

Mr. Lilly

No. 90-099

IN THE SUPREME COURT OF THE STATE OF MONTANA

WALEN F. LILLY,

Plaintiff/Respondent,

vs.

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

Defendants/Appellants.

JAMES BONNETT and DEBORAH BONNETT,

Defendants and
Counter-plaintiffs/Appellants,

vs.

WALEN F. LILLY,

Counter-defendant/Respondent.

PLAINTIFF/RESPONDENT'S REPLY BRIEF

On Appeal from the Eighteenth Judicial District Court of
the State of Montana in and for the County of Gallatin

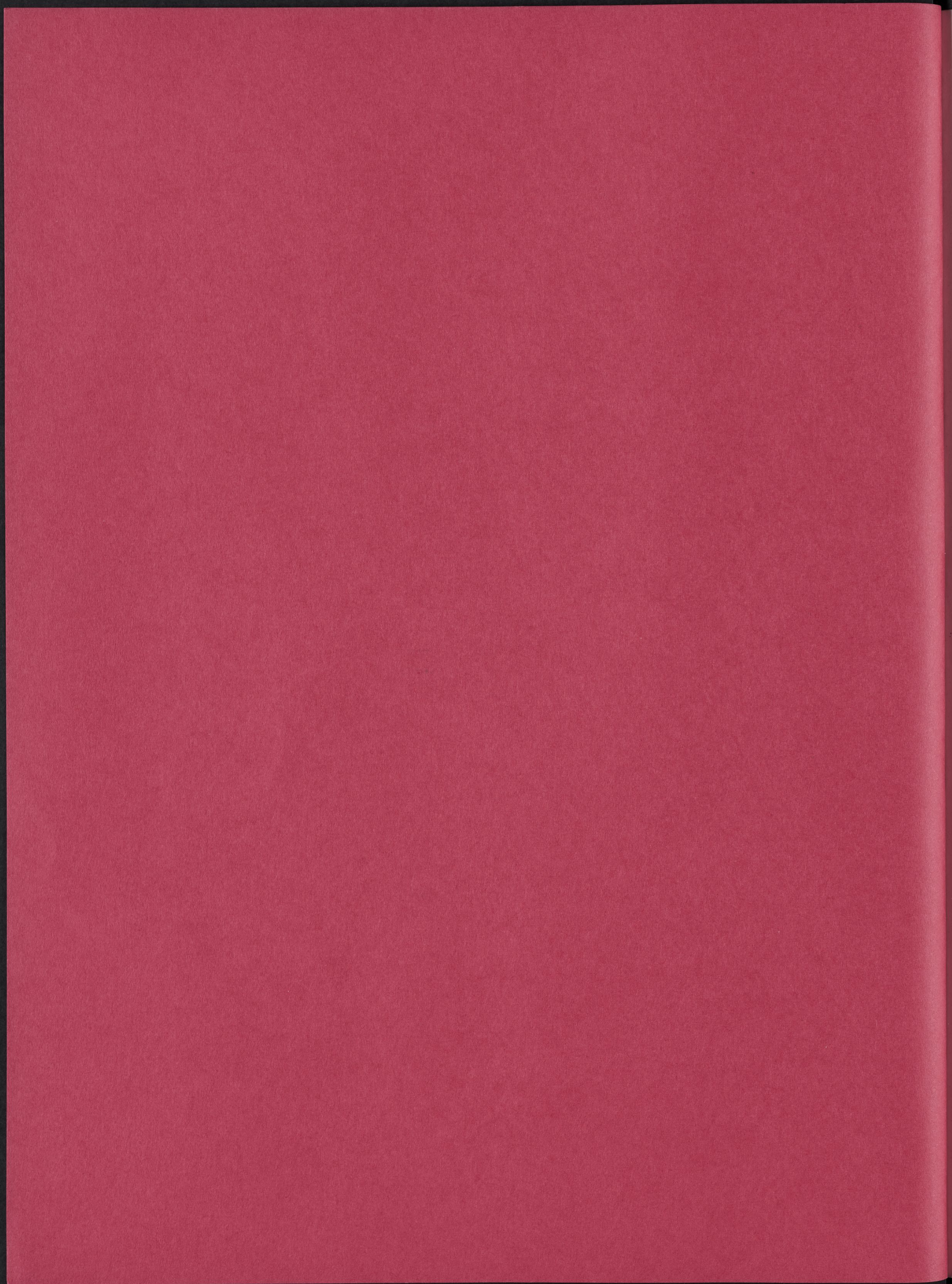
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Filed _____, 1990.

_____, Clerk.



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* * * * *

PLAINTIFF/RESPONDENT'S REPLY BRIEF

* * * * *

LILLY'S POSITION

1. Public v. Private Sale
2. Solicitation of bids and Advertising
3. Appraisal
4. Price

D. SUMMARY



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STATEMENT OF THE CASE

Plaintiff/respondent (hereinafter referred to as Lilly) accepts the defendants/appellants' (hereinafter referred to as Bonnetts) Statement of the Case.

2. Did the Trial Court err in concluding that the sale of the repossessed collateral was commercially reasonable?

3. Did the Trial Court err in calculating the dollar amount to which Lilly was entitled by judgment?

STATEMENT OF THE CASE

Plaintiff/respondent (hereinafter referred to as (i))
accepts the defendant/appellant's (hereinafter referred to
as (ii)) Statement of the Case.

STATEMENT OF THE ISSUES

Lilly restates the issues as follows:

1. Did the Trial Court err in concluding that the Notice of Repossession was defective?
2. Did the Trial Court err in concluding that the sale of the repossessed collateral was commercially reasonable?
3. Did the Trial Court err in calculating the dollar amount to which Lilly was entitled by judgment?

STATEMENT OF THE ISSUES

Lilly restated the issues as follows:

1. Did the Trial Court err in concluding that the

Notice of Repossession was defective?

2. Did the Trial Court err in concluding that the

sale of the repossessed collateral was commercially

reasonable?

3. Did the Trial Court err in calculating the dollar

amount to which Lilly was entitled by judgment?

STATEMENT OF THE FACTS

This lawsuit involves the sale of "Bud Lilly's Trout Shop" located in West Yellowstone, Montana--a nationally and internationally famed fly fishing business. (Tr. p. 12, l. 7-13) Lilly started Bud Lilly's Trout Shop in the spring of 1952. Thereafter, the Lilly family pursued this labor of love for thirty years. (Tr. p. 41, l. 3-8) The business was a very personal one to the Lilly family. (Tr. p. 43., l. 22) At the time of its sale in 1982, Bud Lilly's Trout Shop grossed in excess of \$600,000.00 per year. (Tr. p. 42, l. 8-9) The business involved the sale of fishing tackle, the sale of clothing, the outfitting and guiding of fishermen, an art gallery, a fishing school, and a wintertime catalog. (Tr. p. 41, l. 19-25)

In 1982, Lilly decided to sell Bud Lilly's Trout Shop. (Tr. p. 42, l. 16-24) The sale was an emotional one for Lilly for he was not fully ready to sell his business. (Tr. p. 44, l. 16-17) Nonetheless, he was persuaded by his family to sell. His wife was very ill at the time. (Tr. p. 43, l. 1-13) Shortly after the sale, she deceased. (Tr. p. 53, l. 22) None of Lilly's children were interested in assuming responsibility for the business from him. (Tr. p. 43, l. 1-13) As a result, Lilly simply felt he had no choice but to make the sale.

The Bonnetts and the Terwilligers approached Lilly with an interest in purchasing Bud Lilly's Trout Shop in 1982.

STATEMENT OF THE FACTS

This lawsuit involves the sale of "Bud Lilly's Trout Shop" located in West Yellowstone, Montana--a nationally and internationally famed fly fishing business. (Tr. p. 12, 1. 7-13) Lilly started Bud Lilly's Trout Shop in the spring of 1952. Thereafter, the Lilly family pursued this labor of love for thirty years. (Tr. p. 41, 1. 3-8) The business was a very personal one to the Lilly family. (Tr. p. 43, 1. 22) At the time of its sale in 1982, Bud Lilly's Trout Shop grossed in excess of \$600,000.00 per year. (Tr. p. 43, 1. 8-9) The business involved the sale of fishing tackle, the sale of clothing, the outfitting and guiding of fishermen, an air gallery, a fishing school, and a wintertime catalog. (Tr. p. 41, 1. 15-25)

In 1982, Lilly decided to sell Bud Lilly's Trout Shop. (Tr. p. 43, 1. 15-24) The sale was an emotional one for Lilly for he was not fully ready to sell his business. (Tr. p. 44, 1. 15-17) Nonetheless, he was persuaded by his family to sell. His wife was very ill at the time. (Tr. p. 43, 1. 1-13) Shortly after the sale, she deceased. (Tr. p. 23, 1. 23) None of Lilly's children were interested in assuming responsibility for the business from him. (Tr. p. 43, 1. 1-13) As a result, Lilly simply felt he had no choice but to make the sale.

