



COURT FILE NUMBER 1401-04781
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
PLAINTIFF HARDIE & KELLY INC., IN ITS CAPACITY AS TRUSTEE IN BANKRUPTCY OF ASSISTIVE FINANCIAL CORP.
DEFENDANTS RANDY SCHIFFNER, SLADE SCHIFFNER, BRANDON SCHIFFNER, ELAYNE SCHIFFNER, CAMERON SCHIFFNER AND BRANDI SCHIFFNER
DOCUMENT STATEMENT OF DEFENCE
PARTY FILING THIS DOCUMENT RANDY SCHIFFNER, SLADE SCHIFFNER, BRANDON SCHIFFNER and ELAYNE SCHIFFNER

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Burnet, Duckworth & Palmer LLP
2400, 525 – 8 Avenue SW
Calgary, Alberta T2P 1G1
Lawyer: Barry R. Crump
Phone Number: (403) 260-0352
Fax Number: (403) 260-0332
Email Address: brc@bdplaw.com

Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

Introduction

1. This Action is an attempt to find someone to blame after Assistive was the victim of a massive fraud. Rather than aggressively and diligently pursue the fraudsters, the Trustee has effectively abandoned Assistive's claims against those fraudsters and given up Assistive's only asset. Instead, the Trustee has chosen to go after the innocent shareholders of Assistive, who were themselves victims of the same fraud.

Admissions

2. This Statement of Defence adopts the same defined terms as the Statement of Claim unless otherwise defined. The Assistive Shareholders admit the facts contained in paragraphs 2-11, 15-24, 26-27, 29-31 of the Statement of Claim.

Denials

3. Other than the admissions in paragraph 2 in this Statement of Defence, all other allegations in the Statement of Claim are denied, and the Assistive Shareholders put the Trustee to the strict proof thereof. Specifically, the Assistive Shareholders expressly deny paragraphs 28, 32, 36, 38-64 of the Statement of Claim.
4. Contrary to paragraphs 12 and 13 of the Statement of Claim, Cameron Schiffner and Brandi Schiffner reside in Edmonton.

The Assistive Shareholders

5. For clarity, the Assistive Shareholders consist of Randy Schiffner, Slade Schiffner, Elayne Schiffner, and Brandon Schiffner. Assistive has no other shareholders.
6. For clarity, the Director & Officers consisted of Randy Schiffner as sole director, and Randy Schiffner and Slade Schiffner as officers.
7. Brandon Schiffner and Elayne Schiffner were named as nominal officers of Assistive. As it was always intended and expected, neither acted as directing minds of Assistive.

Relationship between Assistive and Cash Store

8. Assistive is a small, privately held corporation. Its head office was located out of Randy Schiffner's house in Calgary, Alberta.
9. Since 2002, Assistive engaged in the business of advancing funds in trust to CSF for the express purpose of CSF using the funds to finance short-term "payday" loans (the **Loans**).
10. This relationship was formalized in the CSI Broker Agreements and the Australia Broker Agreement (together, the **Broker Agreements**). All funds that Assistive advanced under the Broker Agreements were advanced directly to CSF as agent for CSI under the CSI Broker Agreement and as agent for CSA Pty under the Australia Broker Agreement. CSF then in turn advanced Assistive's funds to the various entities within the CSF Enterprise—as needed to finance Loans to customers of the CSF Enterprise.
11. Regardless of which CSF Enterprise entity, including RTF, brokered the loans, it was always intended that the Broker Agreements applied to any of Assistive funds that CSF advanced to any entity within the CSF Enterprise. Assistive also had independent agreements in place with RTF establishing a similar relationship to that under the Broker Agreements.
12. At all material times, the Director & Officers advanced Assistive's funds to CSF, in trust, under the express or implied condition that the funds be used solely to finance Loans to the CSF Enterprise's customers, and not for any other purpose. When a Loan was repaid, the funds were required to be held in trust and either repaid to Assistive or used to finance a new Loan.
13. At all material times, the Director & Officers understood, and it was expressly agreed under the Broker Agreements, that Loans brokered by the CSF Enterprise were made in the name of Assistive or Assistive's subsidiaries.

