headings. Section headings of this Agreement have been inserted for convenience of reference only and will in no way modify or restrict any provisions hereof or be used to construe any such provision.
- 21.8 Exhibits and Schedules. All Exhibits and Schedules attached hereto are incorporated herein by reference and made a part hereof.
- 21.9 Additional Acts. Each party hereto shall from time to time perform such additional acts as the other party may reasonably request to effectuate the intent of this Agreement.
- 21.10 Interpretation and Enforcement. If suit or action is filed to interpret or enforce this Agreement, the prevailing party shall be entitled to be awarded its reasonable attorneys' fees and disbursements through all appeals in addition to other costs and disbursements allowed by law, including those incurred on appeal.
- 21.11 Zoning. If, at any time prior to closing or thereafter, Buyer elects to make application for any change in zoning or related matters, Seller shall cooperate fully with said application. Any such application shall not extend the Initial Contingency Period and shall be at no expense to Seller.
- 21.12 Business Day. For purposes of this Agreement, "Business Day" means any day except any Saturday, any Sunday, or any day which is a federal legal holiday or any day on which banking institutions are authorized or required by law or other governmental action to close.

22. Delivery of Documents and Other Items. In addition to those documents to be provided herein, at the Closing, Seller shall deliver or cause to be delivered to the Buyer all other documents and records reasonably requested by Buyer pertaining to the ownership and operation of the Premises and the assets of Seller.

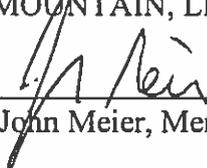
23. Execution of Agreement. This Agreement shall be effective if executed by all parties (personally or by electronic signature) with executed copies delivered by fax, e-mail or personally to all parties no later than midnight on March 18, 2021, Eastern Standard Time.

[Signature Page Follows]

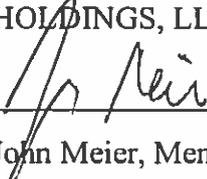
IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year above written.

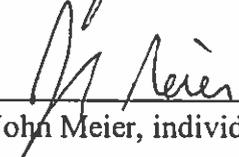
SELLER:

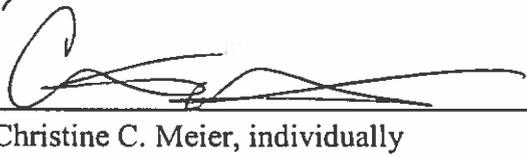
TOGG MOUNTAIN, LLC

By:   
John Meier, Member/Manager

TOGG HOLDINGS, LLC

By:   
John Meier, Member/Manager

  
John Meier, individually

  
Christine C. Meier, individually

BUYER:

INTERMOUNTAIN MANAGEMENT INC.

By: \_\_\_\_\_  
Peter Harris, President

STATE OF NEW YORK )  
COUNTY OF ~~ONONDAGA~~ ) SS.:  
*Chemung*

On this 18 day of March, 2021, before me, the undersigned, a notary public in and for said State, personally appeared JOHN MEIER, individually and as Sole Member and Manager of Togg Mountain, LLC and Togg Holdings, LLC, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

PATRICIA D. KETTER  
Notary Public, State of New York  
Chemung County No. 01KE6292105  
Commission Expires October 28, 2021

*Patricia D. Ketter*  
\_\_\_\_\_  
Notary Public

STATE OF NEW YORK )  
COUNTY OF ~~ONONDAGA~~ ) SS.:  
*Chemung*

On this 18 day of March, 2021, before me, the undersigned, a notary public in and for said State, personally appeared CHRISTINE C. MEIER, individually and as Sole Member and Manager of Togg Mountain, LLC and Togg Holdings, LLC, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

PATRICIA D. KETTER  
Notary Public, State of New York  
Chemung County No. 01KE6292105  
Commission Expires October 28, 2021

*Patricia D. Ketter*  
\_\_\_\_\_  
Notary Public

STATE OF NEW YORK ) *Chemung*  
COUNTY OF ~~ONONDAGA~~ ) SS.:

On this \_\_\_ day of \_\_\_\_\_, 202\_\_\_, before me, the undersigned, a notary public in and for said State, personally appeared PETER HARRIS, individually and as President of Labrador Development Corporation, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

(M0754498.1)

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-19-*

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year above written.

SELLER:

TOGG MOUNTAIN, LLC

By: \_\_\_\_\_  
John Meier, Member/Manager

TOGG HOLDINGS, LLC

By: \_\_\_\_\_  
John Meier, Member/Manager

\_\_\_\_\_  
John Meier, individually

\_\_\_\_\_  
Christine C. Meier, individually

BUYER:

INTERMOUNTAIN MANAGEMENT INC.

By: \_\_\_\_\_  
Peter Harris, President

*PHS*

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) SS.:

On this \_\_\_\_ day of \_\_\_\_\_, 202 \_\_, before me, the undersigned, a notary public in and for said State, personally appeared JOHN MEIER, individually and as Sole Member and Manager of Togg Mountain, LLC and Togg Holdings, LLC, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) SS.:

On this \_\_\_\_ day of \_\_\_\_\_, 202 \_\_, before me, the undersigned, a notary public in and for said State, personally appeared CHRISTINE C. MEIER, individually and as Sole Member and Manager of Togg Mountain, LLC and Togg Holdings, LLC, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) SS.:

On this 18 day of August, 202 \_\_, before me, the undersigned, a notary public in and for said State, personally appeared PETER HARRIS, individually and as President of Labrador Development Corporation, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

*125*

*[Handwritten Signature]*  
\_\_\_\_\_  
Notary Public

Lisa M Morgan  
No. 01M05071625  
Notary Public, State of New York  
Qualified in Onondaga County  
My commission expires 12/31/2025

# Exhibit 2

## ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT ("Agreement") dated as of the 17<sup>th</sup> day of March, 2021 (the "Effective Date"), by and among TOGG MOUNTAIN, LLC, a New York limited liability company doing business at 2000 NYS Route 392, Cortland, New York 13045 ("Togg Mountain") and TOGG HOLDINGS, LLC, a New York limited liability company doing business at 2000 NYS Route 392, Cortland, New York 13045 ("Togg Holdings") (collectively herein referred to as "Seller"), JOHN MEIER and CHRISTINE C. MEIER with a business office at 2000 NYS Route 392, Cortland, New York 13045 ("Meier") and INTERMOUNTAIN MANAGEMENT INC., a New York corporation duly organized and existing under the laws of the State of New York with a business address of 1 Song Mountain Road, Tully, New York 13159 ("Buyer").

