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P. O. Box 2078
Billings, MT 59103
Telephone: (406) 252-8202
Attorney for Defendants and Counter-Plaintiffs
James and Deborah Bonnett

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

WALEN F. LILLY,)	Cause No. DV-87-407
)	
Plaintiff,)	<u>DEFENDANTS' MEMORANDUM IN</u>
)	<u>SUPPORT OF CROSS-MOTION FOR</u>
vs.)	<u>PARTIAL SUMMARY JUDGMENT AND</u>
)	<u>IN OPPOSITION TO PLAINTIFF'S</u>
FRED TERWILLIGER, CLARA)	<u>MOTION FOR SUMMARY JUDGMENT</u>
TERWILLIGER, JAMES BONNETT,)	
and DEBORAH BONNETT,)	
)	
Defendants,)	
<hr/>		
JAMES BONNETT and DEBORAH)	
BONNETT,)	
)	
Defendants and Counter-)	
Plaintiffs,)	
)	
v.)	
)	
WALEN F. LILLY,)	
)	
Counter-Defendant.)	
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The issue squarely before the Court upon the cross-motions for summary judgment filed herein, and the threshold issue which must be resolved before any other aspect of this case may proceed forward, is the commercial reasonableness of disposition by the plaintiff, Walen Lilly, of business assets repossessed by him following defendants' default in performance of a Contract for Purchase and Sale. In testing the conduct of plaintiff Lilly in selling repossessed assets against the strictures and requirements of Article IX of the Montana Uniform Commercial Code, the defendants assert that Lilly has failed to conduct a

COPY

1 commercially reasonable sale and is, therefore, foreclosed
2 from asserting any liability against the defendants for a
3 deficiency.

4 The history of the transaction at issue has been
5 meticulously outlined by counsel for plaintiff Lilly in his
6 Memorandum in Support of Plaintiff's Motion for Summary
7 Judgment and, accordingly, need not be restated here. It is
8 sufficient, for purposes of analyzing the threshold issue in
9 this case simply to note that all of the documents of sale
10 were drafted and prepared by counsel employed by plaintiff
11 Lilly. Included among those documents of sale is a Security
12 Agreement, a copy of which is attached to Plaintiff's
13 Memorandum in Support of Motion for Summary Judgment as
14 Exhibit "D." That Security Agreement purports to describe the
15 collateral for this transaction by reference to certain
16 exhibits "A and "B" which are to be attached to the Security
17 Agreement. It is important to note that the Security
18 Agreement does not have Exhibits "A" and "B" attached, either
19 in the plaintiff's Exhibit "D" attached to the Motion for
20 Summary Judgment and Support Memorandum, or in any copy that
21 has thus far been produced" by plaintiff, utilized in
22 deposition, provided to defendants following closing the
23 transaction, or, to the best of the defendants' knowledge,
24 escrowed subsequent to closing this transaction. The absence
25 of such exhibits becomes troublesome, insofar as the
26 plaintiff, on March 21, 1987, transmitted to the defendants a
27 Notice of Repossession, a copy of which is attached hereto as
28 Exhibit "A" and by this reference incorporated herein. That
29 Notice of Repossession was given pursuant to the provisions of
30 § 9-502 of the Montana Uniform Commercial Code. The Notice of
31 Repossession states that "The sale of said inventory, fixtures
32 and equipment is contemplated by the undersigned pursuant to §

1 30-9-504 M.C.A. James Krinner (sic) has offered to purchase
2 said property for the sum of \$60,000. Subsequent to issuing
3 his Notice of Repossession, the plaintiff sold assets to
4 Krinner pursuant to a Sales Agreement, a copy of which is
5 attached hereto marked as Exhibit "B," and by this reference
6 incorporated herein. Among the assets sold to Criner were
7 inventory, fixtures, equipment, the Trout Shop, Inc. mailing
8 list, and the right to use the name "Bud Lilly's Trout Shop."
9 It is important to note that the mailing list is separately
10 treated throughout all of the sales documents between
11 plaintiff and defendants. No where is the mailing list
12 included in equipment inventory or fixtures. Nonetheless, the
13 mailing list was repossessed by plaintiff Lilly, and resold to
14 defendant Criner, pursuant to a notice which recited
15 specifically that sale was to be only of inventory, fixtures
16 and equipment. The omission of the mailing list from the
17 Notice of Repossession is extremely important insofar as the
18 original Agreement between the plaintiff and the defendants
19 values the mailing list, together with the good will and
20 assumed business name at \$145,000. The omission of the
21 mailing list from the Notice of Repossession in this case is,
22 therefore, no small omission. The omission was omission of an
23 asset of significant value.