The Bonnetts and the Terwilligers approached Lilly with an interest in purchasing Bud Lilly's Trout Shop in 1982.

(Tr. p. 44, l. 10-13) Lilly requested the Bonnetts and the Terwilligers to negotiate the purchase with his son, Michael, a Montana attorney. (Tr. p. 44, l. 14-20) As a result of those negotiations, an agreement was reached.

(Tr. p. 45, l. 11-14)

The sale of Bud Lilly's Trout Shop was by agreement. The seller was designated as Bud Lilly's Trout Shop, Inc., a Montana corporation. (Plaintiff's Exhibit 1) That sales agreement was assigned to Lilly and his wife, Patricia (Plaintiff's Exhibit 5). The total purchase price for the business was \$275,000.00. A down payment of \$50,000.00 was made to the seller. (Plaintiff's Exhibit 1) The Terwilligers contributed \$25,000.00 toward the down payment and the Bonnetts contributed \$25,000.00 toward the down payment. (Tr. p. 24, l. 19-23)

The unpaid balance of \$225,000.00 was evidenced by a promissory note which bore interest at the rate of 12% per annum and which required monthly installment payments of \$2,477.52. (Plaintiff's Exhibit 3) The promissory note was secured by a security agreement dated the 31st day of January, 1982. (Plaintiff's Exhibit 4)

The security agreement required the Bonnetts and the Terwilligers as debtor to pledge certain personal property as collateral. That personal property consisted of inventory and fixtures. A Uniform Commercial Code financing statement was filed with the Secretary of State. As

(Tr. p. 44, l. 10-11) Lilly requested the Bonnetts and the
Terwilligers to negotiate the purchase with his son,
Michael, a Montana attorney. (Tr. p. 44, l. 14-16) As a
result of those negotiations, an agreement was reached.
(Tr. p. 45, l. 11-14)
The sale of Bud Lilly's Trout Shop was by agreement.
The seller was designated as Bud Lilly's Trout Shop, Inc., a
Montana corporation. (Plaintiff's Exhibit 1) That seller
agreement was assigned to Lilly and his wife, Patricia.
(Plaintiff's Exhibit 5). The total purchase price for the
business was \$175,000.00. A down payment of \$20,000.00 was
made to the seller. (Plaintiff's Exhibit 1) The
Terwilligers contributed \$15,000.00 toward the down payment
and the Bonnetts contributed \$25,000.00 toward the down
payment. (Tr. p. 24, l. 19-23)
The unpaid balance of \$225,000.00 was evidenced by a
promissory note which bore interest at the rate of 12% per
annum and which required monthly installment payments of
\$2,477.52. (Plaintiff's Exhibit 3) The promissory note was
secured by a security agreement dated the 31st day of
January, 1982. (Plaintiff's Exhibit 4)
The security agreement required the Bonnetts and the
Terwilligers as debtor to pledge certain personal property
as collateral. That personal property consisted of
inventory and fixtures. A Uniform Commercial Code financing
statement was filed with the Secretary of State. As

collateral, the Uniform Commercial Code statement listed the following:

All inventory and fixtures, and additions thereto, located at 39 Madison Avenue, West Yellowstone, Montana.

A Uniform Commercial Code financing statement continuation was timely filed. (Plaintiff's Exhibit 4)

In the fall of 1982 the Bonnetts sold their interest in Bud Lilly's Trout Shop to the Terwilligers. The sale price was \$34,100.00 (Tr. p. 29, l. 7) (Plaintiff's Exhibit 16), a \$9,000.00 return on the Bonnetts' initial investment. At that same time, the Bonnetts attempted to obtain a release of liability from Lilly under the terms of the sales agreement, promissory note, and security agreement. (Plaintiff's Exhibit 19) Lilly refused to grant the Bonnetts a release of liability without a pledge by Terwilliger of additional collateral or provision of an alternative means of securing the unpaid balance on the promissory note. (Plaintiff's Exhibit 20)

In the fall of 1986, the Terwilligers ceased making the monthly payments. As a result, a Notice of Default was mailed. (Plaintiff's Exhibit 10) The Notice of Default allowed the Terwilligers and the Bonnetts 45 days in which to cure the default. A cure of the default was not effected. As a result, a Notice of Acceleration was mailed to the Bonnets and the Terwilligers on the 27th day of January, 1987. (Plaintiff's Exhibit 11) Again, the Notice

collateral, the Uniform Commercial Code statement listed the following:

All inventory and fixtures, and additions thereto, located at 33 Madison Avenue, West Yellowstone, Montana.

A Uniform Commercial Code financing statement continuation was timely filed. (Plaintiff's Exhibit 4)

In the fall of 1982 the Bonnetts sold their interest in Hub Lilly's Trout Shop to the Terwilligers. The sale price was \$24,100.00 (Tr. p. 29, l. 7) (Plaintiff's Exhibit 16), a \$2,000.00 return on the Bonnetts' initial investment. At that same time, the Bonnetts attempted to obtain a release

of liability from Lilly under the terms of the sales agreement, promissory note, and security agreement.

(Plaintiff's Exhibit 19) Lilly refused to grant the

Bonnetts a release of liability without a pledge by

Terwilliger of additional collateral or provision of an

alternative means of securing the unpaid balance on the

promissory note. (Plaintiff's Exhibit 20)

In the fall of 1986, the Terwilligers ceased making the monthly payments. As a result, a Notice of Default was

mailed. (Plaintiff's Exhibit 10) The Notice of Default

allowed the Terwilligers and the Bonnetts 45 days in which

to cure the default. A cure of the default was not

effected. As a result, a Notice of Acceleration was mailed

to the Bonnetts and the Terwilligers on the 15th day of

January, 1987. (Plaintiff's Exhibit 11) Again, the Notice

of Acceleration went unanswered. Therefore, a Notice of Repossession was mailed to the Bonnetts and the Terwilligers on the 21st day of March, 1987. (Plaintiff's Exhibit 13)

The Notice of Repossession advised the Bonnetts and the Terwilligers of a pending sale of the inventory, fixtures, and equipment to James Criner, for the purchase price of \$60,000.00. The notice allowed the Bonnetts and the Terwilligers 5 days in which to enter their objection to the proposed sale. No objection was forthcoming.

In the latter part of March 1987, Fred Terwilliger turned the keys to the building in which Bud Lilly's Trout Shop did business over to Lilly. (Tr. p. 115, l. 3-4) At that time, Lilly had an opportunity to examine the condition of the business. He found that the inventory was devastated, that the catalog had not been mailed for that season, and that no arrangements had been made for guides for that season. (Tr. p. 75, l. 7-16) In addition, he found the condition of the leasehold premises to be in total disrepair. (Tr. p. 113, l. 3-10)

Lilly's son, Gregory, opened a fly fishing business in Bozeman in the fall of 1982, known as The River's Edge. (Tr. p. 121, l. 17) In 1984 or 1985, Gregory and his partner approached Terwilliger to express an interest in purchasing Bud Lilly's Trout Shop. (Tr. p. 123, l. 24-25 and p. 124, l. 1-3) Terwilliger was uninterested in a sale.

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Repossession was mailed to the Bonnetts and the Terwilligers
on the first day of March, 1987. (Plaintiff's Exhibit 13)
The Notice of Repossession advised the Bonnetts and the
Terwilligers of a pending sale of the inventory, fixtures,
and equipment to James Ciner, for the purchase price of
\$60,000.00. The notice allowed the Bonnetts and the
Terwilligers 30 days in which to enter their objection to the
proposed sale. No objection was forthcoming.
In the latter part of March 1987, Fred Terwilliger
turned the keys to the building in which Bob Lilly's Trout
Shop did business over to Lilly. (Tr. p. 115, 1-3-4) At
that time, Lilly had an opportunity to examine the condition
of the business. He found that the inventory was
depleted, that the catalog had not been mailed for that
season, and that no arrangements had been made for guides
for that season. (Tr. p. 75, 1-7-16) In addition, he
found the condition of the lease-
hold premises to be in total disrepair. (Tr. p. 113, 1-3-
18)
Lilly's son, Gregory, opened a fly fishing business in
Bosman in the fall of 1985, known as The River's Edge.
(Tr. p. 131, 1-17) In 1984 or 1985, Gregory and his
partner approached Terwilliger to express an interest in
purchasing Bob Lilly's Trout Shop. (Tr. p. 133, 1-24-25
and p. 134, 1-1-3) Terwilliger was uninterested in a sale.

