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ATTORNEYS FOR PLAINTIFF AND
COUNTER-DEFENDANT

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

* * * * *

No. DV 87-407

WALEN F. LILLY,)
)
Plaintiff,)

vs.)

A F F I D A V I T

FRED TERWILLIGER, CLARA)
TERWILLIGER, JAMES BONNETT,)
and DEBORAH BONNETT,)
)
Defendants,)

-----)
)
JAMES BONNETT and DEBORAH)
BONNETT,)

)
Defendants and)
Counter-plaintiffs,)

vs.)

WALEN F. LILLY,)
)
Plaintiff and)
Counter-defendant.)
-----)

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FURTHER AFFIANT SAYETH NAUGHT.

WALEN F. LILLY

SUBSCRIBED AND SWORN to before me this ____ day of
May, 1988.

Notary Public for the State of MT
Residing at:
My commission expires:

EXHIBIT B

1. 5 McKenzie Riverboats
2. 5 McKenzie Riverboat trailers
3. Boat cushions
4. House trailer
5. 5 ice chests
6. 6 water jugs
7. 6 first aide kits
8. 10 sets of oars
9. fireplace
10. fly bins with plastic boses
11. Rod racks
12. 3 glas display counters
13. peg boards and peg board accessories
14. built in shelving
15. 3 wooden display racks
16. 3 metal display racks
17. 1 free standing wooden display rack
18. 3 window display screens
19. 2 cash registers
20. 1 weather station
21. 1 recording barometer
22. map rack
23. area rugs
24. thread display
25. neon sign
26. 3 wooden signs
27. built in storage in basement
28. vacuum cleaning and brooms
29. deep freeze
30. refrigerator
31. photographs and drawings
32. metal filing cabinet
33. 2 wooden desks
34. 1 texas instrument adding maching
35. 1 copy machine
36. 1 electric typewriter
37. 2 wooden work tables
38. 1 set built in shelving
39. 1 wooden storage cabinet
40. classroom maps, displays, charts and insect displays
41. classroom tables, chairs and shelving
42. rods, reels, and lines for instruction
43. full track rodding
44. 2 braided rugs
45. covered wall panel displays
46. built in shelving and paneling for art gallery
47. pottery and prints
48. coffee maker
49. mirrors
50. print displays on
51. miscellaneous guide supplies
52. fish mounts
53. frame wall maps
54. line winder
55. repair bench
56. telephone recording
57. 2 fire extinguishers
58. full propane tank
59. 2 floor fans
60. aluminum car top boat

586.
make for
222 E. Main
Suite 20

1987

PROMISSORY NOTE

\$37,263.00
West Yellowstone,
Montana 59758

Date: April 13, 1987

FOR VALUE RECEIVED, the undersigned, JAMES CRINER, promises to pay to the order of WALEN F. LILLY, the sum of THIRTY SEVEN THOUSAND TWO HUNDRED SIXTY THREE AND NO/100 DOLLARS (\$37,263.00), together with interest thereon at the rate of 6 3/4% per annum. The undersigned promises to make payment as follows:

1. The sum of TEN THOUSAND AND NO/100 DOLLARS (\$10,000.00) on the 1st. day of October, 1987, which sum shall include principal and accrued interest.

2. The sum of THIRTY THOUSAND AND NO/100 DOLLARS (\$30,000.00) on the 1st. day of October, 1988, which sum shall include principal and accrued interest and upon payment of this last installment, the entire unpaid balance of principal plus all accrued interest shall be paid in full.

This Promissory Note is secured by a security agreement of even date which is attached hereto and incorporated herein by reference.

The undersigned shall have the right, without penalty, to prepay any and all principal and interest owing. In such case, the amount prepaid shall first be applied to accrued interest and the balance shall be applied to the unpaid principal

The maker and endorsers hereby waive presentment, demand, protest and notice thereof.

In the event that there shall be any default in the making of the payment as herein provided, the maker agrees to pay reasonable attorneys fees in event of suit thereon.

Jim W Criner
JAMES CRINER

The undersigned has read the foregoing terms of and hereby accepts the same.

Dated this 13 day of April, 1987.

Walen F Lilly
WALEN F. LILLY

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ATTORNEYS FOR PLAINTIFF AND
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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

* * * * *

No. DV 87-407

WALEN F. LILLY,)
)
Plaintiff,)

vs.)

PLAINTIFF'S REPLY BRIEF

FRED TERWILLIGER, CLARA)
TERWILLIGER, JAMES BONNETT,)
and DEBORAH BONNETT,)
)
Defendants,)

-----)
)
JAMES BONNETT and DEBORAH)
BONNETT,)

Defendants and)
Counter-plaintiffs,)

vs.)

WALEN F. LILLY,)
)
Plaintiff and)
Counter-defendant.)
-----)

INTRODUCTION

The defendants have filed a cross Motion for Summary
Judgment. In that motion, defendants request entry of

1 judgment in their favor on the issue of their liability
2 under the sales agreement which is at issue in this case.

