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8 MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

9 \* \* \* \* \*

10 WALEN F. LILLY, ) Cause No. DV-87-407  
11 )  
11 Plaintiff, )  
12 )  
12 vs. )  
13 )  
13 JAMES BONNETT and DEBORAH )  
BONNETT, )  
14 )  
14 Defendants, )  
15 )

16 JAMES BONNETT and DEBORAH ) PLAINTIFF'S AMENDED PROPOSED  
BONNETT, ) FINDINGS OF FACT AND CONCLUSIONS  
17 ) OF LAW  
17 Defendants and )  
18 Counter-plaintiffs, )  
18 )  
19 vs. )  
20 )  
20 WALEN F. LILLY, )  
21 )  
21 Plaintiff and )  
22 Counter-defendant. )  
22 )

23 Trial in the above-entitled matter came on before the Court,  
24 the Honorable Frank M. Davis presiding without a jury, on the  
25 21st day of April, 1989, at the hour of 9:30 a.m. Plaintiff was  
26 present and represented by his counsel, Donald E. White.  
27 Defendants were present and represented by their counsel  
28 Pierre L. Bacheller.

1           Testimony was introduced, exhibits admitted, and after being  
2 duly considered by the Court, the Court enters the following  
3 Findings of Fact and Conclusions of Law:

4                                   FINDINGS OF FACT

5                                   INTRODUCTION

6           1. That plaintiff is a resident of the city of Bozeman,  
7 county of Gallatin, state of Montana.

8           2. That defendants James and Deborah Bonnett are residents  
9 of the city of Billings, county of Yellowstone, state of Montana.

10          3. That defendants Fred and Clara Terwilliger have  
11 received a discharge of their debts, including their debts to the  
12 plaintiff, by decree of discharge entered by the United States  
13 Bankruptcy Court for the District of Montana, Billings Division.  
14 As a result, they have been dismissed as parties defendant in  
15 this matter.

16                                   PLAINTIFF'S CLAIM FOR RELIEF

17                                   (Breach of Contract)

18          4. That on the 30th day of January, 1982, the Trout Shop,  
19 Inc., a Montana corporation, entered into a Sales Agreement  
20 wherein it was named as seller and James and Deborah Bonnett and  
21 Fred and Clara Terwilliger were named as buyers. The subject of  
22 said Sales Agreement was certain assets, inventory, and good will  
23 of the business known as the Trout Shop, Inc. (Ex. 1)

24          5. That pursuant to said Sales Agreement, the defendants  
25 agreed to pay to the Trout Shop, Inc. the total purchase price of  
26 TWO HUNDRED SEVENTY-FIVE THOUSAND DOLLARS (\$275,000.00). Said  
27 purchase price was to be paid as follows:

28

1 (a) The sum of TWO THOUSAND FIVE HUNDRED DOLLARS  
2 (\$2,500.00) as earnest money.

3 (b) The sum of FORTY-SEVEN THOUSAND FIVE HUNDRED  
4 DOLLARS (\$47,500.00) was to be paid as a down payment.

5 (c) The balance in the amount of TWO HUNDRED  
6 TWENTY-FIVE THOUSAND DOLLARS (\$225,000.00), together  
7 with interest thereon at the rate of twelve percent  
8 (12%) per annum was to be amortized over a period of  
9 ten (10) years and was to be paid in equal monthly  
10 installments of TWO THOUSAND FOUR HUNDRED SEVENTY-SEVEN  
11 AND 52/100 DOLLARS (\$2,477.52). The first payment was  
12 due on the 30th day of June, 1982 and a like payment  
13 was due on the 30th day of each month thereafter until  
14 the 30th day of June, 1992, at which time the entire  
15 remaining unpaid balance was to be paid in full.