14. The CSF Enterprise's operations achieved a scale at which it became administratively impossible for certain terms of the Broker Agreements to be strictly followed. As a result, Assistive consented to commercially reasonable accommodations, including:
 - (a) All storefront outlets of the CSF Enterprise were considered authorized;
 - (b) Assistive had no involvement in approving any specific Loans brokered by the CSF Enterprise; and
 - (c) The CSF Enterprise would retain any funds collected from prior Loans to serve as a pool from which the CSF Enterprise could advance new Loans to the CSF Enterprise's customers on Assistive's behalf.
15. In consideration for Assistive making a pool of funds available for Loans, CSF agreed to pay Assistive a monthly interest fee equal to 17.5% (and later on, up to 20% for Assistive's pool of funds held by RTF) of Assistive's outstanding advances to the CSF Enterprise (the **Interest Fee and the Interest Fee Agreement**).
16. At the end of every calendar month, CSF provided Assistive with an accounting of the current funds outstanding in CSI, CSA, and RTF. CSF, and later on each of CSI, CSA, and RTF, then remitted the Interest Fee payments to Assistive in proportion to the respective amounts of their Loans portfolio funded by Assistive.
17. It was agreed as between Assistive and CSF, on behalf of the CSF Enterprise, that there would never be any erosion or reduction of the capital that Assistive advanced to CSF, and that the capital would be returned to Assistive in full upon request.
18. In addition to the above agreements, the Director & Officers reasonably believed the CSF Enterprise would comply with its obligations under the Broker Agreements and that there would never be any erosion to Assistive's capital, in that:
 - (a) At all material times, the Director & Officers received constant and personal assurances from CSF that Assistive's capital was safe.
 - (b) CSF was a publicly traded company on the Toronto Stock Exchange and the New York Stock Exchange. CSA was registered on the TSX Venture Exchange. Both CSF and CSA had independent directors.
 - (c) The Director & Officers received and reviewed the publicly available audited financial statements of CSF.
 - (d) CSF agreed to pay and did pay Assistive retention fees on a quarterly basis (the **Retention Fee and the Retention Fee Agreement**) for 12.5 years. The Retention Fee ensured that Assistive continued to receive a rate of return of 17.5% (20% for RTF) on the original amount of capital that Assistive advanced to CSF.
 - (e) CSF repaid Assistive part of its capital advanced to CSF in January 2012 in the amount of \$44,819,562, rather than a lesser amount attributable to bad debts on the underlying Loans brokered by the CSF Enterprise.

- (f) CSF provided monthly and quarterly reporting to Assistive showing that Assistive's capital was valued at 100%.
 - (g) CSF paid Assistive the monthly Interest Fee on all of Assistive's capital advanced to CSF, for 12.5 years until the end of August 2013.
19. At all material times, Assistive advanced funds to CSF for the sole purpose of providing cash or credit to CSF Enterprise's customers who entered into direct loan agreements with Assistive. The Director & Officers never provided any of Assistive's funds to CSF for its own use or the use of any of its affiliates or other entities within the CSF Enterprise.
20. In early 2012, the Director & Officers discovered that CSA had been receiving and using Assistive's funds from CSF to pay CSA's operating expenditures in violation of the Australia Broker Agreement. After consulting legal counsel, the Director & Officers entered into negotiations with CSF and CSA. In the judgment of the Director & Officers, it was in Assistive's best interests to continue its relationship with the CSF Enterprise on terms that saw CSA acknowledge a debt to Assistive of \$18.7 million, at an interest rate of 17.5% per annum (the **CSA Loan Agreement**) The Director & Officers ensured that Assistive received a promissory note and security interest over CSA's assets in exchange for the CSA Loan Agreement.
21. In response to paragraph 25 of the Statement of Claim, the CSA Services Agreement and the RTF Services Agreement terminated in the summer of 2012. The CSF Enterprise concealed the termination of these agreements from the Director & Officers.

Assistive's debt financing through Unsecured Debentures

22. Assistive's capital was made up primarily of debt. This debt arose from the issuance of subordinated, unsecured notes and debentures issued by Assistive under standard form subscription agreements to debentureholders. The debentureholders were mere unsecured creditors of Assistive (the **Unsecured Debentures** and the **Unsecured Debentureholders**).
23. Assistive owed the Unsecured Debentureholders:
- (a) No fiduciary duties whatsoever; and
 - (b) No duty of care whatsoever.
24. The Director & Officers owed the Unsecured Debentureholders:
- (a) No fiduciary duties whatsoever; and
 - (b) No duty of care whatsoever.
25. In exchange for the debt financed by the Unsecured Debentureholders, Assistive owed most Unsecured Debentureholders interest between 14% to 16% per annum on the stated principal amount of their respective Unsecured Debentures. The Unsecured Debentures used to have stipulated interest rates as high as 20%, but these interest rates declined along with the interest rates Assistive could charge the CSF Enterprise over the years.