24 A secured party's right to dispose of collateral after
25 default is governed by § 30-9-504, M.C.A. In pertinent part,
26 that statute provides that:

27 "Disposition of the collateral may be made by
28 public or private proceedings and may be made by way
29 of one or more contracts. Sale or other disposition
30 may be as a unit or in parcels and at any time and
31 place and on any terms, but every aspect of the
32 disposition, including the method, manner, time,
place and terms must be commercially reasonable.
Unless collateral is perishable or threatens to
decline speedily in value or is of a type
customarily sold on a recognized market, reasonable
notification of the time and place of any public
sale or reasonable notification of the time after

1 which any private sale or other intended disposition
2 is to be made shall be sent by the secured party to
3 the debtor if he has not signed after default a
 statement renouncing or modifying his right to
 notification of sale. . . ."

4 In this case, the plaintiff, as a secured party, sent a
5 notice to the defendants, as debtors, that he intended to
6 sell, at a private sale, the inventory, fixtures and equipment
7 of Bud Lilly's Trout Shop, Inc. to James Criner for the sum
8 of \$60,000. In actual fact, what occurred, was that the
9 plaintiff sold the inventory, fixtures and equipment of Bud
10 Lilly's Trout Shop, Inc., as well as the mailing list and
11 assumed business name of Bud Lilly's Trout Shop, Inc. to James
12 Criner for the sum of \$57,263. No notice whatsoever was
13 given to the defendants that the plaintiff intended to sell
14 the mailing list of the Trout Shop, Inc., which asset,
15 together with good will and the assumed business name bore an
16 allocated value in the original sale transaction of \$145,000.
17 The failure on the part of the plaintiff to give such notice
18 is a clear failure to meet the requirements of the Montana
19 Uniform Commercial Code. Likewise, sale of the mailing list
20 for a mere \$3,263 when compared to its original value in the
21 original sale transaction was ~~sale~~ at a price so far below the
22 real value of the list that the reasonableness of the sale is
23 susceptible to challenge. Likewise, the contents of the
24 notice itself are misleading. The notice plainly states that
25 sale of the inventory, fixtures and equipment is to be
26 consummated for the sum of \$60,000. The actual sale that
27 occurred was for significantly less than \$60,000. While it is
28 arguable that the plaintiff need not provide such information
29 as the amount of the purchase price at sale or the identity of
30 the purchaser, having undertaken to provide such information
31 and, utilizing such information to solicit the objection or
32

1 lack thereof on the part of the defendants, the plaintiff is
2 obligated to be accurate in the information thus given.