### WITNESSETH:

WHEREAS, Seller is engaged in the operation of a ski center known as Toggenburg Mountain Winter Sports Center located at 1135 Toggenburg Road, Fabius, New York (the "Business"); and

WHEREAS, Seller owns certain land and buildings, more fully described in a separate Purchase and Sale Agreement entered into by Seller, Buyer and Meier of even date of this Agreement ("Purchase and Sale Agreement"); and

WHEREAS, Seller owns certain assets and other personal property comprising the Purchased Assets, as herein defined, which Purchased Assets are utilized in and/or related to the conduct of the Business (the "Purchased Assets"); and

WHEREAS, Seller wishes to sell such Purchased Assets; and

WHEREAS, Buyer is willing to buy the Purchased Assets from Seller upon the terms and conditions set forth herein, and contingent upon a contemporaneous closing of the transactions contemplated by the real estate Purchase and Sale Agreement; and

WHEREAS, John Meier and Christine C. Meier are the sole members and managers of Seller; and

NOW, THEREFORE, in consideration of the mutual terms, conditions and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby mutually acknowledged, Seller, Meier and Buyer agree as follows:

### ARTICLE I

#### PURCHASE OF THE PURCHASED ASSETS AND PURCHASE PRICE; ETC.

1.1 Purchase of Assets and Purchase Price. Subject to the terms and conditions herein, Seller and Meier agree that, on the Closing Date, as hereafter defined, Seller shall sell, transfer,

assign, convey and deliver to Buyer or to Buyer's assigns, which may be one or more of its subsidiaries or an entity to be formed by Buyer (hereinafter, reference to Buyer shall include Buyer's assign(s)), free and clear of any liens and encumbrances, and Buyer agrees that on the Closing Date it shall purchase, acquire and accept from Seller all of the following Purchased Assets as further identified in and supplemented by the Appraisal Report as provided for in Section 5.1 of this Agreement: See the attached Schedules.

1.1.1 Fixed Assets. All ski lifts, snow making equipment, snow guns, piping, snow grooming equipment, tools, spare parts, machinery, vehicles, office equipment, computers, phone system including phones, kitchen and bar equipment, restaurant furniture, fixtures and equipment, all equipment and vehicle warranties, personal property and other fixed assets of the Seller used in the ski center operation of Toggenburg Mountain, including but not limited to those detailed and set forth in Schedule 1.1.1 ("Fixed Assets") attached hereto and made a part hereof.

1.1.2 Inventory. All inventory of food stuffs, tickets, office supplies, ski rental equipment, tools and supplies on site at the time of Closing, including but not limited to the inventory detailed and set forth in Schedule 1.1.2 ("Inventory"), attached hereto and made a part hereof.

1.1.3 Intangible Assets. All of the Seller's goodwill; trademarks; trade names; intellectual property; its rights in any licenses, permits or registrations for petroleum bulk storage, lifts, water usage and discharge, to the extent transferrable; and ownership of and the right to use the name "Toggenburg Mountain" and all variations thereof; including but not limited to the detailed list set forth in Schedule 1.1.3, attached hereto and made a part hereof.

1.1.4 Miscellaneous Property. All of Seller's operating data and records of the Business, including without limitation, customer lists and records, portfolios, Seller's telephone and fax numbers, web sites, internet IP addresses, email names, financial-accounting-credit records of customers, vendors and suppliers, correspondence, budgets, reference catalogs, sales training materials, video tapes, disks, reference books and other similar documents and records relating to or used in the Business or the Purchased Assets, including but not limited to the detailed list set forth in Schedule 1.1.4 ("Miscellaneous Property") attached hereto and made a part hereof.

1.1.5 Ten (10) Business Days before the scheduled Closing Date, Seller shall provide Buyer with revised Schedules 1.1.1-1.1.4 which shall include the assets identified in the Appraisal Report as provided for in Section 5.1 of this Agreement, for verification and, once verified by Buyer, said revised Schedules shall be attached to this Agreement and to Seller's respective Bills of Sale for each category of assets comprising the Purchased Assets, which are to be delivered on the Closing Date.

1.2 Excluded Assets. The accounts receivable and cash and cash equivalents on hand as of the Closing Date, insurance rebates, deposits with vendors, tax refunds and adjustments, shall remain the property of the Seller.

1.3 Liabilities. Buyer shall not assume or be responsible for any liabilities of Seller

with the exception of gift cards or gift certificates sold by Seller. At Closing, Seller shall provide Buyer with a complete list of all outstanding gift cards and/or gift certificates sold by Seller including the card or certificate numbers and the outstanding balance on each card or certificate for which Seller shall provide Buyer with a credit against the Purchase Price on a dollar for dollar basis and Buyer shall assume the liability for such cards and/or gift certificates. Seller covenants and agrees that, if it sells season ski passes for the 2021/2022 ski season, it shall offer season ski passes for sale at prices substantially the same as or similar to those charged for season ski passes for the 2019/2020 season, and shall keep a list of the names and addresses of all season ski pass purchasers including the actual price paid by each purchaser. In the event the Buyer elects to proceed to the Closing and advises the Seller that it does not intend to operate the Business for the 2021/2022 season, at the Closing the Seller agrees to send a refund check to each season ski pass purchaser for the actual amount paid by such purchaser for the season ski pass(es). In addition, the Seller agrees to cooperate with the Buyer in allowing the Buyer to market Song Mountain and Labrador Mountain in the same envelope containing the Seller's refund check and correspondence.

1.4 Purchase Price; Buyer Credits; Allocation; Payment; Adjustments.

1.4.1 The Purchase Price to be paid by Buyer to Seller for the Purchased Assets shall be One Million Five Hundred Thousand and 00/100 Dollars (\$1,500,000.00), less any credit for the gift cards and/or gift certificates assumed by Buyer as provided for in Section 1.3 of this Agreement, allocated as follows [subject to review by accountants for Seller and Buyer]:

Covenant Not to Compete	\$ 195,000.00
Machinery and Equipment	\$ 955,000.00
Furniture and Fixtures	\$ 175,000.00
Goodwill	\$ 175,000.00
Purchase Price	\$ 1,500,000.00

1.4.2 The Purchase Price, as adjusted, shall be paid in full at Closing.

1.4.3 To the extent that Seller has failed to pay any of its Accounts Payable incurred but not paid in the ordinary course of business, Buyer shall be authorized and permitted to pay all or any portion of the Seller's Accounts Payable via joint check to Seller and the particular creditor(s) of Seller and reduce the Purchase Price to be delivered at Closing.