26. The Unsecured Debentureholders are sophisticated and wealthy parties who were able to protect their financial interests. They were aware of how Assistive operated, the structure of its advances to the CSF Enterprise, and the risks associated with those advances.
27. Further, in signing the Subscription Agreements, each Unsecured Debentureholder represented, warranted, acknowledged, and covenanted that the Unsecured Debentureholder:
- (a) acknowledged that there were risks associated with the purchase of the Unsecured Debentures;
 - (b) had knowledge in financial and business affairs as to be capable of evaluating the merits and risks of its investment;
 - (c) was able to bear the economic risk of loss of its entire investment;
 - (d) understood and acknowledged that the Unsecured Debentures were exempt from certain securities legislation and that the common law may not provide an adequate remedy in the event it suffers investment losses in connection with the Unsecured Debenture;
 - (e) had not received nor been provided with, nor requested, nor have any need for, any offering memorandum, sales or advertising literature, or any other similar document, describing or purporting to describe the business and affairs of Assistive which has been prepared for delivery to, and review by, prospective purchasers in order to assist such prospective purchasers in making an investment decision in respect of the Unsecured Debenture;
 - (f) was not relying on any verbal or written representation as to fact or otherwise made by or on behalf of Assistive, other than those contained in the Subscription Agreement;
 - (g) acknowledged and confirmed that neither Assistive nor any of its directors, employees, officers, affiliates, advisors or agents, made any representations (written or oral) to the Unsecured Debentureholder regarding either the future value of the Debenture or that any person will refund the purchase price of the Unsecured Debenture other than as provided in the Subscription Agreement; and
 - (h) acknowledged that it had been encouraged to and should obtain independent legal, income tax and investment advice with respect to its subscription for the Unsecured Debenture, and accordingly has been independently advised, or has waived such independent advice, as to the meanings of all terms contained within the Unsecured Debentures.
28. It was a material term of the Subscription Agreements that "there are no representations, covenants or other agreements relating to the subject matter hereof except as stated or referred to herein."
29. The Director & Officers made no inducements or misrepresentations whatsoever, including any untrue or fraudulent statements or inducements, and the allegations to the contrary in subparagraph 40(nn) of the Statement of Claim are frivolous, scandalous, and vexatious.
30. As admitted in paragraph 35(f) of the Statement of Claim, it was a material term of the Unsecured Debentures that Assistive's funds raised by the Unsecured Debentures could be used to provide

loans to the CSF Enterprise. The CSA Loan Agreement and any funds not advanced strictly in accordance with the Broker Agreements and the Trust Arrangement so qualified.

31. The Unsecured Debentureholders are now seeking a guarantee for the funds they lent to Assistive. None was ever sought by the Unsecured Debentureholders, nor provided by Assistive.
32. In exchange for accepting the significant risks that they agreed to, the Unsecured Debentureholders were well compensated at agreed amounts at or above 14% per annum. For example, since 2005, the following Unsecured Debentureholders have received substantial interest payments, in some cases greater than the principal invested:
 - (a) Michael Kallis: \$8,027,501 (principal outstanding of \$10,025,000);
 - (b) Dale Hodgson: \$2,901,427 (principal outstanding of \$2,095,000);
 - (c) Devan Corp: \$3,408,702 (principal outstanding of \$3,000,000); and
 - (d) Michael Abram: \$719,836 (principal outstanding of \$500,000).
33. It was a material term of the Unsecured Debentures that the Unsecured Debentureholders would be furnished with such information respecting Assistive as the Debentureholders may reasonably request. In many cases and at various times prior to or subsequent to an execution of an Unsecured Debenture or renewal, Unsecured Debentureholders had their own lawyers, accountants, and other professional advisors perform due diligence regarding Assistive's business and records, as well as closely examine and audit Assistive's accounts and books.
34. Assistive Shareholders are themselves Unsecured Debentureholders in the aggregate amount of \$710,000.
35. The Assistive Shareholders never misappropriated any funds received from the Unsecured Debentureholders. All funds were advanced, as both Assistive and the Unsecured Debentureholders intended, to the CSF Enterprise. As Assistive received Interest Fee payments from the CSF Enterprise, Assistive in turn paid those interest payments, subject to the Interest Rate Spread (defined below), to the Unsecured Debentureholders.
36. Assistive was able to pay—and did pay—the Unsecured Debentureholders the interest stipulated in the Unsecured Debentures when due until the CSF Enterprise ceased making payments to Assistive at the end of August 2013. The Director & Officers immediately notified the Unsecured Debentureholders of this development.