3 It is fundamental law in Montana that the burden of
4 proving the commercial reasonableness of a disposition of
5 collateral is on the secured party. Farmers State Bank v.
6 Mobile Homes, Unlimited, 181 Mont. 342, 593 P.2d 734. (1979);
7 Bank of Sheridan v. Devers, 702 P.2d 1388 (Mont., 1985).
8 Fundamental to the requirement of commercial reasonableness is
9 that a debtor have notice of the intended disposition by a
10 secured party. In this case, notice was given of the secured
11 party's intent to dispose only of inventory, fixtures and
12 equipment, not the mailing list. No notice has ever been
13 given of the secured party's intent to dispose of the mailing
14 list, even though the secured party has treated the mailing
15 list as collateral susceptible to sale upon repossession.
16 Lack of notice was found, in Farmers State Bank v. Mobile
17 Homes, Unlimited, supra, to preclude or limit a creditors
18 right to recover a deficiency judgment. Likewise, in Wippert
19 v. The Blackfeet Tribe of the Blackfeet Indian Reservation,
20 _____ Mont. _____, 695 P.2d 461, (1985), failure of a secured
21 party to give notice of sale precluded that secured creditor
22 from obtaining a deficiency judgment against the defendant.
23 It would have been extremely simple for the plaintiff in this
24 case to include in his notice of sale the fact that he
25 intended to sell, as well, the mailing list. Instead, the
26 plaintiff elected to omit the information in the notice sent
27 to the defendants, and proceeded to sell the mailing list to
28 James Criner. The first notification received by the
29 defendants that the mailing list had been sold, or that the
30 sale conducted by the plaintiff varied significantly from the
31 notice of sale sent by the plaintiff was after the sale had
32 been completed and upon receipt of a copy of the sales

1 agreement between Criner and plaintiff Lilly. The patent
2 lack of notice in this case entitles the defendants to summary
3 judgment in their favor on the issue of liability to the
4 plaintiff for deficiency judgment, as a matter of law. In
5 addition to notice, however, the issue of the price obtained
6 at sale is also a significant factor. The original notice
7 sent to the defendant stated that the price to be obtained for
8 the inventory, equipment and fixtures upon sale to Criner
9 would be the sum of \$60,000. Not only was \$60,000 not
10 obtained for the inventory, equipment and fixtures, but the
11 mailing list, a tangible asset which was a component part of
12 the good will of the business, valued at \$145,000 in the
13 original sales transaction, was sold to Criner for slightly
14 over \$3,000. It is submitted that the price thus obtained by
15 Lilly for the mailing list is so far out of keeping with the
16 original valuation placed on the mailing list as to render the
17 sale commercially unreasonable.

18 Based upon the foregoing, the defendants respectfully
19 submit that they are entitled to summary judgment in their
20 favor on the issue of their liability to the plaintiff for any
21 deficiency arising out of the sale to Criner. It is likewise
22 submitted that the plaintiff's Motion for Summary Judgment as
23 respects the issue of deficiency, must be resolved in the
24 defendants' favor.

25 Plaintiff argues further, with regard to the
26 counterclaims filed herein by defendants, that plaintiff is
27 entitled to summary judgment therefore. The first
28 counterclaim deals with breach of the covenant not to compete
29 contained in the sales agreement. The plaintiff admits that
30 Gregg Lilly competed directly with the defendants, but denies
31 any liability therefor. Plaintiff likewise admits that Gregg
32 Lilly was a shareholder of The Trout Shop, Inc. at the time

1 the agreement was signed. The agreement contains a covenant
2 not to compete. That covenant recites that "Seller and its
3 shareholders hereby agree not to compete with Buyer with a
4 like business involving the sale of fishing tackle, outdoor
5 clothing, artwork or outfitting and guide business for a
6 period of five (5) years within a radius of 500 miles of the
7 City of West Yellowstone, County of Gallatin, Montana.

8 It is important to bear in mind that The Trout Shop, Inc.
9 made the sale at issue herein pursuant to a plan of
10 liquidation confirmed and agreed to by all of its
11 shareholders. The entire scheme developed by plaintiff Lilly
12 herein was that, after sale of the business assets, the
13 corporation pursuant to which the business had been conducted,
14 would be dissolved. Thus, the agreement at issue herein was
15 developed, negotiated and executed with the knowledge and
16 consent of the corporate shareholders and was, in fact,
17 prepared by one of those shareholders, Michael Lilly, as such,
18 the ambiguity for deficiency in that agreement must be
19 construed most strongly against the plaintiff herein as
20 assignee of the agreement. Further, pursuant to a meeting of
21 the shareholders of The Trout Shop, Inc. held on January 12,
22 1982, the shareholders, having knowledge of the sale by The
23 Trout Shop, Inc., of its assets authorized its officers to
24 execute the Earnest Receipt and Agreement to Sell and Purchase
25 as well as such steps as are necessary to carry into effect
26 said Earnest Money Receipt and Agreement to Sell and Purchase.
27 A copy of the Minutes of the Shareholders of The Trout Shop,
28 Inc. referred to hereinabove, are attached hereto, marked as
29 Exhibit "C" and by this reference incorporated herein. In
30 addition, at the time and place of sale, Gregory Lilly was a
31 director of The Trout Shop, Inc. The Trout Shop, Inc.'s
32 shareholders have specifically authorized execution of the