Gregory approached him again in the fall of 1986 and again he was uninterested in a sale. (Tr. p. 124, l. 3-8)

Gregory approached Terwilliger yet a third time in the spring of 1987. Gregory again went to West Yellowstone to inspect the business. At that time, he found very little inventory, and the inventory he did find was in a damaged condition. (Tr. p. 137, l. 10-25) In addition, he found the premises in a state of disrepair. (Tr. p. 138, l. 1) Finally, he found the mailing list in total disarray, water damaged and scattered throughout the store. (Tr. p. 138, l. 5-11)

Despite his interest in purchasing the business for several years and his continued interest in purchasing the business in the spring of 1987, Gregory elected not to purchase the business from his father. He simply felt the price offered by Criner of \$60,000.00 was too much in light of the capital investment required to put the business back on its feet and the condition of the inventory, premises, and mailing list. (Tr. p. 138, l. 12-16)

At the time Lilly repossessed Bud Lilly's Trout Shop in late March of 1987, he felt a great deal of pressure to sell the business, or at least what remained of it, immediately. (Tr. p. 106 and 107) That pressure was fostered in part by his understanding of the fact that the business was a labor intensive one. In addition, it was based upon the fact that the principal labor involved with the business was between

Gregory approached him again in the fall of 1986 and again he was uninterested in a sale. (Tr. p. 134, 1-3-8)

Gregory approached Terwilliger yet a third time in the spring of 1987. Gregory again went to West Yellowstone to inspect the business. At that time, he found very little inventory, and the inventory he did find was in a damaged condition. (Tr. p. 137, 1-10-87) In addition, he found the premises in a state of disrepair. (Tr. p. 138, 1-11) Finally, he found the mailing list in total disarray, water damaged and scattered throughout the store. (Tr. p. 139, 1-

2-11)

Despite his interest in purchasing the business for several years and his continued interest in purchasing the business in the spring of 1987, Gregory elected not to purchase the business from his father. He simply felt the price offered by Criner of \$60,000.00 was too much in light of the capital investment required to put the business back on its feet and the condition of the inventory, premises,

and mailing list. (Tr. p. 138, 1-12-87)

At the time Lilly repossessed Bud Lilly's Trout Shop in late March of 1987, he felt a great deal of pressure to sell the business, or at least what remained of it, immediately. (Tr. p. 106 and 107) That pressure was fostered in part by his understanding of the fact that the business was a labor intensive one. In addition, it was based upon the fact that the principal labor involved with the business was between

Memorial Day and Labor Day. (Tr. p. 25, l. 10-19)

Additionally, he felt that a large capital investment was necessary to put the premises back in good condition and to restore the inventory and fixtures to their proper levels. (Tr. p. 113, l. 7-9) Because the sale proceeds he had been receiving from the Terwilligers and the Bonnetts were his primary source of income, he simply did not feel that he had the capital to invest. (Tr. p. 113, l. 7-9)

Given no objection from the Bonnetts or the Terwilligers to his proposed sale to Criner, Lilly went ahead and executed a sales agreement with Criner on April 13, 1987. (Plaintiff's Exhibit 14) That sale agreement provided for a purchase price of \$57,263.00, plus interest, for a total of \$60,000.00. A down payment was made of \$20,000.00 and the balance of \$37,263.00 was to be paid in accordance with a promissory note bearing interest at the rate of 6.75% per annum. (Plaintiff's Exhibit 14)

The Criner sales agreement provided for the sale of inventory, fixtures, equipment, and the mailing list. It also required Lilly to assist Criner in obtaining the name "Bud Lilly's Trout Shop" and outfitting licenses. (Plaintiff's Exhibit 14)

Plaintiff's son, Michael, approached Fred Terwilliger with a request for permission to transfer the name "Bud Lilly's Trout Shop" to Criner. He voiced no objection. (Tr. p. 216, l. 4-7) This was necessary because plaintiff

Memorial Day and Labor Day. (Tr. p. 25, l. 10-13)
 Additionally, he felt that a large capital investment was
 necessary to put the premises back in good condition and to
 restore the inventory and fixtures to their proper levels.
 (Tr. p. 113, l. 7-9) Because the sale proceeds he had been
 receiving from the Terwilligers and the Bonnetts were his
 primary source of income, he simply did not feel that he had

the capital to invest. (Tr. p. 113, l. 7-9)

Given no objection from the Bonnetts or the
 Terwilligers to his proposed sale to Ciner, Lilly went
 ahead and executed a sales agreement with Ciner on April
 17, 1987. (Plaintiff's Exhibit 14) That sales agreement
 provided for a purchase price of \$27,253.00, plus interest,
 for a total of \$60,000.00. A down payment was made of
 \$20,000.00 and the balance of \$37,253.00 was to be paid in
 accordance with a promissory note bearing interest at the
 rate of 6.75% per annum. (Plaintiff's Exhibit 14)

The Ciner sales agreement provided for the sale of
 inventory, fixtures, equipment, and the selling list. It
 also required Lilly to assist Ciner in obtaining the name
 "Bud Lilly's Trout Shop" and outlying licenses.

(Plaintiff's Exhibit 14)

Plaintiff's son, Michael, approached Fred Terwilliger
 with a request for permission to transfer the name "Bud
 Lilly's Trout Shop" to Ciner. He voiced no objection.
 (Tr. p. 218, l. 4-7) This was necessary because Plaintiff

did not have the name "Bud Lilly's Trout Shop" registered at the time; Terwilliger did.

The mailing list which was transferred to Criner by the agreement was abandoned by Terwilliger. Gregory Lilly saw it scattered about on the premises. (Tr. p. 138, l. 5-11)

Although the Criner sales agreement recites the transfer of outfitting licenses in the states of Montana and Idaho, Lilly did not own those licenses. As a result, the agreement provided:

F. Outfitting Licenses. In this connection, Seller will take all necessary steps to assist Buyer in securing the Idaho and Montana Outfitters License.

Lilly's son, Michael, a Montana attorney, explained his research into the licensing situation. He testified that the sale of an Idaho and Montana outfitters license was impermissible. However, he further explained that a person purchasing an existing fishing business receives preference in the state of Idaho in the allocation of outfitter licenses. Thus, paragraph F was inserted in the Criner sales agreement. (Tr. p. 216, l. 3-19) Despite that fact, Criner was unsuccessful in obtaining an outfitters license in Idaho the first year of his operation. (Tr. p. 216, l. 20-21)

At the time of the trial, Criner had successfully paid the balance of the promissory note. Indeed, the business appeared to be successful in his hands. (Tr. p. 80, l. 1-4)

2
did not have the name "Bud Lilly's Trout Shop" registered at

the time Terwilliger died.

The mailing list which was transferred to Criner by the

agreement was abandoned by Terwilliger. Gregory Lilly saw

it scattered about on the premises. (Tr. p. 138, 1-5-11)

Although the Criner sales agreement recites the

transfer of outfitting licenses in the state of Montana and

Idaho, Lilly did not own those licenses. As a result, the

agreement provided:

4. Outfitting licenses. In this connection, seller will take all necessary steps to assist buyer in securing the Idaho and Montana Outfitting licenses.

Lilly's son, Michael, a Montana attorney, explained his

research into the licensing situation. He testified that

the sale of an Idaho and Montana outfitting license was

impermissible. However, he further explained that a person

purchasing an existing fishing business receives preference

in the state of Idaho in the allocation of outfitting

licenses. Thus, paragraph 4 was inserted in the Criner

sales agreement. (Tr. p. 216, 1-3-12) Despite that fact,

Criner was unsuccessful in obtaining an outfitting license

in Idaho the first year of his operation. (Tr. p. 216, 1-

30-21)

At the time of the trial, Criner had successfully paid

the balance of the promissory note. Indeed, the business

appeared to be successful in his hands. (Tr. p. 80, 1-1-4)

ARGUMENTI. LILLY'S NOTICE OF REPOSSESSION WAS NOT FATALY DEFECTIVE.A. INTRODUCTION.

Lilly mailed a Notice of Default to the Terwilligers and the Bonnetts on the 9th day of December, 1986. (Plaintiff's Exhibit 10) The Notice of Default identified the Terwilligers' and the Bonnetts' failure to make payments in the amount of \$2,599.62 on the 30th day of October, 1986, and on the 30th day of November, 1986. The notice provided the Terwilligers and the Bonnetts with 45 days in which to cure the default in accordance with the terms of the parties' sales agreement, promissory note, and security agreement. (Plaintiff's Exhibits 1, 3, and 4) The Terwilligers and the Bonnetts failed to cure the default noticed within the time provided.

As a result, Lilly mailed a Notice of Acceleration to the Terwilligers and the Bonnetts on the 27th day of January, 1987. (Plaintiff's Exhibit 11) The Notice of Acceleration provided the Terwilligers and the Bonnetts with 15 days to pay the entire balance owing in the amount of \$220,785.00. (Plaintiff's Exhibit 11) The Notice of Acceleration was also mailed in accordance with the terms of the parties's sales agreement, promissory note, and security agreement. (Plaintiff's Exhibits 1, 3, and 4) Again, the Terwilligers and the Bonnetts failed to cure the default in accordance with the terms of that Notice of Acceleration.