The Cash Store Litigation

37. Without warning, both RTF and CSA sent letters to Assistive on August 30, 2013 informing Assistive that RTF and CSA would no longer make Interest Fee or Retention Fee payments to Assistive. The Director & Officers had no knowledge that RTF and CSA would default prior to receiving these letters. It was contrary to the Director & Officers' expectations and information.
38. Immediately upon receiving the above notices from both CSA and RTF, the Director & Officers caused Assistive to take immediate action. They instructed Assistive's legal counsel to send three separate demand letters, which were sent on September 3, 2013 as follows:

- (i) A letter to CSA demanding that CSA pay to Assistive all Loan and Interest Fee amounts that CSF attributed to CSA in the CSF August 2013 Statement – by no later than September 13, 2013;
 - (ii) A letter to RTF demanding that RTF pay to Assistive all Loan and Interest Fee amounts that CSF attributed to RTF in the CSF August 2013 Statement – by no later than September 13, 2013;
 - (iii) A letter to CSF and CSI demanding that CSF and CSI suspend all Loans under the CSI Broker Agreement and that CSI remit all present and future Loan repayments to Assistive. The letter also demanded that CSF and CSI pay any deficiency owing if CSA and RTF fail to comply in whole or in part with the demands issued to those parties.
39. When the CSF Enterprise failed, refused, or neglected to pay the amounts demanded or otherwise to comply with Assistive's demands in any way, the Director & Officers caused Assistive's legal counsel to file a statement of claim on September 18, 2013 in the Court of Queen's Bench of Alberta with Action No. 1301-11081 against CSF and other corporations of the CSF Enterprise, as well as officers and directors of various entities within the CSF Enterprise (the **Cash Store Litigation**). In addition to various interlocutory relief, Assistive sought repayment of the entire amount Assistive advanced to the CSF Enterprise, together with interest thereon at the rate of 17.5% per annum.
40. The Director & Officers also caused Assistive's legal counsel to seek extraordinary relief from the Court of Queen's Bench of Alberta in the form of a *mareva* injunction. The Court granted Assistive an interlocutory injunction on September 19, 2013. Among other things, the Court:
- (a) Ordered the defendants in the Cash Store Litigation to remit all of Assistive's funds that were in their possession or that would come into their possession, by paying the money into Court;
 - (b) Prohibited and enjoined the defendants in the Cash Store Litigation from advancing any further loans to customers using Assistive's funds; and
 - (c) Prohibited and enjoined the defendants in the Cash Store Litigation from transferring or dealing in any way with Assistive's loan receivables, except to collect and remit them into Court.
41. The Cash Store Litigation continued throughout the fall of 2013, leading to an application by Assistive heard on December 12, 2013 for the appointment of an inspector under the *Business Corporations Act* for various corporate defendants in the Cash Store Litigation and other interim relief. The Court of Queen's Bench of Alberta reserved its decision.
42. At all material times, the Director & Officers caused Assistive's legal counsel to litigate the Cash Store Litigation as expediently as possible. The Director & Officers devoted Assistive's resources as well as their own personal resources, including their time and money, to the Cash Store Litigation.

The CSF Enterprise Fraud

43. Assistive was defrauded of its funds by the CSF Enterprise and its senior officers and directors. (the **CSF Enterprise Fraud**).
44. The Assistive Shareholders did not know of the CSF Enterprise Fraud. They did not participate or in any way facilitate the CSF Enterprise Fraud. The allegations to the contrary are frivolous, scandalous and vexatious.
45. The CSF Enterprise Fraud only became apparent to the Assistive Shareholders, the Director & Officers and others after the following occurred:
- (a) the simultaneous defaults of CSA, RTF, CSI and CSF;
 - (b) the Australian liquidation proceedings of CSA Pty and the associated investigation of the Voluntary Administrator of CSA Pty;
 - (c) the discovery obtained during the Cash Store Litigation; and
 - (d) the ongoing *CSF Companies Creditors' Arrangement Act* proceedings as further set out at paragraph 26 of the Statement of Claim (the **CSF CCAA Proceedings**).
46. As the Director & Officers discovered evidence of the CSF Enterprise Fraud, they immediately acted to fully uncover the CSF Enterprise Fraud and to prosecute the defendants in the Cash Store Litigation to recover Assistive's funds.
47. The CSF Enterprise Fraud was well planned, deliberate, and intended to deceive Assistive and the Director & Officers. The CSF Enterprise and its senior directors and officers were determined to defraud Assistive and would have done so regardless of any agreements in place or the level of due diligence exercised by the Director & Officers. No trust arrangement would have protected Assistive as the CSF Enterprise and its directors and officers continued to perpetrate the CSF Enterprise Fraud, in part by violating Court Orders.
48. Many of the CSF Enterprise's third party lenders, including sophisticated parties like Trimor Annuity Focus Limited Partnership, lost their funds in the CSF Enterprise Fraud despite knowing of Assistive's allegations of the CSF Enterprise Fraud, the Australian liquidation of CSA Pty, and the Cash Store Litigation since September 2013.
49. It was not possible for the Director & Officers to know of the CSF Enterprise Fraud. The fraudsters actively concealed it from Assistive, the Director & Officers, the investors of the CSF Enterprise, and the public markets through sophisticated accounting manipulations and fraudulent misrepresentations.
50. At the time the Director & Officers uncovered the CSF Enterprise Fraud, the Assistive Shareholders had over \$1.7 million in retained earnings reinvested in Assistive and advanced to CSF, in addition to the funds they advanced under their Unsecured Debentures.