16 6. That, thereafter, the defendants and the Trout Shop,  
17 Inc. entered into an Addendum to said Sales Agreement. By the  
18 terms of that Addendum, the parties agreed to account for  
19 interest which was to accrue from the 30th day of January, 1982,  
20 until the 30th day of June, 1982. To accommodate said interest  
21 accrual, the parties agreed in said Addendum that the monthly  
22 payment due on the 30th day of June, 1982, and on the 30th day of  
23 each month thereafter was to be TWO THOUSAND FIVE HUNDRED NINETY-  
24 NINE AND 62/100 DOLLARS (\$2,599.62). (Ex. 2)

25 7. That pursuant to the terms of said Sales Agreement, the  
26 defendants agreed to execute a Promissory Note in favor of the  
27 Trout Shop, Inc. for the unpaid balance of the Sales Agreement.  
28

1 In addition, the parties agreed that the defendants would execute  
2 a Security Agreement to secure the defendants' payments required  
3 by said Promissory Note. Said Security Agreement required the  
4 defendants to pledge to the Trout Shop, Inc. all inventory,  
5 fixtures, and additions thereto, located at 39 Madison Avenue,  
6 West Yellowstone, Montana, the place of business of the Trout  
7 Shop, Inc. (Ex. 3 & 4)

8 8. That on the 7th day of April, 1982, the Trout Shop,  
9 Inc. assigned all of its right, title, and interest in and to the  
10 above-referenced Sales Agreement, Promissory Note, and Security  
11 Agreement to Walen F. and Patricia B. Lilly. By the terms of  
12 said Assignment, Walen F. Lilly and Patricia B. Lilly assumed all  
13 of the Trout Shop, Inc.'s obligations and assumed all of the  
14 Trout Shop, Inc.'s rights under the terms of said Sales  
15 Agreement, Promissory Note, and Security Agreement. (Ex. 5)

16 9. That Patricia B. Lilly, the wife of Walen F. Lilly, has  
17 deceased since the date of said Assignment.

18 10. That defendants failed to make the monthly payment  
19 required by said Sales Agreement, Promissory Note, and Security  
20 Agreement on the 30th day of October, 1986. Likewise, the  
21 defendants failed to make said monthly payment on the 30th day of  
22 each month thereafter. (Ex. 6)

23 11. That as a result of defendants' failure to make said  
24 monthly payments, the plaintiff caused to be mailed to the  
25 defendants a Notice of Default. Said Notice of Default was  
26 mailed to the defendants on the 9th day of December, 1986.  
27 (Ex. 10)

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1           12. That defendants failed to cure their default within 45  
2 days as specified in said Notice of Default. As a result, the  
3 plaintiff caused to be mailed to the defendants a Notice of  
4 Acceleration on the 27th day of January, 1987. (Ex. 11)

5           13. That defendants failed to pay the entire amount due  
6 under the terms of said Sales Agreement, Promissory Note, and  
7 Security Agreement within the 15 days provided for therein.

8           14. That plaintiff retook possession of all personal  
9 property conveyed pursuant to said Sales Agreement and pledged as  
10 collateral in said Security Agreement on the 21st day of March,  
11 1987. Plaintiff thereafter caused to be mailed a Notice of  
12 Repossession to the defendants. (Ex. 13)

13           15. That plaintiff then caused said inventory, fixtures,  
14 and additions thereto, to be sold by Sales Agreement to James  
15 Criner on the 13th day of April, 1987. (Ex. 14) Pursuant to  
16 said Sales Agreement, James Criner agreed to purchase said  
17 assets, together with a mailing list, the name Bud Lilly's Trout  
18 Shop, and outfitting licenses for the sum of FIFTY-SEVEN THOUSAND  
19 TWO HUNDRED SIXTY-THREE DOLLARS (\$57,263.00). Said purchase  
20 price was to be paid as follows:

21           (a) The sum of TWENTY THOUSAND DOLLARS  
22 (\$20,000.00) as down payment.

23           (b) The sum of TEN THOUSAND DOLLARS (\$10,000.00)  
24 on the 1st day of October, 1988.

25           (c) The sum of THIRTY THOUSAND DOLLARS  
26 (\$30,000.00) on the 1st day of October, 1988.

27           16. That James Criner paid said purchase price in full.  
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1 The total sum received by the plaintiff was SIXTY THOUSAND  
2 DOLLARS (\$60,000.00).