1.4.4 Attached hereto as Schedule 1.4.4 is a list of Seller's liabilities that have not been paid as of the date of this Agreement. To the extent that Seller has failed to pay in whole or in part any of these scheduled liabilities as of the Closing Date, Buyer shall be authorized and permitted to pay all or any portion of the Seller's unpaid scheduled liabilities via joint check to Seller and the particular creditors of Seller and reduce the cash portion of the Purchase Price to be

delivered at Closing.

1.4.5 Ten (10) Business Days before the scheduled Closing Date and again on the Closing Date, Seller shall provide Buyer with revised Schedule 1.4.4 for verification and utilization in calculating the appropriate adjustments to the Net Purchase Price.

## ARTICLE II

### CLOSING

2.1 The Closing. The consummation of the purchase and sale of the Purchased Assets (the "Closing") shall take place contemporaneously with the real estate Purchase and Sale Agreement closing at Mackenzie Hughes LLP, 440 South Salina Street, Suite 400, Syracuse, New York, or such other place as the parties shall mutually agree upon.

2.2 Except as otherwise provided for herein, in the event that a contingency which inures to the benefit of a party is not satisfied or waived by the date which is ninety (90) days from the Effective Date of this Agreement, the other party may elect to terminate this Agreement and upon said election to terminate, the parties shall be released from any further obligations to one another and the Deposit under the Purchase and Sale Agreement shall be returned to Buyer by the Escrow Agent.

## ARTICLE III

### REPRESENTATIONS AND WARRANTIES OF SELLER AND MEIER

Seller and Meier, jointly and severally, represent and warrant to Buyer, as follows:

3.1 Organization and Qualification. Seller is validly existing and in good standing under the laws of the State of New York, and has all the requisite limited liability company power and authority to (a) own, lease and operate its properties and assets, particularly those assets of the Business which collectively comprise the Purchased Assets and (b) to carry on the Business as it is now conducted. Seller is duly qualified to do business in each jurisdiction in which the nature of its Business or properties and assets makes such qualification necessary. Seller does not conduct its Business at any location other than 1135 Toggenburg Road, Fabius, New York. Seller has fully complied with all of the requirements of any statute governing the registration and use of any assumed name and has the right to use the names under which Seller conducts its Business. There is no pending or threatened proceeding for the dissolution, liquidation, insolvency or rehabilitation of Seller. A Certificate of Good Standing with respect to Seller will be delivered by Seller to Buyer at Closing, which Certificate will be dated within thirty (30) days of the Closing Date.

3.2 Litigation. Except as set forth in Schedule 3.2 attached hereto, there are no outstanding orders, judgments, stipulations, injunctions, investigations, awards or decrees of any Governmental or Regulatory Body or arbitration tribunal by which Seller, or any of its assets (in

particular the Purchased Assets), properties or the Business is subject to and/or bound. There are no actions, suits, claims, investigation, legal, administrative or arbitral proceedings pending, or, to the knowledge of Seller and Meier, threatened (whether or not the defense thereof or liabilities in respect thereof are covered by insurance) against or affecting Seller, or any of its assets (in particular the Purchased Assets), nor, to the knowledge of Seller and Meier are there any facts which are likely to give rise to any such action, suit, claim, investigation or legal, administrative or arbitral proceeding, or which questions the validity and/or enforceability of this Agreement or the transactions contemplated hereby.

3.3 Purchased Assets. The Purchased Assets being assigned, sold and transferred to Buyer pursuant to this Agreement constitute substantially all of the assets used, owned and/or occupied by Seller for the conduct of the Business. Seller owns, or will on the Closing Date own outright, and have good and marketable title to, the Purchased Assets attributable to the Business, free and clear of any lien(s) and encumbrances at the Closing. The Bills of Sale and such other conveyancing documents as shall have been executed and delivered to Buyer by Seller at Closing will convey to Buyer good and marketable title to the Purchased Assets, free and clear of any and all liens and encumbrances. All accounts, books, ledgers and other official records of Seller are accurate and complete to the knowledge of Seller, and there are no discrepancies therein of any kind which could give rise to monetary liability to Buyer after the Closing or which could have a material adverse effect on the Purchased Assets, the Premises and/or the Business of Seller and/or the contemplated business of Buyer after the Closing.

3.4 Tax Matters. All Tax returns (except those not yet due or not yet due because there are properly filed extensions) required to be filed with respect to Seller's Business have been duly filed. All such Tax Returns were in all material respects true, complete and correct and filed on a timely basis. Seller and/or Meier (i) has paid all Taxes that are due, or claimed or assessed by the Internal Revenue Services, the State of New York or any domestic or foreign taxing authority (each constituting a "Taxing Authority") to be due, from Seller and/or Meier for the periods covered by such Tax Returns or (ii) have duly and fully provided reserves adequate to pay all Taxes in Seller's Financial Statements.

3.5 Unemployment Insurance Account. Seller does not have a negative balance in its unemployment insurance account with the State of New York, Department of Labor, Unemployment Insurance Division, which would cause Buyer, based upon a closing of the transactions contemplated by this Agreement, to be burdened, subsequent to the Closing Date, with any adverse (to Buyer) transfer of Seller's unemployment experience and/or being assessed a penalty with respect to Buyer's unemployment insurance tax rate.

3.6 Contracts. Except for the gift cards and/or gift certificates and/or season ski passes provided for in Section 1.3 above, Seller has no currently existing contract, lease or commitment, and will not have any on and/or as of the Closing Date, for the delivery of any goods and/or services to Buyer or which will create any lien or encumbrance upon any of the Purchased Assets or upon Seller's Business or which will obligate Buyer, as a practical matter, to acquire and/or provide any particular goods and/or services subsequent to the Closing.

3.7 ERISA. Seller does not sponsor any type of pension, profit sharing, HR10, 401(k) or similar plan for the benefit of its employees that will impose any post-Closing liability on

Buyer. Seller and Meier agree to indemnify and save Buyer harmless from and against any and all liability, cost, expense or otherwise that may arise against Buyer from and after the Closing Date predicated upon a claim that such a pension, profit sharing, HR10, 401(k) and/or similar plan exists for the benefit of Seller's employees and that Buyer has some obligation to the employees under such plan.