3 Specifically, defendants claim that plaintiff's sale
4 of the fixtures, equipment, and inventory in question was
5 commercially unreasonable. They contend that the notice
6 provided to them was inadequate for its failure to include
7 the fact that The Trout Shop, Inc.'s mailing list and the
8 name "Bud Lilly's Trout Shop" were to be sold. In
9 addition, they claim that the sales price of Fifty-seven
10 Thousand and No/100 Dollars (\$57,000) as opposed to the
11 proposed sales price in the notice of Sixty Thousand and
12 No/100 Dollars (\$60,000) was fatal.

13 Defendants' cross Motion for Summary Judgment puts
14 the issue of their liability under the sales agreement
15 directly at issue. Plaintiff, in his Motion for Summary
16 Judgment, has likewise requested the Court to enter
17 summary judgment in his favor on the issue of defendants'
18 liability under the sales agreement.

19 Defendants also take the position that plaintiff is
20 not entitled to summary judgment on the First Claim for
21 Relief in their Counterclaim. That First Claim for Relief
22 contends that Greg Lilly, a shareholder of The Trout Shop,
23 Inc. at the time of the sale, competed directly with the
24 defendants, therefore violating the sales agreement.
25 Finally, defendants argue that summary judgment in favor
26 of the plaintiff is not appropriate on the Second Claim
27 for Relief contained in their Counterclaim. That claim
28

1 for relief alleges that Walen F. Lilly violated a
2 consultation paragraph in the sales agreement. Defendants
3 argue that summary judgment is not appropriate on this
4 issue because all of the questions are factual in nature.

5 Each of these arguments will be addressed separately
6 below:

7
8 ARGUMENT

9 I. PLAINTIFF, NOT DEFENDANTS, IS ENTITLED TO
10 SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY PURSUANT TO HIS
11 FIRST CLAIM FOR RELIEF.

12 This issue centers on the sufficiency of the Notice
13 of Repossession provided by plaintiff to the defendants.
14 Defendants contend that the notice was inadequate for two
15 (2) reasons. First, the notice did not identify the
16 mailing list or the name "Bud Lilly's Trout Shop" as
17 assets to be sold to James Criner. Second, defendants
18 claim it was inadequate because the proposed sales price
19 in the notice was \$60,000 when the actual sales price to
20 James Criner was \$57,000.

21 Defendants attempt to make an issue of the fact that
22 counsel for the plaintiff drafted the sales agreement in
23 question. However, defendants conveniently failed to
24 advise the Court that they too were represented by counsel
25 in this transaction. Therefore, both parties were
26 represented in this transaction, and no conclusions can be
27 drawn from the fact that plaintiff had counsel.
28

1 Defendants initially argue that the notice in
2 question was inadequate because it failed to list The
3 Trout Shop, Inc.'s mailing list and the name "Bud Lilly's
4 Trout Shop." This argument overlooks several significant
5 factors. First, neither the mailing list nor the name
6 "Bud Lilly's Trout Shop" was pledged as collateral
7 pursuant to the terms of the security agreement. Exhibit
8 "A" to the security agreement listed the inventory, and
9 exhibit "B" listed the fixtures and equipment. Those
10 lists did not include the name or the mailing list (see
11 Affidavit of Walen F. Lilly and certified copy of the
12 Uniform Commercial Code Financing Statement filed with the
13 Secretary of State for the State of Montana).

14 In providing the defendants with Notice of
15 Repossession, the plaintiff was proceeding pursuant to the
16 terms of the Uniform Commercial Code and the security
17 agreement. Therefore, he was bound by the terms of that
18 security agreement and the Uniform Commercial Code, and no
19 others.

20 The mailing list was abandoned by Fred and Clara
21 Terwilliger at the premises upon which the defendants and
22 the Terwilligers conducted the business known as "Bud
23 Lilly's Trout Shop." The plaintiff merely took possession
24 of those, as they had been abandoned, and passed them on
25 to James Criner (see Lilly Affidavit).

26 Likewise, having breached the sales agreement, the
27 defendants were no longer entitled to the name "Bud
28

1 Lilly's Trout Shop." Indeed, the business known as "Bud
2 Lilly's Trout Shop" as formed by the defendants was
3 involuntarily dissolved.

4 Defendants are not in a position to complain. By
5 selling the name and the mailing list, plaintiff secured
6 more funds than he would have by simply selling the
7 fixtures, equipment, and inventory. Therefore, the
8 defendants have actually gained by the plaintiff's
9 efforts. Because the sales price to James Criner was
10 higher than could have been obtained otherwise, the size
11 of the deficiency judgment which plaintiff now seeks
12 against defendants is smaller.