Any matters that defeat the claim of the Plaintiff:

Director & Officers owed no duty to Unsecured Debentureholders

51. The Unsecured Debentureholders are not plaintiffs in this Action.

52. The Director & Officers owed no duty to the Unsecured Debentureholders given that the Unsecured Debentureholders were mere unsecured creditors of Assistive. No trust or fiduciary relationship arose between Assistive and the Unsecured Debentureholders, or the Director & Officers and the Unsecured Debentureholders. No trust arose over the Unsecured Debentureholders' funds.
53. No special relationship existed between the Unsecured Debentureholders and the Director & Officers, nor between the Unsecured Debentureholders and Assistive.
54. As stated above, the Unsecured Debentureholders agreed and acknowledged that Assistive could simply loan funds to the CSF Enterprise. As a result, the Unsecured Debentureholders have no basis whatsoever to complain that the Trust Arrangement between Assistive and the CSF Enterprise, which enhanced the Unsecured Debentureholders' position, was not diligently enforced by Assistive through the Director & Officers.

Director & Officers acted honestly and exercised reasonable due diligence

55. At all material times, Assistive (and the Unsecured Debentureholders) knew that Assistive's business model was inherently high risk and that there were no guarantees that it would be successful. Particulars of Assistive's inherently risky business model include that:
- (a) Assistive's funds were being advanced by Assistive to the CSF Enterprise;
 - (b) The CSF Enterprise used the funds to make Loans to the CSF Enterprise's customers;
 - (c) The CSF Enterprise's customers were inherently high risk;
 - (d) The CSF Enterprise had wide discretion as to what customers to broker Loans to;
 - (e) There was no guarantee that the CSF Enterprise's customers would repay the Loans to the CSF Enterprise or to Assistive;
 - (f) Assistive's financial success was entirely dependent on the profitable outcome of the CSF Enterprise's Loans brokering business; and
 - (g) The CSF Enterprise, and not Assistive, had possession of Assistive's funds and receivables.
56. At all material times, the Director & Officers:
- (a) carried out their duties to Assistive honestly and in good faith with a view to the best interests of Assistive, and
 - (b) exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
57. At all material times it was in Assistive's best interests to make a profit to benefit the Assistive Shareholders, which would in turn benefit the Unsecured Debentureholders. It was also in Assistive's best interest for its funds to be continuously invested through the CSF Enterprise. Assistive had no other business.

58. The Director & Officers exercised reasonable care, diligence and skill in conducting Assistive's affairs by making reasonable business decisions on the basis of all the circumstances they knew at the time that the business decisions were made. These business decisions reflected the business realities of the circumstances, Assistive's relative market power, and the reasonable expectations of Assistive, Assistive's Shareholders, and the Unsecured Debentureholders. These business decisions were made without the benefit of hindsight the Trustee now seeks to apply.
59. All agreements between Assistive and the CSF Enterprise, and their implementation by the Director & Officers, including ongoing decisions made in the course of business, were an exercise of business judgment and entitled to deference. The Director & Officers plead and rely upon the business judgment rule.
60. In furtherance of the Director & Officers' exercise of reasonable due diligence, at all material times, the Director & Officers reasonably engaged, retained, instructed, and relied on various independent third party professionals in making their decisions and in providing services to the company, including legal and financial advisors.
61. In the alternative, even if the Director & Officers did not exercise all reasonable care in carrying out their duties, which is not admitted but denied, they did not cause Assistive's loss. The CSF Enterprise Fraud caused the loss and the perpetrators of the CSF Enterprise Fraud always intended to keep Assistive's funds. Had the CSF Enterprise Fraud been uncovered earlier, Assistive would not only have lost the funds advanced to CSF, it would also have lost any Interest Fee payments it earned from the CSF Enterprise under the Interest Fee Agreement prior to August 2013.
62. The Director & Officers plead and rely on the *Business Corporations Act*, R.S.A. 2000, c. B-9, and in particular s. 123(3).