3.8 Compliance with Laws. To the knowledge of Seller and Meier, Seller has complied in all material respects with all applicable federal, state and local laws, rules, regulations and ordinances or any requirement of any Governmental or Regulatory Body affecting the Business and the Purchased Assets, and has complied with the terms of all permits, licenses, registrations and consents and neither Seller nor Meier has received any notice of any violation from any Governmental or Regulatory Body which has not been fully remedied by Seller. Seller and Meier acknowledge that Buyer may, but has no commitment or obligation to, hire any of Seller's employees after the Closing. Seller agrees to comply with the New York State WARN Act and other applicable federal and state laws regarding the layoff of its employees on or before the Closing Date.

3.9 Disclosure. No representation or warranty by Seller and/or Meier in this Agreement, or in any document, instrument or certificate to be delivered on the Closing Date, contains, or will contain, any untrue statement of material fact or omits to state a material fact necessary to make any statement herein not misleading.

3.10 Reliance. The foregoing representations and warranties are jointly and severally made by Seller and Meier with the knowledge that Buyer is entering into this Agreement, and intends to consummate the transactions described herein, in full and complete reliance upon said representations and warranties and the documentation and/or information to be provided by Seller and Meier to Buyer.

## ARTICLE IV

### REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer represents and warrants to Seller and Meier as follows:

4.1 Validity and Execution of Agreement. Buyer has the full legal right, capacity and power required to enter into, execute and deliver this Agreement and any other agreement or instrument contemplated hereby, and to perform fully its obligations hereunder and thereunder. This Agreement and each other document, instrument and/or certificate required pursuant hereto have been or will be duly executed and delivered by Buyer (in each case as to which Buyer is a party) and each constitutes the valid and binding obligation of Buyer.

4.2 No Conflict. Neither the execution and delivery of this Agreement nor any other document, instrument and/or certificate required to be delivered hereunder nor the performance by Buyer of the transactions contemplated hereby will violate or conflict with any provision of any law, rule, regulation, order, judgment, decree or ruling of any Governmental or Regulatory Body applicable to Buyer.

## ARTICLE V

## COVENANTS OF SELLER AND MEIER

Seller and Meier, jointly and severally, hereby covenant and agree with Buyer, that Seller and Meier shall do, cooperate in doing, and/or refrain from doing, as the case may be, the following:

5.1 Corporate Examinations and Investigations. From and after the full execution and delivery of this Agreement and up to Closing Date, Buyer shall be entitled, through its employees, consultants, appraisers, lenders, accountants, representatives and attorneys, to make such investigation of the Purchased Assets, as Buyer deems necessary in making its due diligence inquiry. Buyer shall engage a qualified appraiser to identify, list and appraise the fair market value of substantially all of the Purchased Assets to assist the Buyer and Seller in supplementing the Schedules referenced in Section 1.1 of this Agreement and in allocating the Purchase Price among the Purchased Assets (the "Appraisal Report"). The cost of the appraiser shall be at the sole expense of the Buyer. Any such investigation and examination shall be conducted at reasonable times and under reasonable circumstances and Seller and Meier shall cooperate fully therein. No investigation by Buyer shall diminish or obviate any of the representations, warranties, covenants or agreements of Seller and/or Meier under this Agreement.

5.2 Conduct of Business. From the date hereof through the Closing Date, Seller and Meier shall (i) conduct the Business in the ordinary course in the same manner as the Business has been conducted and in such a manner that the representations and warranties contained in Article III shall continue to be true and correct on the Closing Date as if made on and as of the Effective Date and (ii) refrain from misusing, selling or otherwise disposing of any of the Purchased Assets other than in the ordinary course of business.

5.3 Preservation of Business. From the date hereof through the Closing Date, Seller and Meier shall (i) maintain Seller's company existence in good standing, (ii) preserve intact the Business and organizations of Seller, (iii) use their best efforts to keep available the services of their present employees, (iv) properly maintain, repair and service the Purchased Assets in a manner consistent with industry standards, (v) continue to perform their obligations to their customers, and (vi) keep all licenses, permits, registrations and consents necessary for the conduct of the Business in full force and effect and in good standing.

5.4 Bulk Sales. No less than twenty (20) days prior to Closing, Seller and Meier agree to do, or cause to be done, any and all things requested by Buyer or Buyer's attorney to comply with Section 1141(c) of the Tax Law of the State of New York dealing with bulk sales. Seller and Meier also agree to cooperate with Buyer and Buyer's attorney to comply with any other laws of the State of New York applicable to transactions of this nature. Seller and Meier shall jointly and severally indemnify and save Buyer harmless from all liability, expenses, claims, reasonable attorneys' fees or other costs, penalties, interest or the like arising out of any past due sales tax liability arising out of Seller's operation of the Business.

## ARTICLE VI

### SALES TAXES

6.1 Sales Taxes. Within twenty (20) days of the Closing Date but no later than the Closing Date, Buyer shall pay all resulting sales taxes under any applicable state sales tax laws or regulations relating to the sale by Seller to Buyer of the Purchased Assets, and Buyer shall indemnify and hold Seller and Meier harmless from all expenses, claims, reasonable attorney's fees, or other costs and expenses arising out of Buyer's failure to make such payments in a timely and full manner.

## ARTICLE VII

### CONDITIONS PRECEDENT TO THE CLOSING

7.1 Conditions Precedent to Buyer's Obligations to Complete the Closing. The obligations of Buyer to enter into and complete the Closing of the transactions contemplated by this Agreement are subject to the occurrence of the following conditions with respect to Buyer and the fulfillment by Seller and Meier, as the case may be, on or prior to the Closing Date, of the following conditions, any one or more of which may be waived by Buyer:

7.1.1 Representations, Warranties and Covenants. The representations and warranties of Seller and Meier contained in this Agreement shall be materially true, complete and correct on and as of the Closing Date with the same force and effect as though made on and as of the Closing Date. Seller and Meier shall have performed and complied with all covenants and agreements required by this Agreement to be performed or complied with by Seller and/or Meier on or prior to the Closing Date.

7.1.2 Documents to be delivered by Seller and Meier and/or to be received by Buyer. At or prior to the Closing, Seller and Meier shall deliver, or cause to be delivered, to Buyer the following documents, duly executed or certified to the reasonable satisfaction of Buyer and/or the Buyer having received the following documents and/or agreements where applicable:

7.1.2.1 Separate Bills of Sale or Department of Motor Vehicle transfers of title, dated the Closing Date, for each of the categories of Purchased Assets.

7.1.2.2 Certificate, dated the Closing Date, of the Members and Managers of Seller, confirming (i) that the resolutions attached to the certificate approving the transactions contemplated by this Agreement were duly adopted by the Members and Managers of Seller, and (ii) the incumbency of the officers of Seller executing, on behalf of Seller, this Agreement and the other agreements contemplated hereby.