3 17. That the principal balance due under the terms of said  
4 Sales Agreement, Promissory Note, and Security Agreement on the  
5 27th day of January, 1987, was TWO HUNDRED TWENTY THOUSAND  
6 SEVEN HUNDRED AND 85/100 DOLLARS (\$220,700.85). Interest was  
7 accruing upon that principal amount in the amount of SEVENTY  
8 POINT FOUR FIVE ONE FOUR DOLLARS (\$70.4514) per day.

9 18. That defendants are indebted to the plaintiff as of  
10 April 21, 1989, in the amount of TWO HUNDRED SEVENTEEN THOUSAND  
11 EIGHT AND 81/100 DOLLARS (\$217,008.81) as a result of their  
12 default under the terms of said Sales Agreement, Promissory Note,  
13 and Security Agreement. Said amount is calculated as follows:

14	Amount due 01-27-87	\$220,700.85
15	Amount Due on 04-13-87 (date of first Criner payment) (108 days)	
16	\$220,700.85 + (108/365) (\$220,700.85) (.12)	228,573.24
17	Credit for First Criner Payment (\$20,000.00)	<u>(20,000.00)</u>
18	Amount Due After First Criner Payment	208,573.24
19	Amount Due on 10-01-87 (date of second Criner payment) (170 days)	
20	\$210,573.24 + (170/365) (\$208,573.24) (.12)	220,230.48
21	Credit for Second Criner Payment (\$10,000.00)	<u>(10,000.00)</u>
22	Amount Due on 10-01-88 (date of third Criner payment) (365 days)	
23	\$210,230.48 + (365/365) (\$210,230.48) (.12)	235,458.13
24	Credit for Third Criner Payment (\$30,000.00)	<u>(30,000.00)</u>
25	Total Due After Third & Final Criner Payment	205,458.13
26	Total Due on 04-21-89 (171 days)	
27	\$205,458.13 + (171/365) (\$205,458.13) (.12)	217,008.81
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1  
2 PLAINTIFF'S RESALE OF COLLATERAL

3 19. That on the 30th day of March, 1987, plaintiff caused  
4 to be mailed to defendants a Notice of Repossession. In that  
5 Notice of Repossession, the plaintiff advised the defendants of  
6 his intent to sell the inventory, fixtures, and equipment  
7 repossessed to James Criner. The price offered was SIXTY  
8 THOUSAND DOLLARS (\$60,000.00).

9 20. That in said Notice of Repossession, the plaintiff gave  
10 the defendants the opportunity to object to said purchase of  
11 inventory, fixtures, and equipment within five (5) days of the  
12 notice. The defendants failed to file or otherwise notify the  
13 plaintiff of their objection to the sale.

14 21. That prior to entering into an agreement with James  
15 Criner, the plaintiff investigated various options available to  
16 him for the sale of the repossessed items. Based upon that  
17 investigation, the plaintiff was of the opinion that a private  
18 sale to James Criner would realize the largest net income from  
19 the sale of said inventory, fixtures, and equipment.

20 22. That Gregory F. Lilly attempted to purchase the Trout  
21 Shop, Inc. from Fred and Clara Terwilliger in the fall of 1984  
22 and the fall of 1986. In each instance, he found the Trout Shop  
23 not for sale.

24 23. That Gregory F. Lilly attempted to purchase the  
25 inventory, fixtures and equipment repossessed by plaintiff from  
26 plaintiff in March of 1987. Believing that the inventory,  
27 fixtures and equipment were not worth the SIXTY THOUSAND DOLLARS  
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1 (\$60,000.00) offered by James Criner, Gregory F. Lilly declined  
2 plaintiff's offer to sell them to him for that price.

3 24. That Gregory F. Lilly viewed the inventory, fixtures,  
4 and equipment first hand in March of 1987. He found the  
5 inventory in a depleted state, the fixtures and equipment in a  
6 state of disrepair, and the premises damaged by water. In  
7 addition, he was concerned with the closeness of the proposed  
8 sale to the opening of fishing season and with the large amount  
9 of capital required to reopen the store. As a result, he  
10 believed that the fair market value of the assets offered for  
11 sale by plaintiff was less than SIXTY THOUSAND DOLLARS  
12 (\$60,000.00).