1 covenant not to compete, Gregory Lilly as one of the directors
2 of the corporation has taken the steps to effectuate
3 finalization of the agreement which contains the covenant not
4 to compete, and now Walen Lilly, as assignee of the contract
5 and as principal shareholder and a director of the
6 corporation, claims that despite the ratification by
7 shareholders and directors that the corporation has no
8 liability for direct competition engaged in by one of the
9 ratifying shareholders and directors. Lilly's objections take
10 place, in addition, in an environment in which yet another
11 shareholder of the corporation drafted the contract documents
12 at issue herein. Such machinations by the plaintiff cannot be
13 permitted. The agreement, if it is to be given its clear
14 intent, must be binding upon the original signatory and its
15 assignee, and the clear intent is that any competition or
16 violation of the covenant not to compete would be a breach by
17 the party signatory to the agreement -- The Trout Shop, Inc.
18 or its assignee, Walen Lilly. Plaintiff even goes so far
19 herein as to argue that the covenant not to compete contained
20 herein is void under Montana law. Such a contention should
21 not be allowed in light of the fact that an attorney engaged
22 by plaintiff and one of plaintiff's own shareholders, drafted
23 the agreement, including the covenant not to compete.
24 Likewise, the agreement at issue herein includes sale of the
25 goodwill of a business. Under such circumstances, Montana law
26 specifically provides that a covenant not to compete is lawful
27 in any contract which includes sale of the good will of a
28 business. In the instant case, the corporation has bound
29 itself to account for the good conduct of its shareholders in
30 complying with the terms and provisions of the covenant not to
31 compete. In that Gregory Lilly did directly compete with the
32 defendants in violation of the covenant not to compete, the

1 party signatory to the contract, the corporation, and its
2 assignee, Walen F. Lilly, must be held to account for breach
3 of that provision. The plaintiff argues further that the
4 conduct of the defendants constitutes a waiver of any claim
5 for violation of the covenant not to compete. While
6 defendants dispute this allegation, any question of waiver is
7 a question of fact which must be determined by a trier of fact
8 and is not proper subject matter for motion for summary
9 judgment.

10 In addition to breach of the covenant not to compete,
11 defendants have asserted a counterclaim based upon plaintiff
12 Lilly's breach of the sales agreement by refusal to provide
13 consultation services as is provided for in paragraph 13 of
14 that agreement. All of the allegations pertaining to the
15 alleged breach of paragraph 13 are factual in character and
16 are not susceptible to determination upon summary judgment.
17 There is no clear recitation of either case or statutory law
18 by the plaintiff which entitles to the plaintiff to judgment
19 as a matter of law upon this element of defendants'
20 counterclaim. Clearly, the counterclaim is factual in
21 character and must be resolve by the trier of fact.

22 In conclusion, it is respectfully submitted that
23 plaintiff Lilly has the burden of proving the commercial
24 reasonableness of the sale conducted by him of the inventory,
25 fixtures, equipment and mailing list of The Trout Shop, Inc.
26 Lilly has clearly failed in that burden insofar as the notice
27 given by him to the defendants was defective both in failing
28 to include reference to the mailing list and in misleading the
29 defendants as to the sales price to be derived as a result of
30 sale. Likewise, Lilly's sale of the business assets of The
31 Trout Shop, Inc. was commercially unreasonable for the reason
32 that the price obtained at sale for the mailing list was

NOTICE OF REPOSSESSION

TO: Fred and Clara Terwilliger
James Bonnett and Deborah Bonnett

FROM: Walen F. Lilly

DATE: March 21, 1987

RE: The Trout Shop, Inc.