ARGUMENT

I. LILLY'S NOTICE OF REPOSSESSION WAS NOT FATALLY DEFECTIVE.

A. INTRODUCTION.

Lilly mailed a Notice of Default to the Terwilligers and the Bonnetts on the 5th day of December, 1985. (Plaintiff's Exhibit 10) The Notice of Default identified the Terwilligers' and the Bonnetts' failure to make payments in the amount of \$1,592.62 on the 10th day of October, 1985, and on the 30th day of November, 1985. The notice provided the Terwilligers and the Bonnetts with 45 days in which to cure the default in accordance with the terms of the parties' sales agreement, promissory note, and security agreement. (Plaintiff's Exhibits 1, 3, and 4) The Terwilligers and the Bonnetts failed to cure the default noticed within the time provided.

As a result, Lilly mailed a Notice of Acceleration to the Terwilligers and the Bonnetts on the 17th day of January, 1987. (Plaintiff's Exhibit 11) The Notice of Acceleration provided the Terwilligers and the Bonnetts with 15 days to pay the entire balance owing in the amount of \$10,785.00. (Plaintiff's Exhibit 11) The notice of Acceleration was also mailed in accordance with the terms of the parties' sales agreement, promissory note, and security agreement. (Plaintiff's Exhibits 1, 3, and 4) Again, the Terwilligers and the Bonnetts failed to cure the default in accordance with the terms of that Notice of Acceleration.

Thereafter, on the 30th day of March, 1987, Lilly mailed a Notice of Repossession to the Terwilligers and the Bonnetts on the 30th day of March, 1987. (Plaintiff's Exhibit 13) The Notice of Repossession provided in pertinent part:

PLEASE TAKE NOTICE and you are hereby notified that on the 21st day of March, 1987, the undersigned took possession of all inventory, fixtures and equipment conveyed by that certain sales agreement dated the 30th day of January, 1982, wherein the Trout Shop, Inc. is named as seller and you are named as buyer, and pursuant to Section 30-9-502, MCA.

The sale of said inventory, fixtures, and equipment is contemplated by the undersigned pursuant to Section 30-9-504, MCA. James Criner has offered to purchase said property for the sum of \$60,000.00. You are requested to notify the undersigned's counsel, Michael J. Lilly, at 222 East Main Street, Suite 301, Bozeman, Montana 59715, of your objection to said purchase of inventory, fixtures and equipment within five (5) days of the date of this notice.

DATED this 30th day of March, 1987.

WALEN F. LILLY

Neither the Terwilligers nor the Bonnetts entered any objection to the proposed sale.

B. THE TRIAL COURT'S FINDINGS.

The Trial Court found that the resale of the business to James Criner was commercially reasonable. However, the

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 mailed a Notice of Repossession to the Terwilligers and the
 Bonnetts on the 30th day of March, 1987. (Plaintiff's
 Exhibit 13) The Notice of Repossession provided in
 pertinent parts:

PLEASE TAKE NOTICE and you are hereby
 notified that on the 31st day of March, 1987, the
 undersigned took possession of all inventory,
 fixtures and equipment conveyed by that certain
 sales agreement dated the 30th day of January,
 1983, wherein the Trout Shop, Inc. is named as
 seller and you are named as buyer, and pursuant to
 Section 30-9-502, MCA.

The sale of said inventory, fixtures, and
 equipment is contemplated by the undersigned
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 has offered to purchase said property for the sum
 of \$88,000.00. You are requested to notify the
 undersigned's counsel, Michael J. Lilly, at 333
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 inventory, fixtures and equipment within five (5)
 days of the date of this notice.

DATED this 30th day of March, 1987.

WALTER F. LILEY

Neither the Terwilligers nor the Bonnetts entered any
 objection to the proposed sale.

B. THE TRIAL COURT'S FINDINGS.

The Trial Court found that the resale of the business
 to James Criner was commercially reasonable. However, the

Trial Court concluded:

. . . The Court finds that under the circumstances, the sale to Criner was commercially reasonable, although flawed by procedural technicality of proper notice, which the Court is required to address in effecting a remedy. (Findings of Fact and Conclusions of Law, Finding No. 11.)

The Court addressed what it considered to be a flawed notice in its memorandum. In essence, the Court seemed concerned about the fact that it believed Lilly had sold assets which were not identified in the Notice of Repossession.

(Findings of Fact and Conclusions of Law, p. 8) The Trial Court ruminated over the possibility that the sale of unidentified assets, specifically, good will, may have constituted a conversion.

C. BONNETTS' POSITION.

The Bonnetts take the position that the Trial Court was correct in concluding that the Notice of Repossession was fatally flawed. The Bonnetts contend that the Notices's failure to identify in Lilly's proposed sale to Criner the covenant not to compete, the good will, the name, the licenses, and the mailing list, rendered the Notice legally inadequate.

D. LILLY'S POSITION.

The Trial Court and the Bonnetts' conclusion that the Notice of Repossession was fatally flawed is simply, and

Trial Court concluded:

The Court finds that under the circumstances, the sale to Criner was commercially reasonable, although flawed by procedural technicality of proper notice, which the Court is required to address in effecting a remedy. (Findings of Fact and Conclusions of Law, Finding No. 11.)

The Court addressed what it considered to be a flawed notice in its memoranda. In essence, the Court seemed concerned about the fact that it believed Lilly had sold assets which were not identified in the Notice of Repossession. (Findings of Fact and Conclusions of Law, p. 8.) The Trial Court remained over the possibility that the sale of unidentified assets, specifically, good will, may have constituted a conversion.

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The Bonnetts take the position that the Trial Court was correct in concluding that the Notice of Repossession was fatally flawed. The Bonnetts contend that the Notice's failure to identify in Lilly's proposed sale to Criner the covenant not to compete, the good will, the name, the licenses, and the mailing list, rendered the notice legally inadequate.

D. LILLY'S POSITION.

The Trial Court and the Bonnetts' contention that the Notice of Repossession was fatally flawed is simply, and

clearly, not correct. A careful analysis and review of the exhibits, the testimony, and the applicable law, reveals that the Notice of Repossession was more than legally adequate.

1. The Exhibits.

The Terwilligers and the Bonnetts executed a promissory note evidencing the unpaid balance of the purchase price. That promissory note required monthly payments in the amount of \$2,599.62. (Plaintiff's Exhibit 3) It was these monthly payments which were the subject of the Terwilligers and the Bonnetts' default. (Plaintiff's Exhibit 10)

The promissory note stated on its face the following:

It is understood and agreed that this promissory note is secured by a Security Agreement dated the 31st day of January, 1982, which is attached hereto, marked "Exhibit A" and incorporated herein by reference.

Thus, security for the monthly payments of \$2,599.62 was established in the security agreement.

The security agreement referenced in the promissory note was executed by the parties. It contained a list of items pledged as collateral. That list included inventory, fixtures, and equipment. (Plaintiff's Exhibit 4) A Uniform Commercial Code financing statement was filed with the Secretary of State. The Uniform Commercial Code financing statement provided:

All inventory and fixtures, and additions thereto, located at 39 Madison Avenue, West Yellowstone, Montana.

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1. The Exhibits.

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The promissory note stated on its face the following:

It is understood and agreed that this promissory note is secured by a security agreement dated the 1st day of January, 1982, which is attached hereto, marked "Exhibit A" and incorporated herein by reference.

Thus, security for the monthly payments of \$1,599.62 was established in the security agreement.

The security agreement referenced in the promissory note was executed by the parties. It contained a list of items pledged as collateral. That list included inventory, fixtures, and equipment. (Plaintiff's Exhibit 4) A Uniform Commercial Code financing statement was filed with the Secretary of State. The Uniform Commercial Code financing statement provided:

All inventory and fixtures, and additional thereto, located at 38 Madison Avenue, West Yellowstone, Montana.

The Uniform Commercial Code financing statement was properly continued. (Plaintiff's Exhibit 4)

Neither the security agreement executed by the parties, nor the financing statement, referenced as collateral the covenant not to compete, licenses, mailing list, good will, or the name "Bud Lilly's Trout Shop." As a result, they were not pledged as collateral by the Terwilligers and the Bonnetts to Lilly. The Trial Court's conclusion that these items were pledged as collateral by the Terwilligers and the Bonnetts to Lilly by virtue of the sales agreement is erroneous. (Findings of Fact and Conclusions of Law, p. 7)

At no point in the parties' sales agreement is there a provision establishing a security interest in favor of Lilly for the covenant not to compete, licenses, mailing list, good will, or company name. A security interest does not arise unless certain definable terms are contained in the agreement. Those terms are identified in Section 30-9-203, MCA:

(1) . . . A security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

(a) . . . the debtor has signed a security agreement which contains a description of the collateral . . . ;

(b) value has been given; and

(c) the debtor has rights in the collateral.