7.1.2.3 A UCC search of Seller and a good standing certificate of Seller, issued by the Department of State of the State of New York, dated subsequent to the execution date of this Agreement but within thirty (30) Business Days of the Closing Date;

7.1.2.4 Certificate, executed by Seller and Meier, dated at least thirty (30) Business Days prior to the Closing Date, stating that the copies of UCC-1 financing statements attached to the Certificate are all of the financing statements that, as of the Closing Date, have been filed against the Purchased Assets in each of the jurisdictions in which Seller maintains a place of business or maintains any of the Purchased Assets.

7.1.2.5 Buyer having obtained any and all licenses, permits, registrations, consents and approval from any and all Governmental and Regulatory Bodies necessary and/or convenient for the conduct of a business from and after the Closing substantially similar to the Business of Seller and to conduct same without conditions and/or restriction at 1135 Toggenburg Road, Fabius, New York;

7.1.2.6 Articles of Organization and all amendments thereto and Operating Agreements and all amendments thereto of Seller and unanimous written consents of all the members and managers of Seller authorizing the transactions contemplated by this Agreement and the Purchase and Sale Agreement.

7.1.2.7 Such other documents, instruments, searches and certificates as may be reasonably requested by Buyer, or Buyer's attorney, and/or necessary or convenient to carrying out the intents and purposes and the transactions contemplated by this Agreement.

7.1.3 Financing. Buyer receiving a commitment from a commercial bank or other lender for financing the purchase of the Purchased Assets under this Agreement and the purchase of the Premises under the Purchase and Sale Agreement upon terms and conditions acceptable to Buyer, in its sole and absolute opinion, within ninety (90) days from the Effective Date. In the event that Buyer has not received a commitment for a loan within ninety (90) days from the Effective Date, Buyer may either terminate this Agreement or waive this contingency.

7.2 Conditions Precedent to Seller's and Meier's obligations to Complete the Closing. The obligations of Seller and Meier to complete the Closing are subject to the fulfillment, on or prior to the Closing Date, of the following conditions, any one or more of which may be waived by Seller and/or Meier:

7.2.1 Representations and Warranties and Covenants. The representations and warranties of Buyer contained in this Agreement shall be materially true, complete and correct as of the Closing Date with the same force and effect as though made on and as of the Closing Date. Buyer shall have performed and complied with, or caused to be performed and complied with, all covenants and agreements required by this Agreement to be performed or complied with by Buyer on or prior to the Closing Date.

7.2.2 Such other documents and instruments as may be reasonably requested by Seller and Meier and their attorney and necessary to carry out the transactions contemplated by this Agreement.

## ARTICLE VIII INDEMNIFICATION

8.1 Indemnification of Buyer. Seller and Meier, jointly and severally, agree to indemnify, defend and hold Buyer and its assign(s), if applicable, harmless from and against any and all losses, liabilities (including any special, consequential, indirect, exemplary, punitive or other damages, fines or penalties and any interest thereon), expenses (including reasonable fees and disbursements of counsel and expenses of investigation and defense), claims, liens or other obligations of any nature whatsoever (hereinafter individually, a "Loss" and collectively, "Losses") including reasonable attorneys' fees which, directly or indirectly, arise out of, result from or relate to any misrepresentation, warranty and/or covenant of Seller and/or Meier contained in this Agreement or in any other document contemplated by this Agreement to be delivered by Seller and/or Meier to Buyer in advance of and at Closing, or (ii) breach of any covenant or agreement of Seller and/or Meier contained in this Agreement or in any other document or instrument executed in conjunction with this Agreement. Provided, however, that in no event shall such indemnification in the aggregate exceed the Purchase Price. Further, Seller and Meier shall not be liable hereunder until the aggregate of all Losses hereunder exceeds Twenty Five Thousand Dollars (\$25,000.00 the "Basket"); provided that the Basket shall not apply to (i) any claim arising out of a breach of a representation or warranty relating to authorization to enter into and enforceability of this Agreement or the Purchase and Sale Agreement entered into of even date herewith, (ii) unencumbered title to the Purchased Assets, (iii) any claim based on Seller and Meier fraud or intentional misrepresentation, or (iv) any fraudulent or intentional breach of this Agreement or the Purchase and Sale Agreement by Seller and Meier or any intentional failure by Seller and Meier to perform any obligation set forth in this Agreement or the Purchase and Sale Agreement. In the event the aggregate of all Losses exceeds Twenty Five Thousand Dollars (\$25,000.00), Seller and Meier shall be liable hereunder for all Losses hereunder from the first dollar, without regard to the Basket.

8.2 Indemnification of Seller and Meier. Buyer agrees to indemnify, defend and hold Seller and Meier harmless from and against any and all Loss or Losses, including reasonable attorneys' fees, which, directly or indirectly, arise out of, result from or relate to any misrepresentation of Buyer which results in (i) material inaccuracy in or any breach of any representation or warranty of Buyer contained in this Agreement or in any other document contemplated by this Agreement to be delivered by Buyer to Seller and/or Meier at Closing, or (ii) breach of any covenant or agreement of Buyer contained in this Agreement or in any other document or instrument executed in conjunction with this Agreement.

## ARTICLE IX

### MISCELLANEOUS

9.1 Notices. All notices, requests, demands and other communications required or permitted to be given hereunder shall be in writing and shall be given personally, telegraphed, telexed, sent by facsimile transmission or sent by prepaid air courier or certified or express mail, postage prepaid. Any such notice shall be deemed to have been given (a) when received, if

delivered in person, telegraphed, telexed or sent by facsimile transmission and confirmed in writing by certified mail, postage prepaid, within three (3) Business Days thereafter or sent by prepaid air courier or express mail or (b) three (3) Business Days following the mailing thereof, if mailed by certified mail, postage prepaid, return receipt requested, in any such case as follows (or to such other address or addresses as a party may have advised the other in the manner provided in this Section 9.1):

If to Seller or Meier: Togg Mountain, LLC and Togg Holdings, LLC  
Attn: John Meier  
1580 Lake Road  
Elmira, NY 14903

With a copy to: John R. Alexander, Esq.  
Sayles & Evans  
One West Church Street  
Elmira, NY 14901

If to Buyer: Intermountain Management Inc.  
Attn: Peter Harris 1 Song Mountain  
Road P.O. Box 1001 Tully, New  
York 13159

With a copy to: Edward J. Moses, Esq.  
Mackenzie Hughes LLP  
440 South Warren Street, Suite 400  
Syracuse, New York 13202

9.2 Entire Agreement. This Agreement and the agreements, certificates and other documents delivered, or to be delivered pursuant to this Agreement, contain the entire agreement among the parties with respect to the transactions described herein and supersede all prior agreements, written or oral, with respect thereto.