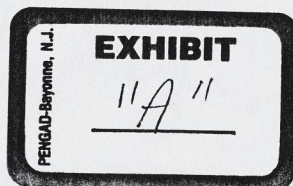
PLEASE TAKE NOTICE and you are hereby notified that on the 21st day of March, 1987, the undersigned took possession of all inventory, fixtures and equipment conveyed by that certain Sales Agreement dated the 30th day of January, 1982, wherein The Trout Shop, Inc. is named as seller and you are named 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 Krinner 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 20th day of March, 1987.

15/

WALEN F. LILLY



EARNEST MONEY RECEIPT AND
AGREEMENT TO SELL AND PURCHASE

THIS AGREEMENT, entered into on this 14 day of January, 1982, by and between THE TROUT SHOP, INC., hereinafter referred to as "Seller"; and, JAMES BONNETT and DEBORHA BONNETT, husband and wife, and FRED TERWILLIGER and CLARA TERWILLIGER, husband and wife, hereinafter referred to as "Buyer".

R E C I T A L S :

WHEREAS, the Seller is desirous of selling all of the assets, inventory and goodwill of that business known as The Trout Shop, Inc., and

WHEREAS, the Buyer is desirous of purchasing all of the assets, inventory and goodwill of the business known as The Trout Shop, Inc., and,

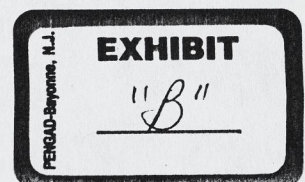
WHEREAS, the parties hereto are desirous of expressing the general terms of their agreement for sale and purchase of said business prior to closing.

NOW, THEREFORE, it is hereby agreed as follows:

1. Sale of Business. The Seller hereby agrees to sell all assets, inventory and goodwill, exclusive of cash on hand on the date of closing and motor vehicles, of the business known as The Trout Shop, Inc. located in the City of West Yellowstone, County of Gallatin, Montana, to Buyer.

2. Purchase Price. The Buyer hereby agrees to pay the sum of TWO HUNDRED SEVENTY-FIVE THOUSAND and 00/100 DOLLARS (\$275,000.00) for all of the assets, inventory and goodwill, exclusive of cash on hand on the date of closing and motor vehicles, of the business known as The Trout Shop, Inc.

A. The purchase price shall be paid as follows:



1. \$50,000 as down payment payable on the date of closing;

2. The remaining balance in the amount of \$225,000 plus interest thereon at 12% annually, shall be paid in equal monthly payments, the first payment due and payable the 30th day of June, 1982, amortized over a twenty (20) year period, with a balloon payment of the remaining unpaid balance at the end of ten (10) years, from the 30th day of June, 1982.

B. It is understood and agreed that the total purchase price is based upon an assumed inventory figure of \$67,650. In the event the actual inventory figure is \$5,000 greater than or less than the assumed inventory figure, then the parties agree to increase or decrease the total purchase price accordingly.

3. Assets, Inventory and Goodwill. The value of assets, inventory, and goodwill shall be established at closing by the parties.

A. The value of inventory shall be established by an inventory taken by Buyer and Seller as of the date of closing;

B. The value of all physical assets, exclusive of motor vehicles, established by the parties as of closing;

C. The value of The Trout Shop, Inc.'s mailing list;

D. The value of the 1982 Trout Shop, Inc.'s catalog;

E. The value of The Trout Shop, Inc.'s name; and

F. The value of goodwill

4. Additional Consideration. In addition, the Buyer shall be entitled to the following, the value of which shall be established at closing:

A. The Buyer shall have Seller's cooperation in obtaining all guides and outfitter licenses for Montana, Idaho, and Yellowstone National Park;

B. The Seller agrees to sign a covenant not to compete with a like business involving the sale of fishing tackle, outdoor clothing and art work for a period of 5 years within a radius of 500 miles of the City of West Yellowstone, County of Gallatin, Montana;

C. The Seller agrees to enter into consultation agreements with Buyer wherein they will agree to provide such assistance as is necessary in effecting the transfer of business to Buyer; and,

D. Buyer shall be entitled to all monies now held by Seller advanced by customers for guide services and orders to be performed or delivered after the day of closing.