The sales agreement between the parties does not identify as collateral the covenant not to compete, licenses, mailing

The Uniform Commercial Code financing statement was properly

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Neither the security agreement executed by the parties,

nor the financing statement, referenced as collateral the

covenant not to compete, license, selling list, good will,

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were not pledged as collateral by the Terwilligers and the

bonnettes to Lilly. The Trial Court's conclusion that these

items were pledged as collateral by the Terwilligers and the

bonnettes to Lilly by virtue of the sales agreement is

erroneous. (Findings of Fact and Conclusions of Law, p. 7)

At no point in the parties' sales agreement is there a

provision establishing a security interest in favor of Lilly

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agreement. Those terms are identified in Section 9A-307,

MCA:

(1) . . . A security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

(a) . . . the debtor has signed a security agreement which contains a description of the collateral . . .

(b) value has been given; and

(c) the debtor has rights in the collateral.

The sales agreement between the parties does not identify as

collateral the covenant not to compete, license, selling

list, good will, or the company name.

Indeed, the sales agreement between the parties clearly, and without ambiguity, identifies Lilly's security as seller:

9. Seller's Security. It is understood and agreed that buyer shall execute a promissory note and security agreement in favor of seller and its assigns for the unpaid balance of the purchase price. Said security agreement shall designate the inventory and fixtures, and any additions thereto, as collateral for the unpaid purchase price. . . .

Thus, the documents themselves clearly identify the collateral. They do not list the covenant not to compete, the company name, the mailing list, or the licenses as collateral.

2. The Testimony.

Lilly's sales agreement with the Terwilligers and the Bonnetts identified the assets which were the subject of the sale as inventory, fixtures, covenant not to compete, guide deposits, accounts receivable, and good will consisting of the name "Bud Lilly's Trout Shop," all guide licenses, all outfitters licenses, all special use permits for the state of Montana, the state of Idaho, and Yellowstone National Park, and the 1982 mailing list. (Plaintiff's Exhibit 1) It is important to bear in mind a number of important points about those items which were transferred by Lilly to the Terwilligers and the Bonnetts.

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Indeed, the sales agreement between the parties

clearly, and without ambiguity, identified Lilly's security

as seller:

2. Seller's Security. It is understood and agreed that buyer shall execute a promissory note and security agreement in favor of seller and its assigns for the unpaid balance of the purchase price. Said security agreement shall designate the inventory and fixtures, and any additions thereto, as collateral for the unpaid purchase price.

Thus, the documents themselves clearly identify the

collateral. They do not list the covenant not to compete,

the company name, the mailing list, or the licenses as

collateral.

3. The Testimony.

Lilly's sales agreement with the Terwilligers and the Bonnetts identified the assets which were the subject of the sale as inventory, fixtures, covenant not to compete, guide deposits, accounts receivable, and good will consisting of the name "Bud Lilly's Trout Shop," all guide licenses, all outfitters licenses, all special use permits for the state of Montana, the state of Idaho, and Yellowstone National Park, and the 1982 mailing list. (Plaintiff's Exhibit 1) It is important to bear in mind a number of important points about those items which were transferred by Lilly to the Terwilligers and the Bonnetts.

First, the good will reference in the sales agreement to licenses did not imply that Lilly would actually transfer licenses to the Terwilligers and the Bonnetts. Paragraph 1G provided:

G. Seller's assistance in obtaining all Montana, Idaho, and Yellowstone National Park outfitters licenses, guide licenses, and special use permits.

All that Lilly was committing himself to do in the sales agreement was to assist the Terwilligers and the Bonnetts in obtaining these licenses. He did not, and could not legally, transfer those licenses to the Terwilligers and the Bonnetts. As a result, the licenses could not be pledged as collateral for the performance of the promissory note.

Second, the Bonnetts argue, although the Trial Court did not express its concern relative thereto, that Lilly failed to notify them of his transfer of the covenant not to compete. (Bonnett Brief, p. 13) This is a seriously erroneous assertion. Lilly did not transfer or sell to James Criner a covenant not to compete. (Plaintiff's Exhibit 14) To so assert is to mislead this Court.

Third, the sales agreement between Lilly and the Terwilligers and the Bonnetts transferred the 1982 mailing list as prepared for the 1982 catalog mailing. Likewise, Lilly's sales agreement with Criner conveyed a mailing list. (Plaintiff's Exhibit 14) However, the testimony was clear that the mailing list was abandoned by Terwilliger when he

First, the good will reference in the sales agreement to licenses did not imply that Lilly would actually transfer licenses to the Terwilligers and the Bonneltas. Paragraph 10 provided:

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All that Lilly was committing himself to do in the sales agreement was to assist the Terwilligers and the Bonneltas in obtaining these licenses. He did not, and could not

legally, transfer those licenses to the Terwilligers and the Bonneltas. As a result, the licenses could not be pledged as collateral for the performance of the promissory note.

Second, the Bonneltas argue, although the Trial Court did not express its concern relative thereto, that Lilly failed to notify them of his transfer of the covenant not to

compete. (Bonnelt Brief, p. 13) This is a seriously erroneous assertion. Lilly did not transfer or sell to James Criner a covenant not to compete. (Plaintiff's

Exhibit 14) To so assert is to mislead this Court. Third, the sales agreement between Lilly and the Terwilligers and the Bonneltas transferred the 1982 mailing

list as prepared for the 1982 catalog mailing. Likewise, Lilly's sales agreement with Criner conveyed a mailing list. (Plaintiff's Exhibit 14) However, the testimony was clear

that the mailing list was abandoned by Terwilliger when he

rendered possession of the premises to Lilly. (Tr. p. 138, 1. 5-11) Given that abandonment, the Trial Court should have felt no concern about any impropriety in its sale to Criner.

The Bonnetts contend that Lilly's sale of the name "Bud Lilly's Trout Shop," without notification to them, rendered the Notice of Repossession fatal. It must be clearly understood that Lilly did not sell Criner the name "Bud Lilly's Trout Shop." Rather, the Criner sales agreement provides:

E. Name. The seller shall secure the right for buyer to use the name "Bud Lilly's Trout Shop"; (Plaintiff's Exhibit 14)

Lilly did not own the name "Bud Lilly's Trout Shop," Fred Terwilliger did. As a result, to comply with this provision, Michael J. Lilly secured Fred Terwilliger's permission for Criner to use this name. (Tr. p. 116, 1. 1-3)

3. The Law.

Lilly's Notice of Repossession contemplated a private sale. (Plaintiff's Exhibit 13) The private sale of repossessed collateral is sanctioned by Montana law. Section 30-9-504(3)(a), MCA, provides:

Disposition of the collateral may be by public or private proceedings . . . Reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor . . .

Lilly's Notice of Repossession clearly satisfies the

rendered possession of the premises to Lilly. (Tr. p. 138)
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The Bonnette contends that Lilly's sale of the name "Bud
Lilly's Trout Shop," without notification to them, rendered
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provided:

5. Name. The seller shall secure the right
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Lilly did not own the name "Bud Lilly's Trout Shop," Fred
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Disposition of the collateral may be by public or
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of the time after which any private sale or other
intended disposition is to be made shall be made
by the secured party to the debtor . . .

Lilly's Notice of Re-possession clearly satisfied the

mandates of this section. It notified the Terwilligers and the Bonnetts of the time after which the private sale was to be consummated. Nothing more was required.

Without doubt, Lilly's Notice of Repossession went beyond the requirements of this section. In addition to providing the Terwilligers and the Bonnetts with notice of the date after which the private sale would be held, it identified the prospective purchaser and the purchase price. Section 30-9-504, MCA, and the cases construing it, do not require the inclusion of such information in the notice.

This Court approved a notice which contained less information to the debtor than the information contained in the Lilly notice in Dulan v. Montana Nat. Bank of Roundup, (1983), 203 Mont. 177, 661 P.2d 28. In that case, the Court approved the following notice:

This letter is to advise you that a demand is being placed on you in the amount of \$1,499.38 which is relative to your note of May 22nd, 1972, in the original amount of \$7,500.00. This includes principal of \$1,427.44 and interest of \$71.94. This pays interest through August 31st, 1974, and if not received by that date we will then proceed against the stock certificate consisting of 4995 shares of Sharon Studio stock which you assigned to the Montana National Bank. 661 P.2d at 29. (Court's emphasis)

Although this notice did not include the dollar figure which would be paid for the stock to be sold, nor identify a prospective purchaser, this Court approved its contents and sufficiency.

mandates of this section. It notified the Tawilligers and the Bonetta of the time after which the private sale was to be consummated. Nothing more was required.

Without doubt, Lilly's Notice of Reorganization went beyond the requirements of this section. In addition to providing the Tawilligers and the Bonetta with notice of the date after which the private sale would be held, it identified the prospective purchaser and the purchase price. Section 30-2-204, MCA, and the cases construing it, do not require the inclusion of such information in the notice.