9.3 Waivers and Amendments. This Agreement may be amended, superseded, canceled, renewed or extended, and the terms hereof may be waived only by a written instrument signed by Seller, Meier and Buyer, or, in the case of a waiver, by the party waiving compliance. No delay on the part of any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof.

9.4 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to principles of conflicts of law.

9.5 Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors, assigns and legal representatives. The Buyer may assign all or any part of its rights and/or obligations under this Agreement, without the

consent of Seller or Meier, to a Person which is owned in majority by Buyer; provided, however, Buyer shall remain obligated for "Buyer's" performance obligations hereunder after such assignment.

9.6 Counterparts. This Agreement may be executed by the parties hereto in separate counterparts, and by facsimile, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute one and the same instrument. Each counterpart may consist of a number of copies hereof each signed by less than all, but together signed by all of the parties hereto.

9.7 Headings. The headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

9.8 Severability of Provisions. If any provision or any portion of any provision of this Agreement or the application of such provision or any portion thereof to any person or circumstance shall be held invalid or unenforceable, the remaining portion of such provision and the remaining provisions of this Agreement, or the application of such provision or portion of such provision held invalid or unenforceable with respect to Persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby.

9.9 Survival of Representations and Warranties. Except as otherwise provided for herein, all statements contained in any certificate or other instrument delivered by or on behalf of Seller and/or Meier pursuant hereto, or in connection with the transactions contemplated hereby, shall be deemed representations and warranties by Seller and Meier and except as otherwise provided for herein, all representations, warranties and agreements made by Seller and/or Meier in this Agreement, or pursuant hereto, or in any document, instrument, certificate and/or agreement to be delivered at Closing shall survive the Closing and continue thereafter for a period of two (2) years. To the same extent, and except as otherwise provided for herein, Buyer make a reciprocal representation and warranty to Seller and Meier.

9.10 Risk of Loss. Risk of loss and/or damage to the Purchased Assets by any casualty and liability for personal injury, property and leasehold improvement damage directly and/or indirectly related to the Seller's conduct of the Business and/or the use of any of the Purchased Assets shall be borne by Seller until the Closing Date. If and in the event that the Purchased Assets are materially damaged in whole or in part by any casualty prior to the Closing Date to such an extent that the Purchased Assets cannot be used for Buyer's intended use on the Closing Date, then in such an event Buyer shall have the option to terminate this Agreement, in which even the Deposit paid under the Purchase and Sale Agreement by Buyer to the Escrow Agent shall be returned to Buyer and there shall be no further liability between the parties or proceed to Closing, in which event Seller agrees to assign any and all rights Seller has under its property and casualty insurance policy to Buyer to replace, repair or pay for any such damage to the Purchased Assets.

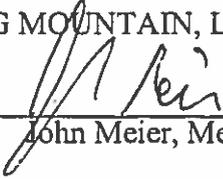
9.11 Business Day. For purposes of this Agreement, "Business Day" means any day except any Saturday, any Sunday, or any day which is a federal legal holiday or any day on which banking institutions are authorized or required by law or other governmental action to close

[Signature page Follows]

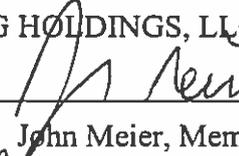
IN WITNESS WHEREOF, the parties have executed this Agreement as of the date and year first above written.

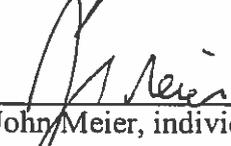
SELLER:

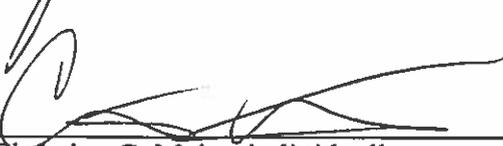
TOGG MOUNTAIN, LLC

By:   
John Meier, Member/Manager

TOGG HOLDINGS, LLC

By:   
John Meier, Member/Manager

  
John Meier, individually

  
Christine C. Meier, individually

BUYER:

INTERMOUNTAIN MANAGEMENT INC.

By: \_\_\_\_\_  
Peter Harris, President

STATE OF NEW YORK )  
COUNTY OF ~~ONONDAGA~~ ) SS.:

*Chemung*

On this 18<sup>th</sup> day of March, 2021, before me, the undersigned, a notary public in and for said State, personally appeared JOHN MEIER, individually and as Sole Member and Manager of Togg Mountain, LLC and Togg Holdings, LLC, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

PATRICIA D. KETTER  
Notary Public, State of New York  
Chemung County No. 01KE6292105  
Commission Expires October 28, 2021

*Patricia D. Ketter*  
\_\_\_\_\_  
Notary Public

STATE OF NEW YORK )  
COUNTY OF ~~ONONDAGA~~ ) SS.:

*Chemung*

On this 18<sup>th</sup> day of March, 2021, before me, the undersigned, a notary public in and for said State, personally appeared CHRISTINE C. MEIER, individually and as Sole Member and Manager of Togg Mountain, LLC and Togg Holdings, LLC, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

PATRICIA D. KETTER  
Notary Public, State of New York  
Chemung County No. 01KE6292105  
Commission Expires October 28, 2021

*Patricia D. Ketter*  
\_\_\_\_\_  
Notary Public

STATE OF NEW YORK ) *Chemung*  
COUNTY OF ~~ONONDAGA~~ ) SS.:

On this \_\_\_ day of \_\_\_\_\_, 202\_\_\_, before me, the undersigned, a notary public in and for said State, personally appeared PETER HARRIS, individually and as President of Labrador Development Corporation, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date and year first above written.

SELLER:

TOGG MOUNTAIN, LLC

By: \_\_\_\_\_  
John Meier, Member/Manager

TOGG HOLDINGS, LLC

By: \_\_\_\_\_  
John Meier, Member/Manager

\_\_\_\_\_  
John Meier, individually

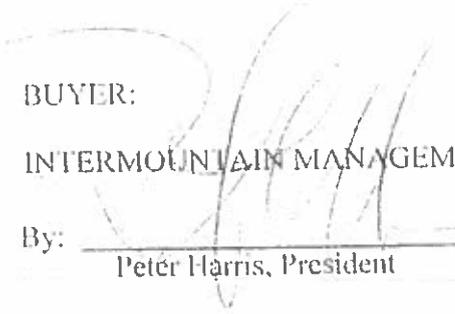
\_\_\_\_\_  
Christine C. Meier, individually

BUYER:

INTERMOUNTAIN MANAGEMENT INC.