13 Finally, defendants argue that the discrepancy
14 between the proposed sales price contained in the notice
15 of \$60,000 and the actual sales price of approximately
16 \$57,000 renders the sale commercially unreasonable. The
17 differential is easily explained. The payment terms as
18 set forth in the Criner agreement when added to the
19 interest reaches the amount of approximately \$60,000.
20 This was by design (see Lilly Affidavit). Regardless, the
21 amount is so small as to become ridiculously
22 insignificant.

23 In sum, defendants are attempting, although
24 valiantly, to make a good stew without meat. This simply
25 cannot be done. The defendants have cited to this Court
26 no case authority and no statutory authority in support of
27 their position. Their argument is simply fluff.
28

1 Therefore, the plaintiff respectfully requests the
2 Court to enter summary judgment in his favor on the issue
3 of defendants' liability under the terms of the sales
4 agreement.

5
6 II. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON
7 THE FIRST CLAIM FOR RELIEF CONTAINED IN DEFENDANTS'
8 COUNTERCLAIM ON BOTH THE ISSUES OF LIABILITY AND DAMAGES.

9 The First Claim for Relief contained in defendants'
10 Counterclaim alleges that Greg Lilly, a shareholder and
11 director of The Trout Shop, Inc. at the time of the
12 purchase, violated the covenant not to compete contained
13 in the sales agreement. While Greg Lilly was in fact a
14 shareholder and director, and did in fact compete with the
15 defendants, the plaintiff is not liable for those actions.

16 Defendants appear to argue that because the sales
17 agreement at issue was executed with the knowledge and
18 consent of the shareholders, including Greg Lilly, that he
19 should be bound thereby. This argument fails to address,
20 and does not refute, the case authorities cited in
21 plaintiff's opening Brief. In sum, those authorities
22 clearly indicate that a director or shareholder has no
23 good will to sell, and therefore, cannot be bound by a
24 covenant not to compete.

25 Defendants also argue, although tongue in cheek, that
26 perhaps the covenant not to compete is void under Montana
27 law, but the Court should ignore the law because of the
28

1 fact that plaintiff's counsel drafted the agreement and
2 was in fact a shareholder of The Trout Shop, Inc. at the
3 time of the sale. This argument, again, is not supported
4 by any statutory or case law. In addition, it ignores the
5 fact that defendants were represented by counsel as well.

6 Defendants refuse to address the issue of waiver with
7 regard to this claim for relief. Rather, they rely on the
8 bold assertion that the question of waiver is one of fact
9 and cannot be decided at this point in time. Nonetheless,
10 defendants do not cite to this Court any law to that
11 effect.

12 The facts with regard to waiver are clear,
13 unequivocal, and unambiguous. Greg Lilly competed for
14 a number of years before the defendants' default. Despite
15 their knowledge of that competition, they sent no notices
16 of default and continued to make the payments.

17 Surely, a notice of default, or, in the alternative,
18 cessation of the payments, together with a notice of
19 default, were mandatory in order to avail the defendants
20 of this claim.

21
22 III. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON
23 THE ISSUES OF LIABILITY AND DAMAGES PURSUANT TO
24 DEFENDANTS' SECOND CLAIM FOR RELIEF.

25 Defendants' Second Claim for Relief alleges that
26 plaintiff violated the consultation agreement contained in
27 the sales agreement. Defendant maintains that this
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alleged breach is strictly a factual issue. While that may be true, defendants do not address the issue of waiver.

The consultation was to occur in 1982. Never have the defendants notified the plaintiff of any breach of that provision, nor have they withheld payments for breach of that agreement. Again, a clear waiver exists.

CONCLUSION

This is a case in which this matter should be resolved in full, save for the amount of damages, on these cross Motions for Summary Judgment. This case represents one where counsel for the defendants has ingeniously argued to assist his clients from escaping their clear liability under a sales agreement.

Unfortunately, the defendants' position is not supported by the undisputed facts, nor by the law. This matter should be resolved at this stage on the issue of liability.

Therefore, plaintiff respectfully requests the Court to enter summary judgment in his favor and to deny defendants' Motion for Summary Judgment.

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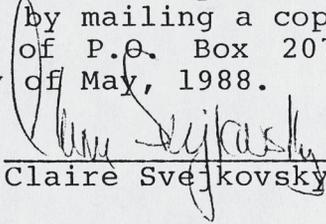
RESPECTFULLY SUBMITTED this 23rd day of May, 1988.

LILLY, ANDRIOLO & SCHRAUDNER
Attorneys at Law
The Baltimore, Suite 301
222 East Main Street
Bozeman, MT 59715

By: _____
RICHARD J. ANDRIOLO
Attorney for Plaintiff
and Counter-defendant

CERTIFICATE OF MAILING

I hereby certify that I served a copy of the foregoing instrument upon the attorney of record in this matter, PIERRE L. BACHELLER, by mailing a copy of the same to his last known address of P.O. Box 2078, Billings, Montana, 59103, this 23rd day of May, 1988.



Claire Svejksky, Secretary