13 25. That plaintiff considered selling the items he  
14 repossessed by auction, but decided against it for several  
15 reasons. First, the landlord for the building in which it was  
16 located was pressing for payment of rent and an auction would  
17 have required an auction fee. In addition, plaintiff considered  
18 a liquidation sale, but again was concerned about the need to pay  
19 rent. Plaintiff concluded that the sale to James Criner was the  
20 means to obtaining the most money from the items repossessed.  
21 This opinion was confirmed to him by Gregory F. Lilly's  
22 unwillingness to match it despite a long term keen interest in  
23 purchasing the business known as the Trout Shop.

24 26. That the sale of said inventory, fixtures, and  
25 equipment by the plaintiff to James Criner was commercially  
26 reasonable.

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DEFENDANTS' FIRST COUNTERCLAIM

(Breach of Covenant Not to Execute)

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2  
3       27. That at the time of the execution of the Sales  
4 Agreement between the parties, the shareholders of the Trout  
5 Shop, Inc. were Walen F. and Patricia B. Lilly. The shareholders  
6 were husband and wife. Shares owned by other family members,  
7 Gregory F. Lilly, Michael J. Lilly, and Annette Schaplow, were  
8 purchased by the Trout Shop, Inc. in January of 1982.

9       28. That at the time of the execution of the Sales  
10 Agreement between the parties, Gregory F. Lilly was residing in  
11 Anaconda, Montana. He was a shareholder in Snapshot Photo, Inc.,  
12 a Montana corporation. He was employed full time by Snapshot  
13 Photo, Inc. as Vice President. (Ex. 15)

14       29. That at the time of the execution of said Sales  
15 Agreement, Gregory F. Lilly had no intentions or desires of  
16 entering into a business which would directly compete with the  
17 Trout Shop, Inc. as purchased by the defendants. His intentions  
18 were to remain with Snapshot Photo, Inc. indefinitely.

19       30. That on the 12th day of January, 1982, Gregory F. Lilly  
20 notified the Trout Shop, Inc. of his intention to sell 27 shares  
21 of common stock in the Trout Shop, Inc. pursuant to the Bylaws of  
22 said corporation. In said notice, Gregory F. Lilly tendered said  
23 shares to the corporation. (Ex. 7)

24       31. That on the 15th day of January, 1982, the Board of  
25 Directors held a meeting. At that meeting, the corporation's  
26 purchase of Gregory F. Lilly's shares in the Trout Shop, Inc. for  
27 the price of NINE HUNDRED SIXTEEN AND 16/100 DOLLARS (\$916.16)

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1 per share was considered. Upon motion duly made, seconded, and  
2 unanimously approved, the President of the corporation was  
3 authorized to execute all instruments necessary to purchase  
4 Gregory F. Lilly's shares in the Trout Shop, Inc. for NINE  
5 HUNDRED SIXTEEN AND 16/100 DOLLARS (\$916.16) per share. (Ex. 8)

6 32. That on the 16th day of January, 1982, the Trout Shop,  
7 Inc. entered into a Stock Purchase Agreement whereby it was named  
8 as buyer and Gregory F. Lilly was named as seller. Pursuant to  
9 said stock purchase agreement, the Trout Shop, Inc. purchased  
10 Gregory F. Lilly's 27 shares of the Trout Shop, Inc. for the  
11 amount of NINE HUNDRED SIXTEEN AND 16/100 DOLLARS (\$916.16) per  
12 share for a total purchase price of TWENTY-FOUR THOUSAND SEVEN  
13 HUNDRED THIRTY-SIX AND 32/100 DOLLARS (\$24,736.32). The purchase  
14 price was to be paid, and was paid, on the 1st day of February,  
15 1982. (Ex. 9)

16 33. That on the 1st day of February, 1983, Gregory F. Lilly  
17 purchased 10,000 shares in the River's Edge, Inc., a Montana  
18 corporation. The River's Edge, Inc. thereafter engaged in a  
19 business of the same or similar type as was engaged in by the  
20 Trout Shop, Inc. at the time the Sales Agreement which is the  
21 subject of this action, was executed.