This Court approved a notice which contained less information as to the debtor than the information contained in the Lilly notice in Dolan v. Montana Nat. Bank of Roundup, (1983), 203 Mont. 177, 661 P.2d 28. In that case, the Court

approved the following notice:

This letter is to advise you that a demand is being placed on you in the amount of \$1,459.38 which is relative to your note of May 22nd, 1971, in the original amount of \$7,500.00. This includes principal of \$1,457.44 and interest of \$1.94. This pays interest through August 31st, 1974, and if not received by that date we will then proceed against the stock certificate consisting of 4335 shares of Sharon Studio stock which you assigned to the Montana National Bank. (Court's emphasis) 661 P.2d at 29.

Although this notice did not include the dollar figure which would be paid for the stock to be sold, nor identify a prospective purchaser, this Court approved its contents and sufficiency.

E. SUMMARY.

The sales agreement, promissory note, and security agreement executed by the parties pledged the inventory, fixtures, and equipment as collateral--nothing more. The clear intent of the parties, as evidenced by these documents, did not include a pledge of the good will as an item of collateral.

The good will item of licenses could not, in fact, be pledged as collateral. That item of good will merely represented Lilly's promise to assist, without guaranty, the Terwilligers and the Bonnetts receipt of those licenses. The good will item of the name "Bud Lilly's Trout Shop" was transferred with the express consent of Terwilliger. The mailing list was abandoned by Terwilliger. Lilly did not transfer a covenant not to compete to Criner.

Lilly did absolutely nothing wrong in transferring the name or the mailing list to Criner or in assisting Criner in securing the Idaho and Montana guide licenses. The Bonnetts should not be before this Court complaining about Lilly's efforts in that regard. Rather, they should be thankful that he took the extra effort to assist in the transfer of the name, the mailing list, and to assist Criner in obtaining the guide licenses. Lilly's efforts resulted in securing a greater price which reduced the deficiency owed by the Bonnetts.

E. HENNARY

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The good will item of license could not, in fact, be pledged as collateral. That item of good will merely represented Lilly's promise to assist, without authority, the Terwilligers and the Bonnetts receipt of those licenses. The good will item of the name "Bud Lilly's Trout Shop" was transferred with the express consent of Terwilliger. The mailing list was abandoned by Terwilliger. Lilly did not transfer a covenant not to compete to Criner.

Lilly did absolutely nothing wrong in transferring the name of the mailing list to Criner or in assisting Criner in securing the Idaho and Montana guide licenses. The Bonnetts should not be before this Court complaining about Lilly's efforts in that regard. Rather, they should be thankful that he took the extra effort to assist in the transfer of the name, the mailing list, and to assist Criner in obtaining the guide licenses. Lilly's efforts resulted in securing a greater price which reduced the deficiency owed by the Bonnetts.

II. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT LILLY'S SALE OF THE REPOSSESSED COLLATERAL WAS COMMERCIALY REASONABLE.

A. THE TRIAL COURT'S FINDINGS.

The Trial Court concluded that Lilly's sale of the collateral was commercially reasonable. In support of that conclusion, the Trial Court found that the Bonnetts' experts' testimony to the contrary was not persuasive. In addition, the Trial Court found that since the date of Lilly's sale of the business to the Terwilligers and the Bonnetts, the gross income had declined from the sum of \$600,000.00 to a sum from which the buyers could not even make relatively modest payments. (Findings of Fact and Conclusions of Law, Finding No. 9)

B. THE BONNETTS' POSITION.

The Bonnetts take the position that the Trial Court erred in reaching this conclusion. The Bonnetts argue that the sale should have been a public one, rather than a private one. In addition, the Bonnetts contend that Lilly should have advertised the sale and solicited bids. The Bonnetts also suggest that Lilly should have obtained an appraisal of the business prior to sale. Finally, the Bonnetts maintain that Lilly's sale price for the repossessed collateral was so inadequate as to suggest a commercially unreasonable sale.

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A. THE TRIAL COURT'S FINDINGS.

The Trial Court concluded that Lilly's sale of the collateral was commercially reasonable. In support of that conclusion, the Trial Court found that the Bonnetts' experts' testimony to the contrary was not persuasive. In addition, the Trial Court found that since the date of Lilly's sale of the business to the Twilligers and the Bonnetts, the gross income had declined from the sum of \$600,000.00 to a sum from which the buyers could not even make relatively modest payments. Findings of fact and Conclusions of Law, Finding No. 21

B. THE BONNETTS' POSITION.

The Bonnetts take the position that the Trial Court erred in reaching this conclusion. The Bonnetts argue that the sale should have been a public one, rather than a private one. In addition, the Bonnetts contend that Lilly should have advertised the sale and solicited bids. The Bonnetts also suggest that Lilly should have obtained an appraisal of the business prior to sale. Finally, the Bonnetts maintain that Lilly's sale price for the reposessed collateral was so inadequate as to suggest a commercially unreasonable sale.

C. LILLY'S POSITION.

At the outset, it must be borne in mind that the determination of whether the sale was commercially reasonable is a question of fact. This Court may not reverse the Trial Court's conclusion in this regard, unless it is clearly erroneous. James Talcott, Inc. v. Reynolds, (1975), 165 Mont. 404, 529 P.2d 352 and Farmers State Bank v. Mobile Homes Unlimited, (1979), 181 Mont. 342, 593 P.2d 734. While Lilly recognizes that as the secured creditor, he must bear the burden of proving that the sale was commercially reasonable, he maintains that he met that burden. Bank of Sheridan v. Devers, (1985), 217 Mont. 173, 702 P.2d 1388.

1. Public v. Private Sale.

The Bonnetts maintain that Lilly's sale of the assets at private sale rendered it commercially unreasonable. The Bonnetts conveniently forget that the Notice of Repossession advised them of the fact that the sale would be conducted privately. In addition, the Notice of Repossession identified the prospective purchaser as well as the price to be paid. The Notice of Repossession went on to invite the Bonnetts' objection to the sale and its terms. (Plaintiff's Exhibit 13)

Despite the Bonnetts' receipt of the notice of the private sale and the terms of the private sale, and despite

LILLY'S POSITION.

At the same time, it must be borne in mind that the determination of whether the sale was commercially reasonable is a question of fact. This Court may not reverse the Trial Court's conclusion in this regard, unless it is clearly erroneous. James Tipton, Inc. v. Reynolds, 165 Mont. 404, 229 P.2d 322 and Larson State Bank v. Mobile Homes United, 197 P.2d 181, 293 P.2d 734. While Lilly recognized that as the secured creditor he must bear the burden of proving that the sale was commercially reasonable, he maintains that he met that burden. Bank of America v. Davis, 198 P.2d 173, 202 P.2d 188.

1. Public v. Private Sale.

The Bonnetts maintain that Lilly's sale of the assets at private sale rendered it commercially unreasonable. The Bonnetts conveniently forget that the Notice of Repossession advised them of the fact that the sale would be conducted privately. In addition, the Notice of Repossession identified the prospective purchaser as well as the price to be paid. The Notice of Repossession went on to invite the Bonnetts' objection to the sale and its terms. (Exhibit 13) Despite the Bonnetts' receipt of the notice of the private sale and the terms of the private sale, and despite

an invitation to object to those terms, the Bonnetts did not enter any objection. As a result, it must be concluded that the Bonnetts waived any objection they might have had to the conduct of a private sale. Section 30-1-107, MCA, Nelson v. Monarch Invest. Plan., Inc., (Ky. 1970), 452 SW2d 375.

The decision to sell the collateral by private sale was, nonetheless, commercially reasonable. The collateral had more value if it were sold together as a going concern. It must be remembered that Lilly did not have a leasehold interest in the premises upon which the collateral was located. In addition, he did not have Montana or Idaho outfitter and guide licenses. By proceeding with a private sale, Lilly was in a better position to sell the assets as a going concern and therefore receive a larger sale price.

Had Lilly held a public auction of the collateral, he would not have been in a position to assist the purchaser in securing the leasehold interest. In addition, he would not have been in a position to assist the purchaser in acquiring the Montana and Idaho outfitter and guide licenses. By handling the sale privately, he was in a position to assist the purchaser in acquiring those benefits.

2. Solicitation of Bids and Advertising.

The Bonnetts contend that Lilly's failure to solicit bids for the assets or to advertise their sale rendered the private sale commercially unreasonable. At the outset, it

an invitation to object to those terms, the Bonnetts did not enter any objection. As a result, it must be concluded that the Bonnetts waived any objection they might have had to the conduct of a private sale. Section 30-1-107, MCA, Helson v. Monarch Invest. Plan, Inc., (Ky. 1976), 452 S.W.2d 175.

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2. Solicitation of Bids and Advertisement.