Salary, Dividends and all other Transfers were all proper

63. It is expressly denied that Assistive became and has remained insolvent since January 2010. Assistive only became insolvent at the earliest on August 30, 2013 when the CSF Enterprise stopped paying Assistive monthly Interest Fee payments. Until that time, Assistive was able to pay—and did pay—all of its debts as they fell due and had assets greater than its liabilities.
64. In particular, the Director & Officers continued to rely on receipt of the Retention Fee payments and continued representations and assurances from the CSF Enterprise and its senior officers and directors that:
- (a) There would be no erosion of capital advanced by Assistive to the CSF Enterprise owing to the Retention Fee Agreement; and
 - (b) The CSF Enterprise would continue to make Interest Fee payments when due on the entire amount of Assistive's advances.
65. The Director & Officers relied on its accountants, BDO Canada Ltd. (**BDO**), who at all material times prior to August 30, 2013 represented that Assistive was solvent. Accountants who were once with BDO, later became Unsecured Debentureholders.
66. At all material times, there was an agreement among Assistive, the Assistive Shareholders, and the Unsecured Debentureholders, express or implied, that the Assistive Shareholders would

receive the benefit of the spread between the Interest Fee payments from the CSF Enterprise and the interest payments made to the Unsecured Debentureholders at the interest rates stipulated in the Unsecured Debentures, subject only to the reasonable expenses of running Assistive's business (the **Interest Rate Spread**). The Interest Rate Spread averaged about 2.5% of Assistive's funds advanced to CSF.

67. The Director and Officers understood that Invico Capital Corporation retained 4%-8% of the stated interest on its Unsecured Debentures before remitting the rest to its retail investors.
68. To the extent that the Assistive Shareholders took the benefit of the Interest Rate Spread, whether as dividends, salary payments, or as perquisites, it was agreed that they were entitled to do so. This was consistent with the Assistive Shareholders' agreement, understanding, and reasonable expectations. None of the Assistive Shareholders has ever complained about any Transfers.
69. In the alternative, to the extent that it is relevant how the Interest Rate Spread was used, the Assistive Shareholders' salaries and benefits (including insurance policies) were in exchange for good and valuable consideration represented by the services provided to Assistive and for Assistive's benefit. Each of the Assistive Shareholders received reasonable payments in the ordinary course of business. The Assistive Shareholders were at all material times entitled to payment for work performed based on their contracts with Assistive and s. 125(1) of the *Business Corporations Act*.
70. The Assistive Shareholders properly received dividends as shareholders of Assistive. When the dividends were declared, issued or received, the Director & Officers had no reasonable grounds for believing that Assistive would not be able to pay its liabilities as they became due or that the realizable value of Assistive's assets would be less than the aggregate of its liabilities and stated capital.
71. In specific response to paragraph 46(g), Slade Schiffner did redeem an Unsecured Debenture of \$200,000 on January 31, 2012. This was an arms-length transaction that was in Assistive's best interests and done in the ordinary course of business. This was done because CSF returned almost \$45 million in Assistive's funds at the end of January 2012. It was in Assistive's best interests not to borrow more than it could advance to the CSF Enterprise, and therefore to pay back some Unsecured Debentureholders. Nor did this prejudice Assistive's Unsecured Debentureholders. While various other Unsecured Debentureholders redeemed their Unsecured Debentures at that time, many Unsecured Debentureholders, like Dwayne Lashin, declined the opportunity to redeem their Unsecured Debentures and insisted on keeping their Unsecured Debentures. Many other Unsecured Debentureholders were paid out at this time, like Michael Kallis, Larry Krause (on behalf of Star West Financial Corp.), and Bruce Hall, but shortly thereafter they insisted that they be issued new Unsecured Debentures. The Assistive Shareholders, including Slade Schiffner, continued to hold Unsecured Debentures following January 31, 2012 and remain Unsecured Debentureholders at this time.
72. In response to the allegations in paragraph 48, none of the Transfers constituted a fraudulent preference or transfer at under value because all Transfers were:
 - (a) for value or good and valuable consideration;
 - (b) done at a time with Assistive was solvent and with no view to Assistive's future insolvency;