By: \_\_\_\_\_  
Peter Harris, President

APA



STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) SS.:

On this \_\_\_\_ day of \_\_\_\_\_, 202 \_\_, before me, the undersigned, a notary public in and for said State, personally appeared JOHN MEIER, individually and as Sole Member and Manager of Togg Mountain, LLC and Togg Holdings, LLC, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) SS.:

On this \_\_\_\_ day of \_\_\_\_\_, 202 \_\_, before me, the undersigned, a notary public in and for said State, personally appeared CHRISTINE C. MEIER, individually and as Sole Member and Manager of Togg Mountain, LLC and Togg Holdings, LLC, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) SS.:

On this 12 day of July, 202 1, before me, the undersigned, a notary public in and for said State, personally appeared PETER HARRIS, individually and as President of Labrador Development Corporation, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

APA

\_\_\_\_\_  
Notary Public

Lisa M. Morgan  
No. 01M05971626  
Notary Public, State of New York  
Qualified in Cortland County County  
My commission expires JANUARY 21st, 2023

# Exhibit 3

**NON-COMPETITION AND CONFIDENTIALITY AGREEMENT**

THIS NON-COMPETITION AND CONFIDENTIALITY AGREEMENT (the "Agreement") is made this 3rd day of August, 2021, by and between INTERMOUNTAIN MANAGEMENT INC., a New York corporation ("Buyer"), and TOGG HOLDINGS, LLC AND TOGG MOUNTAIN, LLC, New York limited liability companies and their Members JOHN H. MEIER AND CHRISTINE C. MEIER ("MEIER") (collectively referred to herein as "SELLER"). Capitalized terms used in this Agreement that are not otherwise defined shall have the meanings prescribed to them in the Asset Purchase Agreement dated March 17, 2021.

Buyer has on this date purchased all of the Purchased Assets of Seller pursuant to the terms and conditions of that certain Asset Purchase Agreement dated March 17, 2021, by and between Buyer and Seller (the "Asset Purchase Agreement") and certain land, buildings and improvements more fully described in the Purchase and Sale Agreement dated March 17, 2021 relating to the operation of a ski center known as Toggenburg Mountain Winter Sports Center (the "Purchase and Sale Agreement"). Buyer intends to incorporate some or all of the Purchased Assets into its business (the "Business"). Capitalized terms not defined herein shall have the meanings prescribed to them in the Asset Purchase Agreement and the Purchase and Sale Agreement. For purposes of protecting the Business and the goodwill associated with the Business, Section 1.4.1 of the Asset Purchase Agreement requires that Seller execute and deliver this Agreement as a condition to the purchase of the Purchased Assets and the land, buildings and improvements known as Toggenburg Mountain Winter Sports Center by Buyer.

The parties agree as follows:

1. **NON-DISCLOSURE OF CONFIDENTIAL INFORMATION.** Each of Seller and the Meiers acknowledges and agrees that the protection of the Confidential Information (as defined in Section 2 below) is necessary to protect and preserve the value of the Purchased Assets and the Business. Therefore, each of the Seller and the Meiers agrees that it will not, at any time, disclose or furnish to any third party, nor use for its own account or for the benefit of any third party, any Confidential Information, whether each of the Seller and the Meiers has such information in its memory or embodied in writing or other physical form, or otherwise without Buyer's written consent, unless and to the extent that the Confidential Information is or becomes generally known to and available for use by the public other than as a result of Seller's or Meiers' fault or the fault of any other person or entity bound by a duty of confidentiality to Buyer.

2. **DEFINITION OF CONFIDENTIAL INFORMATION.** The term "Confidential Information" means all information and any idea in whatever form, tangible or intangible, pertaining in any manner to the Toggenburg Mountain Winter Sports Center business, including, without limitation, (a) trade secrets, inventions, technology, and formulae, innovations, discoveries, improvements, and know-how; show-how, proprietary information and research; (b) information about costs, profits, markets, sales, contracts and lists of customers, suppliers and distributors; (c) information about business, marketing, and strategic plans; and (d) forecasts, unpublished financial information, budgets, projections, and customer identities, characteristics

and agreements. Confidential Information is to be broadly defined, and includes all information that has or could have commercial value or other utility in the Business as it is now or in the future operated and all information of which the unauthorized disclosure could be detrimental to the interests of the Business of Buyer.

3. **NON-COMPETITION.** In consideration of the payment of One Hundred Ninety Five Thousand Dollars (\$195,000.00) and other good and valuable consideration, receipt of which is hereby acknowledged, each of the Seller and Meiers agrees that for a period of five (5) years after the date of this Agreement that:

(a) Each of Seller and Meiers will not, directly or indirectly, engage or invest in, own, manage, operate, finance, control, or participate in the ownership, management, operation, financing, or control of, be employed by, associated with, or in any manner connected with, lend its' name, or any similar name to, lend credit to, or render services or advice to, any business whose activities compete in whole or in part with the Business as it is operated currently and in the future, within the geographic area within a radius of thirty (30) miles from the Toggenburg Mountain Winter Sports Center property located at 1135 Toggenburg Road, Fabius, New York in which the Buyer is then conducting its Business (a "**Competitive Business**"). Each of Seller and the Meiers agrees that this covenant is reasonable with respect to its duration, geographical area, and scope. In elaboration of the foregoing and not in limitation thereof, each of Seller and the Meiers shall not during the period described above, directly or indirectly:

(i) solicit or accept the business of any person or entity known to be a customer or prospective customer of Buyer for purposes of engaging in a Competitive Business;

(ii) induce or attempt to induce any customer, supplier, licensee, distributor or business relation of Buyer to cease doing business with Buyer, or in any way interfere with the relationship between any customer, supplier, licensee, distributor or business relation of Buyer;

(iii) induce or attempt to induce any employee of Buyer to leave the employ of Buyer;

(iv) in any way interfere with the relationship between Buyer and any employee of Buyer; or

(v) employ, or otherwise engage as an employee, independent contractor, or otherwise, any employee of Buyer, without the prior written consent of Buyer which consent shall not be unreasonably withheld.