The Bonnetts contend that Lilly's failure to solicit bids for the assets or to advertise their sale rendered the private sale commercially unreasonable. At the outset, it

must be recognized that the failure to solicit bids or to advertise for sale is not fatal. A creditor need not advertise or solicit bids in order to conduct a commercially reasonable sale. Dulan v. Montana Nat. Bank of Roundup, (1983), 203 Mont. 177, 661 P.2d 28.

In the instant case, there simply was not time sufficient to solicit bids or advertise prior to sale. The conduct of a fishing business in West Yellowstone, Montana, is labor intensive, with the primary effort expended during the fishing season which commences on or about Memorial Day and concludes on or about Labor Day. Lilly effected his repossession of the assets in late March, with very little time for anyone to prepare for the upcoming season. (Tr. p. 25, l. 10-19)

At the time Lilly retook possession of the assets, he did not have a leasehold interest in the premises upon which they were located. (Tr. p. 112, l. 1-5, p. 106, l. 25, and p. 107, l. 1-2) In addition, the premises were in a state of complete disrepair requiring the expenditure of substantial sums to put them into presentable condition. (Tr. p. 113, l. 3-10) At the time of the repossession, there were no guide trips booked for the summer season. (Tr. p. 75, l. 3-16) Lilly testified that typically by March, 50% of the guided trips were booked.

It was essential for any prospective purchaser to be prepared for the upcoming fishing season, that the sale be

must be recognized that the failure to solicit bids or to advertise for sale is not fatal. A creditor need not advertise or solicit bids in order to conduct a commercially reasonable sale. Dumas v. Montana Nat. Bank of Bozeman, (1983), 203 Mont. 177, 681 P.2d 28.

In the instant case, there simply was not time sufficient to solicit bids or advertise prior to sale. The conduct of a fishing business in West Yellowstone, Montana, is labor intensive, with the primary effort expended during the fishing season which commences in or about Memorial Day and concludes in or about Labor Day. Lilly effected his repossession of the assets in late March, with very little time for anyone to prepare for the upcoming season. (Tr. p. 25, 1-10-19)

At the time Lilly took possession of the assets, he did not have a lessor's interest in the premises upon which they were located. (Tr. p. 112, 1-1-8, p. 108, 1-12, and p. 107, 1-1-8) In addition, the premises were in a state of complete disrepair requiring the expenditure of substantial sums to put them into presentable condition. (Tr. p. 113, 1-3-10) At the time of the repossession, there were no guide trips booked for the summer season. (Tr. p. 75, 1-3-10) Lilly testified that typically by March, 50% of the guided trips were booked. It was essential for any prospective purchaser to be prepared for the upcoming fishing season, that the sale be

effected immediately. There simply was not time in which to advertise or solicit bids.

3. Appraisal.

The Bonnetts also suggest that Lilly's failure to obtain an appraisal of the assets prior to sale lead to a commercially unreasonable sale. This suggestion is absurd. The Bonnetts recognize Lilly as a grand master of the fly fishing business. (Tr. p. 8, l. 7-8) In his opinion, the sale price was fair and reasonable. Why should have he gone to the extra expense of securing an appraisal. Indeed, how does one appraise a name, a mailing list, or assistance in obtaining outfitting licenses?

This is particularly so in light of the fact that Lilly advised the Bonnetts of the intended sale price. The Bonnetts did not object to that price. In fact, Mr. Bonnett testified that he felt the price was reasonably fair for the assets sold. (Tr. p. 159, l. 1-7)

To have obtained an appraisal would have been a useless act. The law does not require idle acts. (Section 1-3-223, MCA) As a result, Lilly's failure to obtain an appraisal prior to sale did not render the sale commercially unreasonable.

4. Price.

Finally, the Bonnetts argue that the price obtained

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3. Appraisal.

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To have obtained an appraisal would have been a useless act. The law does not require this act. (Section 1-3-321, MCA). As a result, Lilly's failure to obtain an appraisal prior to sale did not render the sale commercially unreasonable.

4. Price.

Finally, the Bonnetts argue that the price obtained

through the private sale clearly indicates that the sale was commercially unreasonable. It must be recalled that a low price alone does not render a sale commercially unreasonable. Section 30-9-507(2), MCA, provides in pertinent part:

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner.

The debtor has the burden of proving that the price received upon sale of the repossessed collateral is inadequate, rendering the sale commercially unreasonable. Dulan v. Montana Nat. Bank of Roundup, supra. The Bonnetts failed to meet that burden.

In their efforts to meet that burden, the Bonnetts produced Brad Ritchy and Tom Travis, both being individuals engaged in the fishing business. However, neither of those two individuals had any personal knowledge of the premises, the existence of the inventory, or the condition of the business. (Tr. p. 200, l. 1-21 and p. 211, l. 17-25, and p. 212, l. 1-3) Based upon this lack of personal knowledge, the Trial Court did not find their testimony persuasive. (Findings of Fact and Conclusions of Law, Finding No. 9)

On the other hand, Lilly's son, Gregory, testified concerning the value of the assets. His testimony deserves much more credence than that of either Ritchy or Travis.

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The debtor has the burden of proving that the price received upon sale of the repossessed collateral is inadequate, rendering the sale commercially unreasonable. Dolan v. Montana Nat. Bank of Bozeman, supra. The Bonnetts failed to meet that burden.

In their efforts to meet that burden, the Bonnetts produced Brad Ritchy and Tom Travis, both being individuals engaged in the fishing business. However, neither of those two individuals had any personal knowledge of the premises, the existence of the inventory, or the condition of the business. (Tr. p. 200, l. 1-21 and p. 211, l. 17-25, and p. 212, l. 1-3) Based upon this lack of personal knowledge, the Trial Court did not find their testimony persuasive. (Findings of Fact and Conclusions of Law, Finding No. 9) On the other hand, Billy's son, Gregory, testified concerning the value of the assets. His testimony deserves much more credence than that of either Ritchy or Travis.

Gregory testified that he first became interested in purchasing the Trout Shop from Terwilliger in 1984 or 1985. As a result, he approached Terwilliger but did not receive any encouragement. (Tr. p. 123, l. 24-25) Then he approached him again in the fall of 1986 but was rebuffed. (Tr. p. 124, l. 3-8) After repossession of the property by his father, Lilly went back to the premises. At that time he inspected the inventory, the fixtures, and the mailing list. He found the merchandise in a state of devastation, the mailing list spread throughout the store, and water damaged, the facility in a state of complete disrepair. (Tr. p. 137, l. 10-25 and p. 138, l. 1-11)

Gregory's testimony was that he did not believe that the purchase price of \$60,000.00 was sufficient to interest him in pursuing his long-standing interest in purchasing the Trout Shop. As a result, he refused to consummate a sale with his father. (Tr. p. 138, l. 12-16) Gregory's testimony is most persuasive. In light of his long-standing interest in purchasing the business, surely he would have exercised his opportunity to purchase the business for more than the \$60,000.00 Criner offered for it. Having decided that the business simply was not worth that much money, he refused to do so. Thus, it must be concluded that the price Lilly received for the sale of the assets from Criner was commercially reasonable.

Gregory testified that he first became interested in purchasing the Trout Shop from Terwilliger in 1964 or 1965. As a result, he approached Terwilliger but did not receive any encouragement. (Tr. p. 133, l. 24-25) When he approached him again in the fall of 1966 but was rebuffed. (Tr. p. 134, l. 3-8) After repossession of the property by his father, Lilly went back to the premises. At that time he inspected the inventory, the fixtures, and the mailing list. He found the merchandise in a state of devastation, the mailing list spread throughout the store, and what remained, the facility in a state of complete disaster. (Tr. p. 137, l. 10-25 and p. 138, l. 1-11)

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D. SUMMARY.

The Trial Court found Lilly's sale of the assets commercially reasonable. This determination was a question of fact. It may not be reversed by this Court unless it was clearly erroneous. The Trial Court's conclusion that the sale was commercially reasonable was not clearly erroneous. The Bonnetts were advised in advance that the sale would be by private sale and were advised of the price to be paid. They did not enter an objection. As a result, they waived their right to object to the private sale or the amount paid.

There simply was no time for Lilly to advertise the business for sale or to solicit bids. The fishing season was eminent and immediate measures were required to prepare for that season. If Lilly were to sell the assets as a going concern, he had to act quickly. By acting quickly, Lilly was able to obtain more money by the sale of the assets than he would have otherwise.

The Bonnetts failed to meet their burden in establishing that the sale price was commercially unreasonable. Their experts had no personal knowledge of the condition of the premises, the merchandise, or the fixtures. As a result, the Trial Court correctly concluded that their testimony was not subject to belief.