- (c) done without any intent to create or give a preference to any creditor;
 - (d) done without any intent to defeat, hinder, delay, or defraud or otherwise prejudice creditors of Assistive; and
 - (e) *bona fide* transactions done in the ordinary course of business.
73. Assistive has not paid the Director & Officers full value for work they performed since September 1, 2013 until Assistive was placed into bankruptcy on February 3, 2014. The Director & Officers were entitled to be paid salary under their contracts with Assistive in the same amount that they were being paid prior to September 1, 2013, or in the alternative, a right of *quantum meruit* in the same amount. The Director & Officers claim a right of set-off for these amounts as against any amounts claimed against them.
74. While Assistive normally paid salaries of approximately \$75,000 a month to Randy Schiffner and approximately \$50,000 a month to Slade Schiffner prior to September 1, 2013, neither received regular salaries after September 1, 2013. While Randy Schiffner and Slade Schiffner were each paid approximately \$25,000 one month and approximately \$40,000 in another month after September 1, 2013, this amounted to considerably less than they had negotiated and were being paid prior September 1, 2013. At all material times, the post September 1, 2013 salaries were for work done to recover Assistive's funds.
75. At all material times, the salaries noted above did not come from any funds recovered from the CSF Enterprise. Any funds recovered from the CSF Enterprise after September 1, 2013 were either used to pay expenses to recover the remaining CSF Enterprise funds or were paid over to the Unsecured Debentureholders. The salaries for the Director & Officers came directly or indirectly from the Interest Rate Spread.

Assistive's expenses

76. The Director & Officers from time to time were reimbursed for their reasonable and legitimate business expenditures. At all material times, such expenses were incurred on behalf of Assistive and for Assistive's benefit. There were no improper expense claims.
77. The trips mentioned in the Statement of Claim were done for the following legitimate business purposes:
- (a) to meet with Unsecured Debentureholders and potential Unsecured Debentureholders, who are frequently out of province;
 - (b) for business development and marketing activities.
 - (c) to conduct due diligence and fact finding exercises of Assistive and the CSF Enterprises' worldwide operations;
 - (d) to meet with senior directors and officers of the CSF Enterprise;
 - (e) to attend CSF's conferences;
 - (f) to attend industry conferences directly related to Assistive's business; and

- (g) to meet with Assistive's lawyers and advisors in other countries.
78. The Director & Officers never received reimbursement of expenditures that were intended to defeat, hinder, delay, or defraud or otherwise prejudice creditors of Assistive.
79. Assistive was a small private company. The Director & Officers always relied on BDO who performed annual audits on Assistive's accounts. The Director & Officers reasonably relied upon these audits.
80. In the alternative, the Assistive Shareholders were entitled to the Interest Rate Spread, and to the extent that the expenses would otherwise have been lower, the Assistive Shareholders were entitled to those funds. The Assistive Shareholders have not complained about any expense claims.
81. Similarly, many Unsecured Debentureholders, including Dwayne Lashin, requested and received Assistive's internal monthly accounting statements that detailed Assistive's expenses, including travel expenses. None of the Unsecured Debentureholders ever complained about any expense claims.

Assistive's Computers

82. In response to paragraphs 60-64 of the Statement of Claim, Randy Schiffner and Slade Schiffner each had one computer which were used as part of their duties as officers of Assistive.
83. These computers were not delivered to the Trustee because the two computers contain communications that are subject to either litigation or solicitor-client privilege. All non-privileged documents and property of Assistive were promptly delivered to the Trustee.
84. The Trustee demands the computers be given up to it despite:
- (a) The Trustee has known about Assistive's assertion of privilege since its appointment;
 - (b) The Trustee has not provided any statutory authority that the Trustee is entitled to such privileged communication, nor has it distinguished Alberta Court of Appeal authority holding that the Trustee has no entitlement to such privileged communication and that it cannot waive such privilege;
 - (c) The Trustee has been given assurances from Assistive's legal counsel that the computers would be preserved;
 - (d) The Trustee has been given all relevant and material, non-privileged information, on the computers;
 - (e) The Trustee has failed to name Assistive as a party to this Action; and
 - (f) The computers are used and old, and therefore have nominal value.
85. The Trustee knows that it has wrongfully asserted, and continues to wrongfully assert, a proprietary interest in the privileged communications merely so it can continue to insinuate wrongdoing on the part of the Director & Officers regarding these computers.