5. Encumbrances. Seller agrees to remove any encumbrances upon the assets or inventory of the business known as The Trout Shop, Inc. not later than the date of closing.

6. Financial Statement. The Buyer agrees to provide Seller with financial statements prior to closing demonstrating their financial ability to meet the financial obligations imposed by the final agreement for sale and purchase of said business.

7. Lease. It is understood and agreed that the premises upon which the business is currently operated is leased from Hanson Brothers, Inc. The present lease expires on the 31st day of December, 1982. Seller shall endeavor to

seek permission for assignment of said lease pursuant to its terms.

8. Attorney Fees. It is understood and agreed that each party shall assume and pay its own attorney fees in the preparation of all legal documents necessary for the transfer of said business to Buyer.

9. Closing Date. The final documents required for the closing of the sale of the business known as The Trout Shop, Inc. to Buyer shall be signed on the 31 day of January, 1982.

10. Earnest Money. Seller hereby acknowledges receipt of \$2,500.00 from Buyer as earnest money. Said earnest money shall be held in the trust account for the law firm of Scully & Lilly until the date of closing and at that time shall be credited as a portion of the down payment.

11. Bulk Sales Transfer. Seller shall take all steps necessary to comply with Montana's Bulk Sales laws.

DATED this 14th day of January, 1982.

SELLER:

THE TROUT SHOP, INC., a
Montana corporation

By Walen F. Lilly
Walen F. Lilly, President

ATTEST:

Patricia B. Lilly
Patricia Lilly, Secretary

BUYER:

James Bonnett
James Bonnett

Debra Bonnett
Debra Bonnett

Fred Terwilliger
Fred Terwilliger

Clara Terwilliger
Clara Terwilliger

MINUTES OF THE SHAREHOLDERS OF
THE TROUT SHOP, INC.

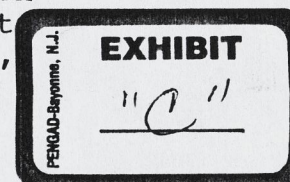
A meeting of the shareholders of the Trout Shop, Inc. was called to order at 10:00 A.M. on January 12, 1982. It appearing that all shareholders had signed a waiver of notice of special meeting, and that all shareholders were present, President Walen F. Lilly announced the meeting was open for business.

Discussion was held concerning certain resolutions proposed by the Board of Directors for complete liquidation of the corporation. Thereafter, the following resolutions were adopted:

RESOLVED, that the shareholders of the corporation hereby unanimously consent and approve the liquidation of the corporation all in accordance with the terms and provisions of the plan of liquidation adopted by the Board of Directors of the corporation at a special meeting of the Board of Directors of the corporation duly convened and held on January 12, 1982, a copy of which was presented to this meeting, which plan of liquidation is in all respects adopted and approved;

RESOLVED, that the appropriate officers of the corporation are hereby authorized to execute an Earnest Receipt and Agreement to Sell and Purchase for the sale of all assets of the corporation exclusive of cash and motor vehicles to James and Deborah Bonnett and Fred and Clara Terwilliger. The officers of the corporation are hereby authorized to take such steps as are necessary to carry into effect said Earnest Money Receipt and Agreement to Sell and Purchase;

RESOLVED, that the proper officers be, and they hereby are, authorized and directed to take such steps as are necessary under the laws of the State of Montana, in dissolving the corporation; and,



RESOLVED, that the proper officers of the corporation be, and they hereby are, authorized and directed to or cause to be done all such acts and things as they may deem necessary and proper in order to effect liquidation and dissolution of the corporation in accordance with the plan of liquidation adopted by the Board of Directors of the corporation.

DATED this 12th day of January, 1982.

Walen F. Lilly
Walen F. Lilly, President

ATTEST:

Patricia B. Lilly
Patricia Lilly, Secretary