In the event of a breach of any covenant set forth in this Section 3 by Seller or the Meiers, the term of such covenant will be extended by the period of the duration of such breach. The parties acknowledge and agree that the covenants contained herein are in addition to and not in lieu of any covenants implied by law. **Notwithstanding the provisions of this Paragraph 3 to the contrary, the ownership, management, finance, control, participation and operation of**

the Greek Peak Mountain Resort located at 2000 NYS Route 392, Cortland, New York 13045 by the Meiers and/or any entity owned by the Meiers shall not constitute or be deemed to be a breach of any covenant set forth in this Section 3 by the Meiers.

4. **REMEDIES.** If Seller or the Meiers breach the covenants set forth in Sections 1 or 3, Buyer will be entitled, in addition to its right to damages and any other rights it may have, to obtain injunctive or other equitable relief to restrain any breach or threatened breach or otherwise to specifically enforce the provisions of Sections 1 and 3, it being agreed that money damages alone would be inadequate to compensate Buyer and would be an inadequate remedy for such breach. The rights and remedies of the parties to this Agreement are cumulative and not alternative.

5. **SUCCESSORS AND ASSIGNS.** This Agreement will inure to the benefit of, and will be binding upon, the parties to this Agreement and their respective successors, assigns, heirs, and legal representatives, including any entity with which Buyer may merge or consolidate or to which all or substantially all of its assets may be transferred.

6. **WAIVER.** Neither the failure nor any delay by any party in exercising any right, power, or privilege under this Agreement will operate as a waiver of such right, power, or privilege, and no single or partial exercise of any such right, power, or privilege will preclude any other or further exercise of such right, power, or privilege or the exercise of any other right, power, or privilege. To the maximum extent permitted by applicable law, (a) no claim or right arising out of this Agreement can be discharged by one party, in whole or in part, by a waiver or renunciation of the claim or right unless in writing signed by the other party; (b) no waiver that may be given by a party will be applicable except in the specific instance for which it is given; and (c) no notice to or demand on one party will be deemed to be a waiver of any obligation of such party or of the right of the party giving such notice or demand to take further action without notice or demand as provided in this Agreement.

7. **GOVERNING LAW.** This Agreement shall be governed by and construed and interpreted in accordance with the internal laws of the State of New York. The state courts of the State of New York in Onondaga County or, if the jurisdictional prerequisites require at the time, the United States District Court for the Northern District of New York, shall have sole and exclusive jurisdiction to hear and determine any dispute or controversy arising under or concerning this Agreement. The parties consent to personal jurisdiction in New York in any federal or state action commenced to enforce its terms. In any action or proceeding concerning such dispute or controversy, the parties consent to such jurisdiction and waive personal service of any summons, complaint or other process; a summons or complaint in any such action or proceeding may be served by mail in accordance with Section 10 hereof.

8. **SEVERABILITY.** Whenever possible each provision and term of this Agreement will be interpreted in a manner to be effective and valid but if any provision or term of this Agreement is held to be prohibited by law or invalid, then such provision or term will be ineffective only to the extent of such prohibition or invalidity, without invalidating or affecting in any manner whatsoever the remainder of such provision or term or the remaining provisions or terms of this Agreement. If any of the covenants set forth in Section 1 or 3 are held to be

unreasonable, arbitrary, or against public policy, by a court of competent jurisdiction, the restrictions shall be severable in their application to a scope, geographical area, and duration that the court deems reasonable and enforceable.

9. COUNTERPARTS. This Agreement may be executed in one or more counterparts by fax, .pdf or electronic signature, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement.

10. NOTICES. All notices, consents, waivers, and other communications under this Agreement will be deemed to have been duly given when given in accordance with Section 9.1 of the Asset Purchase Agreement.

11. ENTIRE AGREEMENT. This Agreement, and the agreements referenced in this Agreement, contain the entire agreement between the parties with respect to the subject matter of this Agreement and supersede all prior written and oral agreements and understandings between the parties with respect to the subject matter of this Agreement. The restrictive covenants contained in this Agreement compliment, and shall not supersede or otherwise modify, any other restrictive covenants contained in the agreements referenced herein or therein. This Agreement may not be amended except by a written agreement executed by the party to be charged with the amendment.

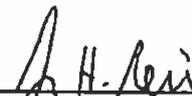
IN WITNESS WHEREOF, the parties have executed and delivered this Non-Competition and Confidentiality Agreement as of the date written in the first paragraph above.

MEIERS

  
\_\_\_\_\_  
John H. Meier, individually

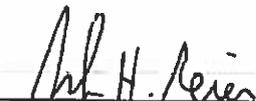
  
\_\_\_\_\_  
Christine C. Meier, individually

TOGG HOLDINGS, LLC

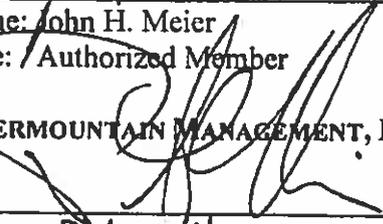
By:   
\_\_\_\_\_  
Name: John H. Meier  
Title: Authorized Member

TOGG MOUNTAIN, LLC

BY: TOGG HOLDINGS, LLC, ITS SOLE MEMBER

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

INTERMOUNTAIN MANAGEMENT, INC.

By:   
\_\_\_\_\_  
Name: Peter Harris  
Title: President

STATE OF NEW YORK )  
COUNTY OF CHEMUNG) SS.:

On this 22<sup>nd</sup> day of July, 2021, before me, the undersigned, a notary public in and for said State, personally appeared JOHN MEIER, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

KAREN A. PASCHAL  
Notary Public, State of New York  
STEBEN COUNTY #4867499  
Commission Expires June 1, 20 23

  
\_\_\_\_\_  
Notary Public

STATE OF NEW YORK )  
COUNTY OF CHEMUNG) SS.:

On this 22<sup>nd</sup> day of July, 2021, before me, the undersigned, a notary public in and for said State, personally appeared CHRISTINE C. MEIER, personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

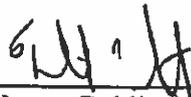
KAREN A. PASCHAL  
Notary Public, State of New York  
STEBEN COUNTY #4897499  
Commission Expires June 1, 20 23

  
\_\_\_\_\_  
Notary Public

STATE OF NEW YORK )  
COUNTY OF ONONDAGA ) SS.:

On this 3<sup>rd</sup> day of August, 2021, before me, the undersigned, a notary public in and for said State, personally appeared PETER HARRIS, President of Intermountain Management Inc., personally known to me or provided to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.

Frederick W. Marty  
Notary Public in the State of New York  
Qualified in Onondaga County No. 02MA6123656  
My Commission Expires March 14, 2025

  
\_\_\_\_\_  
Notary Public