22 34. That immediately prior to or immediately after  
23 February 1, 1983, Gregory F. Lilly called Fred Terwilliger to  
24 advise him of his new business venture. During that conversation  
25 Gregory F. Lilly expressed his desire for the two businesses to  
26 compete on a friendly basis. Thereafter, the two businesses did  
27 compete on a friendly basis, exchanging merchandise and referring  
28

1 clients to one another.

2 35. That prior to opening his new business known as the  
3 River's Edge, Gregory F. Lilly met with defendant James Bonnett.  
4 The defendant was then engaged in the wholesale fly business and  
5 was soliciting the River's Edge account from Greg Lilly. The  
6 defendant obtained the account and thereafter serviced it up  
7 until only recently.

8 36. That Gregory F. Lilly actively participated in the  
9 affairs of the River's Edge, Inc. until the 1st day of January,  
10 1989. At that time, he sold his shares in the River's Edge, Inc.  
11 Thereafter, Gregory F. Lilly moved to Irvine, California.

12 37. That paragraph 6 of said Sales Agreement allocated FIVE  
13 THOUSAND DOLLARS (\$5,000.00) to the covenant not to compete. As  
14 a result, the damages to defendants, if any, are limited to the  
15 sum of FIVE THOUSAND DOLLARS (\$5,000.00).

16 38. That the covenant prohibited the shareholders from  
17 engaging in a business involving the sale of fishing tackle,  
18 outdoor clothing, artwork, or outfitting or guiding. After the  
19 sale, plaintiff started a club known as Western Rivers.  
20 Plaintiff mailed a newsletter annually to club members  
21 forecasting the upcoming fishing season and giving fishing news  
22 generally.

23 39. That the Western Rivers Club did not engage in the sale  
24 of any products, nor did it engage in any outfitting or guiding.

25 COVENANT DID NOT BIND GREGORY F. LILLY

26 40. That the Sales Agreement which is the subject of this  
27 action provided in paragraph 12 as follows:

28

1 Covenant not to Compete. Seller and its shareholders  
2 hereby agree not to compete with buyer with a like  
3 business involving the sale of fishing tackle, outdoor  
4 clothing, art work, or outfitting and guide business  
for a period of five years within a radius of 500 miles  
of the city of West Yellowstone, county of Gallatin,  
Montana.

5 41. That Gregory F. Lilly was not a signator to said Sales  
6 Agreement nor was he a shareholder of the Trout Shop, Inc. at the  
7 time of its execution. Gregory F. Lilly did not authorize the  
8 Trout Shop, Inc., either orally or in writing, to execute said  
9 Sales Agreement and to bind him to said paragraph 12.

10 42. That as a result of Gregory F. Lilly's failure to sign  
11 said Sales Agreement, his failure to authorize the Trout Shop,  
12 Inc. to bind him to said agreement, and the fact that he was not  
13 a Trout Shop, Inc. shareholder, he was not bound by its terms.  
14 As a result, Gregory F. Lilly's direct competition with the  
15 defendants did not constitute a violation of the Sales Agreement.

16 43. That Gregory F. Lilly, even if considered a  
17 shareholder, had no good will to sell to defendants. Therefore,  
18 he cannot be bound by the covenant not to compete.

19 COVENANT'S BREADTH RENDERS IT VOID

20 44. That said covenant not to compete provided that the  
21 seller and its shareholders were prohibited from competing with  
22 the defendants for a period of five years within a radius of 500  
23 miles of the city of West Yellowstone, county of Gallatin, state  
24 of Montana. The geographical prohibition included the states of  
25 Montana, Idaho, and Wyoming, and the counties of Beaverhead,  
26 Silver Bow, Jefferson, Lewis and Clark, Madison, and Yellowstone.