On the other hand, Lilly's son's testimony concerning the purchase price is most persuasive. He had a long-

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The Bonnetts failed to meet their burden in establishing that the sale price was commercially unreasonable. Their experts had no personal knowledge of the condition of the premises, the merchandise, or the fixtures. As a result, the Trial Court correctly concluded that their testimony was not subject to belief. On the other hand, Lilly's son's testimony concerning the purchase price is most persuasive. He had a long

standing interest in purchasing the business and despite the opportunity to do so at a price in excess of \$60,000.00, he elected not to do so. He simply did not think that the inventory, fixtures, and equipment were worth it.

III. THE TRIAL COURT DID NOT ERR IN CALCULATING THE DOLLAR AMOUNT TO WHICH LILLY WAS ENTITLED BY JUDGMENT.

A. THE TRIAL COURT'S FINDINGS.

The Trial Court concluded that Lilly was entitled to a judgment in the amount of \$72,000.00, together with interest thereon at the legal rate. (Findings of Fact and Conclusions of Law, Conclusion No. II) The Court reached this judgment amount by subtracting the sum of \$145,000.00 from the sum of \$217,000.00. The sum of \$217,000.00 represents principal and accrued interest due under the agreement for sale as of the date of trial. The \$145,000.00 amount represents that portion of the agreement for sale's purchase price allocated to good will. The Trial Court's calculations are not erroneous.

B. THE BONNETTS' POSITION.

The Bonnetts, initially, contend that Lilly is not entitled to a deficiency judgment. Section 30-9-504(3), MCA, Farmers State Bank v. Mobile Homes Unlimited, supra, Bank of Sheridan v. Devers, supra. Lilly has no quarrel with this proposition of law. However, Lilly maintains that

standing interest in purchasing the business and despite the opportunity to do so at a price in excess of \$30,000.00, he elected not to do so. He simply did not think that the inventory, fixtures, and equipment were worth it.

III. THE TRIAL COURT DID NOT ERR IN CALCULATING THE DOLLAR AMOUNT TO WHICH LILLY WAS ENTITLED BY JUDGMENT.

A. THE TRIAL COURT'S FINDINGS.

The Trial Court concluded that Lilly was entitled to a judgment in the amount of \$71,000.00, together with interest thereon at the legal rate. (Findings of fact and Conclusions of Law, Conclusion No. 11) The Court reached this judgment amount by subtracting the sum of \$143,000.00 from the sum of \$217,000.00. The sum of \$217,000.00 represents principal and accrued interest due under the agreement for sale as of the date of trial. The \$143,000.00 amount represents that portion of the agreement for sale's purchase price allocated to good will. The Trial Court's calculations are not erroneous.

B. THE BONNETTS' POSITION.

The Bonnetts, initially, contend that Lilly is not entitled to a deficiency judgment. Section 30-9-504(3), MCA, Farmers State Bank v. Noble Home Unlimited, supra, Bank of Sheridan v. Devore, supra. Lilly has no quarrel with this proposition of law. However, Lilly maintains that

this principal is not applicable in the instant case.

The Bonnetts also suggest that the Trial Court erred in its calculations in reaching the judgment amount. The Bonnetts express mystification over the Court's use of the sum of \$217,000.00 as the amount due as opposed to the sum of \$214,000.00 which appears in the escrow ledger. The Bonnetts also suggest that the Court failed to provide an additional credit to them for the \$58,000.00 Lilly received from the resale of the assets.

C. LILLY'S POSITION.

The Trial Court's conclusion that Lilly was entitled to a judgment in the amount of \$217,000.00 is no mystery. That sum is determined through the application of fundamental interest calculations. They are as follows:

Amount due 01-27-87	\$220,700.85
Amount Due on 04-13-87 (date of first Criner payment) (108 days) $\$220,700.85 + (108/365) (\$220,700.85) (.12)$	228,573.24
Credit for First Criner Payment (\$20,000.00)	<u>(20,000.00)</u>
Amount Due After First Criner Payment	208,573.24
Amount Due on 10-01-87 (date of second Criner payment) (170 days) $\$210,573.24 + (170/365) (\$208,573.24) (.12)$	220,230.48
Credit for Second Criner Payment (\$10,000.00)	<u>(10,000.00)</u>
Amount Due on 10-01-88 (date of third Criner payment) (365 days) $\$210,230.48 + (365/365) (\$210,230.48) (.12)$	235,458.13
Credit for Third Criner Payment (\$30,000.00)	<u>(30,000.00)</u>

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C. LILLY'S POSITION.

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Credit for Second Criner Payment (\$10,000.00)	<u>(10,000.00)</u>
Amount Due on 10-01-88 (date of third Criner payment) (365 days)	\$210,230.48 + (365/365) (\$210,230.48) (.12) 235,458.12
Credit for Third Criner Payment (\$10,000.00)	<u>(10,000.00)</u>

Total Due After Third & Final Criner Payment 205,458.13

Total Due on 04-21-89
(171 days)

$\$205,458.13 + (171/365) (\$205,458.13) (.12) 217,008.81$

It would have been inappropriate for the Trial Court to use the escrow ledger sum of \$214,000.00. That sum had been accruing interest as indicated above. Thus, it is clear that the Trial Court correctly calculated the total amount of the judgment due to Lilly from the Bonnetts.

The Trial Court, however, offset the sum of \$145,000.00 against the judgment amount. This amount represents the value allocated to good will in the Bonnett sales agreement (Plaintiff's Exhibit 1). While Lilly does not agree with the Trial Court's offset, he has elected not to appeal that issue. Therefore, if it was inappropriate for Lilly to sell Criner the mailing list, or to assist Criner in securing use of the company name, or to assist Criner in obtaining outfitting permits, Bonnetts have been compensated. They have received a credit for \$145,000.00 for those items. They should not now complain.

D. SUMMARY.

In summary, the Trial Court correctly calculated the amount due to plaintiff by judgment in the amount of \$217,000.00. That amount represents the true principal and

Total Due After Third & Final Citrus Payment 205,458.13
 Total Due on 04-21-89
 (171 days)
 205,458.13 + (171/365) (205,458.13) (.12) 217,008.01

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D. SUMMARY.

In summary, the Trial Court correctly calculated the amount due to plaintiff by judgment in the amount of \$217,000.00. That amount represents the true principal and

accrued interest due to Lilly under the sales agreement as of the date of trial, after applying a credit of \$60,000.00 for the Criner payment.

CONCLUSION

Lilly's Notice of Repossession was not fatally defective. It stated the time after which the collateral would be sold by private sale. Nothing more is required by the law. Indeed, the Notice of Repossession went beyond the requirements of the law by identifying the prospective purchaser and the prospective purchase price.

The Trial Court's conclusion that the sale was commercially reasonable was not clearly erroneous. The private sale held by Lilly was the best method for obtaining the highest price for the collateral. Under the circumstances, the solicitation of bids or the advertisement of sale was not practical. An appraisal, as suggested by the Bonnetts, would have been worthless. The price received by Lilly was adequate.

The Trial Court did not err in calculating the total sum to which Lilly was entitled by judgment. The Trial Court properly calculated the total amount of principal and interest due.

Based upon the foregoing, Lilly requests this Court to

accrued interest due to Lilly under the sales agreement as of the date of trial, after applying a credit of \$50,000.00 for the Criner payment.

CONCLUSION

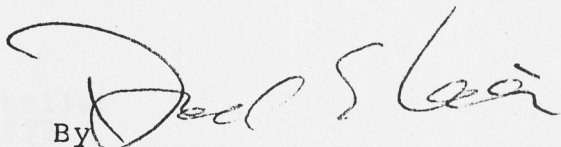
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The Trial Court did not err in calculating the total sum to which Lilly was entitled by judgment. The Trial Court properly calculated the total amount of principal and interest due. Based upon the foregoing, Lilly requests this Court to

affirm the Trial Court's judgment.

DATED this 24th day of April, 1990.



By _____
Donald E. White
Attorney for Walen F. Lilly

within the Trial Court's judgment.

DATED this 24th day of April, 1990.

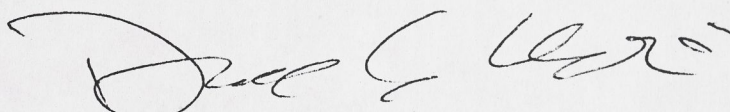


Donald E. White
Attorney for Walter F. Lilly

CERTIFICATE OF MAILING

DONALD E. WHITE hereby certifies that on the 24th day of April, 1990, a copy of the within and foregoing document was duly served by mail upon the following counsel of record:

Mr. Pierre L. Bacheller
Post Office Box 2078
Billings, Montana 59103



DONALD E. WHITE

CERTIFICATE OF MAILING

DONALD E. WHITE hereby certifies that on the 21st day of April, 1990, a copy of the within and foregoing document was duly served by mail upon the following counsel of

records:

Mr. Pierre D. Bachelier
Post Office Box 2078
Billings, Montana 59103



DONALD E. WHITE