27 45. That the covenant not to compete did not limit its  
28

1 terms to the county of Gallatin, state of Montana. This was the  
2 county in which the defendants operated the Trout Shop, Inc. As  
3 a result of the geographical prohibition which extended beyond  
4 the boundaries of Gallatin County, Montana, the covenant not to  
5 compete is void as against public policy and therefore  
6 unenforceable by the defendants.

7 DEFENDANTS' WAIVER

8 46. That the Sales Agreement which is the subject of this  
9 action required the defendants to make monthly payments  
10 commencing the 13th day of June, 1982, and on the 13th day of  
11 each month thereafter.

12 47. That defendants made their payment as required by said  
13 Sales Agreement on the 13th day of June, 1982, and on the 13th  
14 day of each month thereafter until the 13th day of October, 1986.  
15 At that time, defendants ceased making their payments.

16 48. The defendants knew, or should have known, that  
17 Gregory F. Lilly was directly competing with them on or about the  
18 1st day of February, 1983. Nonetheless, defendants continued to  
19 make their monthly payments thereafter and failed to notify the  
20 plaintiff or Gregory F. Lilly pursuant to the terms of the Sales  
21 Agreement of his alleged default.

22 49. That defendant knew of Gregory F. Lilly's contemplated  
23 competition before it began by virtue of his solicitation of  
24 Lilly's wholesale account. At no time then, or at any time  
25 thereafter, did either defendant Bonnett or Fred Terwilliger  
26 notify plaintiff or Gregory F. Lilly that they believed his  
27 conduct to be a breach of the Sales Agreement.

28

1           50. That defendant Bonnett's only indication of an alleged  
2 breach of the covenant not to compete was his March 4, 1983  
3 letter. That letter does not indicate that it was Gregory F.  
4 Lilly's conduct which constituted the alleged breach, but implies  
5 it was plaintiff's conduct which allegedly breached the covenant.

6           51. That Michael J. Lilly's letter of March 10, 1983 asked  
7 the defendant for clarification of his March 4, 1983 letter and  
8 gave assurances that if any breach had occurred it would be  
9 cured. In addition, that letter invited defendant to give formal  
10 notice of breach according to the agreement. Clarification was  
11 not forthcoming from the defendant and a formal notice was not  
12 given by the defendant.

13           52. That as a result of the defendants' continued payments  
14 to the plaintiff from and after the date they acquired knowledge  
15 of Gregory F. Lilly's alleged breach of the Sales Agreement, the  
16 defendants freely and voluntarily waived their right to hold the  
17 plaintiff in default.

18                           DEFENDANTS' SECOND CLAIM FOR RELIEF

19                           (Breach of Consultation Agreement)

20           53. That the above-referenced Sales Agreement contained  
21 paragraph 13 which provided:

22           Consultation Agreement.     The seller, through its  
23 agents, Walen F. Lilly and Patricia B. Lilly, shall  
24 provide such services as are required by buyer in the  
25 maintenance and operation of the business from and  
26 after the 31st day of January, 1982, for such periods  
27 and for such compensation as seller's agents and buyer  
28 may determine.

26           54. That during the winter months of 1982 and the early  
27 spring months of 1982, plaintiff and Patricia B. Lilly worked

1 with and assisted the buyers in preparing for the 1982 fishing  
2 season. The plaintiff and Patricia B. Lilly attended merchandise  
3 purchasing shows, consulted with the defendants concerning the  
4 purchase of merchandise, assisted the defendants in mailing a  
5 catalogue, assisted the defendants in booking guide trips for the  
6 summer of 1982, and otherwise generally assisted the buyers.  
7 Then, in the summer of 1982, plaintiff and Patricia B. Lilly  
8 rented an apartment in West Yellowstone, Montana, for the purpose  
9 of making themselves available to the defendants in the operation  
10 of the Trout Shop, Inc. during the summer season of 1982.

11 55. That upon the commencement of the summer fishing season  
12 of 1982, the plaintiff and Patricia B. Lilly presented themselves  
13 to the store location for the Trout Shop, Inc. for the purpose of  
14 introducing the defendants to old time customers, and generally  
15 advising the defendants concerning the operation of the business.  
16 The plaintiff and Patricia B. Lilly continued to present  
17 themselves to the store location for the Trout Shop, Inc. until  
18 mid-summer of 1982.

19 56. That in mid-summer of 1982, the plaintiff and  
20 Patricia B. Lilly felt increasingly ostracized, unneeded, and in  
21 fact, unwanted by the defendants. As a result, plaintiff visited  
22 with Fred Terwilliger, and the two agreed that the plaintiff and  
23 Patricia B. Lilly would no longer present themselves to the store  
24 location for the Trout Shop, Inc. during the summer of 1982.

25 57. That plaintiff and Patricia B. Lilly were not paid any  
26 compensation for the services they rendered to the defendants  
27 pursuant to paragraph 13.

28



1 certain Sales Agreement, Promissory Note, and Security Agreement  
2 wherein the Trout Shop, Inc. is named as seller and defendants  
3 are named as buyer dated the 30th day of January, 1982.  
4 Defendants' default consisted of their failure to make the  
5 monthly payment required by said Sales Agreement and Promissory  
6 Note on the 13th day of October, 1986 and on the 13th day of each  
7 month thereafter.

8 3. That in accordance with the terms of said Sales  
9 Agreement, plaintiff properly notified the defendants of their  
10 default. Said notice consisted of the plaintiff's Notice of  
11 Default dated the 9th day of December, 1986.

12 4. That defendants failed to cure said default within the  
13 45 days provided for by said Sales Agreement and Notice of  
14 Default.

15 5. That plaintiff notified the defendants of his intention  
16 to accelerate the balance due under the terms of said Sales  
17 Agreement, Promissory Note, and Security Agreement in accordance  
18 with said Sales Agreement. Said Notice of Acceleration was  
19 properly mailed on the 27th day of January, 1987.

20 6. That defendants failed to pay the entire amount due  
21 under the terms of said Sales Agreement, Promissory Note, and  
22 Security Agreement within 15 days as required by said Sales  
23 Agreement and Notice of Acceleration.

24 PLAINTIFF'S SALE OF THE COLLATERAL WAS

25 COMMERCIALLY REASONABLE

26 7. That plaintiff properly notified defendants of his  
27 repossession of the personal property secured by the Security  
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1 Agreement executed by the parties in accordance with Section 30-  
2 9-502, MCA. Said Notice of Repossession was dated the 30th day  
3 of March, 1987.

4 8. That plaintiff properly notified the defendants of his  
5 intention to sell the inventory, fixtures, and equipment to James  
6 Criner for the sum of SIXTY THOUSAND DOLLARS (\$60,000.00). Said  
7 Notice was in conformance with Section 30-9-504, MCA, and dated  
8 the 30th day of March, 1987. Defendants failed to object to said  
9 proposed sale within the time provided for by said Notice of  
10 Repossession.

11 9. That plaintiff's private sale of the inventory,  
12 fixtures, and equipment pledged by the parties' Security  
13 Agreement acquired the highest value possible for said personal  
14 property. As a result, the plaintiff's sale of said inventory,  
15 fixtures, and equipment pledged as collateral pursuant to the  
16 terms of the parties' Security Agreement was commercially  
17 reasonable.

18 10. That the defendants are jointly and severally liable to  
19 the plaintiff in the amount of TWO HUNDRED SEVENTEEN THOUSAND  
20 EIGHT AND 81/100 DOLLARS (\$217,008.81). Said amount shall accrue  
21 interest at the rate of twelve percent (12%) per annum from the  
22 21st day of April, 1989, until paid in full.

23 DEFENDANTS' FIRST COUNTERCLAIM

24 (Breach of Covenant Not to Compete)

25 11. That Gregory F. Lilly's engagement in the business  
26 known as the River's Edge, Inc. was in direct competition with  
27 the defendants. However, Gregory F. Lilly's direct competition  
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1 with the defendants does not constitute a default under the terms  
2 of the parties' Sales Agreement.

3 12. That plaintiff's involvement in the Western Rivers Club  
4 following the sale did not constitute a breach of the covenant  
5 not to compete. That club did not engage in any of the  
6 prohibited acts contemplated by the covenant.

7 COVENANT DID NOT BIND GREGORY F. LILLY

8 13. That Gregory F. Lilly was not a signator to the  
9 parties' Sales Agreement or a shareholder in the Trout Shop, Inc.  
10 In addition, Gregory F. Lilly did not authorize the Trout Shop,  
11 Inc., either orally or in writing, to bind him to the terms of  
12 said Sales Agreement.

13 14. That Gregory F. Lilly's direct competition with the  
14 defendants does not constitute a breach of the Sales Agreement  
15 between the parties.

16 COVENANT'S BREADTH RENDERS IT VOID

17 15. That the Covenant Not to Compete contained in the  
18 parties' Sales Agreement included a geographical distance which  
19 included the states of Montana, Idaho, Wyoming, and the counties  
20 of Gallatin, Madison, Jefferson, Beaverhead, Lewis and Clark, and  
21 Yellowstone.

22 16. That as a result of the breadth of the geographical  
23 limits set forth in said Covenant Not to Compete, it is declared  
24 null and void as against public policy.

25 DEFENDANTS' WAIVER

26 17. That Gregory F. Lilly engaged in direct competition  
27 with the defendants commencing on or about the 1st day of  
28

1 February, 1983. That thereafter, neither he nor the plaintiff  
2 received a notice of default from the defendants.

3 18. The defendants made a monthly payment as required by  
4 the Sales Agreement on the 13th day of June, 1982, and on the  
5 13th day of each month thereafter until the 13th day of October,  
6 1986, at which time they terminated making payments.

7 19. That the defendants' free and voluntary payment to the  
8 plaintiff from and after the date of Gregory F. Lilly's direct  
9 competition with them, constituted a free and voluntary waiver of  
10 their rights under the terms of the Sales Agreement as they  
11 related to the Covenant not to Compete. As a result, the  
12 defendants are barred from bringing this action against the  
13 plaintiff for alleged damages arising out of Gregory F. Lilly's  
14 direct competition.

15 20. That Gregory F. Lilly, and not plaintiff, is the proper  
16 party in an action for breach of the covenant by defendants.

17 CONSULTATION AGREEMENT

18 21. That plaintiff and Patricia B. Lilly attempted to  
19 comply with paragraph 13 of the parties' Sales Agreement.  
20 However, the defendants effectively prevented the plaintiff from  
21 complying with said paragraph.

22 22. That plaintiff and Patricia B. Lilly received no  
23 compensation from the defendants for their consultation services  
24 as required by said Sales Agreement.

25 23. That defendants made their monthly payments pursuant to  
26 the terms of the Sales Agreement from and after the date that  
27 plaintiff and Patricia B. Lilly ceased their consultation  
28

1 services. As a result, defendants' claim for damages arising out  
2 of the alleged breach of the consultation paragraph of the Sales  
3 Agreement was freely and voluntarily waived.

4 24. That defendants' failure to pay the plaintiff and  
5 Patricia B. Lilly for consultation services rendered and  
6 defendants' free and voluntary payment of the monthly payments  
7 required by the Sales Agreement after the alleged termination of  
8 the consultation services by the plaintiff and Patricia B. Lilly  
9 bars the defendants from recovering any alleged damages from the  
10 plaintiff.

11 CONCLUSION

12 25. That the Sales Agreement provides for the payment to  
13 the prevailing party of reasonable attorney's fees to be set by  
14 the Court. The plaintiff is the prevailing party in this action  
15 and is entitled to attorney's fees to be set by the Court after  
16 notice and hearing.

17 26. That the plaintiff shall prepare a judgment in  
18 conformance with the Court's Findings of Fact and Conclusions of  
19 Law following the establishment of attorney's fees.

20 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May, 1989.

21 WHITE & SEEL

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By 151 D.E.W.  
Donald E. White  
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

Donald E. White hereby certifies that on the 1<sup>st</sup> day of May, 1989, a copy of the within and foregoing document was duly served by mail upon the following counsel of record:

Pierre L. Bacheller  
Post Office Box 2078  
Billings, MT 59103

131 D. E. W.  
DONALD E. WHITE