Defence of change of position and estoppel

86. To the extent that any of the Assistive Shareholders were unjustly enriched, which is denied, they have a defence of change of position because they have changed their circumstances in good faith by spending any funds received and making financial commitments in ways that they would not otherwise have done. At all material times, they have relied on the security of receipt of any funds they received.
87. At all material times, the Director & Officers ensured that the Unsecured Debentureholders were kept apprised of Assistive's actions:
- (a) When the Director & Officers uncovered the CSF Enterprise Fraud being perpetrated on Assistive, they informed the Unsecured Debentureholders that Assistive was taking swift action.
 - (b) BD&P gave regular updates on the status of the Cash Store Litigation and steps taken to recover Assistive's funds to counsel for the Unsecured Debentureholders, Borden Ladner Gervais LLP (**BLG**), including answering BLG's emails, telephone calls, and meeting requests throughout September 2013 to February 2014.
 - (c) BD&P gave extensive financial information of Assistive to BLG beginning in September 2013, including Assistive's audited and unaudited financial statements.
 - (d) BLG, and later the accountants hired by the Unsecured Debentureholders, Hardie & Kelly, received all the materials filed in the Cash Store Litigation, including a copy of Assistive's banking statements, cheques, and a detailed reconciliation prepared by Assistive's bookkeeper, accounting for each payment of all amounts Assistive advanced to CSF as well of all amounts received from the Unsecured Debentureholders.
 - (e) Assistive permitted Hardie & Kelly to examine all of Assistive's accounts and books, and provided Hardie & Kelly with any information it requested, including the ability to ask questions of Assistive's legal counsel, BD&P, Assistive's bookkeeper, and Assistive's auditors. Hardie & Kelly reviewed this information in December 2013.
88. All of the requests from BLG and Hardie & Kelly caused Assistive to expend significant amounts of money.
89. Following the CSF Enterprise Fraud, Assistive spent large parts of any remaining assets it had attempting to recover the funds advanced to the CSF Enterprise. Rather than object to any of the actions taken by the Director & Officers, the Unsecured Debentureholders, through their legal counsel, actively encouraged the Director & Officers' actions in the Cash Store Litigation and in recovering funds from the Voluntary Administrator of CSA Pty in Australia.
90. Despite these efforts to recover Assistive's funds were for the sole benefit of Assistive's creditors, the Director & Officers expended great effort in time and money directing and participating in Assistive's efforts. The Unsecured Debentureholders knew that the Director & Officers were entitled and reasonably expected compensation for these services. The Unsecured Debentureholders, through their legal counsel, knew that Assistive would have to pay the Director & Officers for these activities.

Assistive's losses are the Trustee's and Investors Committee's fault

91. The Director & Officers consented to the Unsecured Debentureholders plan of arrangement that permitted the Unsecured Debentureholders to organize themselves and appoint a committee of investors that could bind the Unsecured Debentureholders. The committee of investors is made up of Mark Love, Dwayne Lashin, Michael Kallis and Spencer Coupland (the **Investors Committee**).
92. The Trustee and the Investor Committee have completely failed to mitigate Assistive's and the Unsecured Debentureholders' losses.
93. The Investors Committee instructed legal counsel to petition Assistive in bankruptcy with full knowledge that the Court had not yet released its decision in Assistive's application to have an inspector appointed over various defendants in the Cash Store Litigation, which represented Assistive's best chance of mitigating or reducing its losses.
94. Similarly, the Trustee has been wholly ineffective in pursuing the only asset Assistive has ever had: its claim against the CSF Enterprise. Particulars of this include:
 - (a) Immediately upon its appointment as Trustee, the Trustee told Assistive's litigation counsel in the Cash Store Litigation to cease acting on Assistive's behalf.
 - (b) The Trustee did not immediately retain adequate substitute litigation counsel to pursue the Cash Store Litigation. When the Trustee did retain litigation counsel, it negligently instructed its counsel to take a passive approach to recovering Assistive's funds.
 - (c) Within moments of the Trustee's appointment, BLG, acting for the Unsecured Debentureholders and on instructions from the Investors Committee, and not the Trustee, sent an *ex parte* letter to the Court of Queen's Bench of Alberta informing the Court that the Cash Store Litigation was stayed under the *Rules of Court*. The Investors Committee negligently did so, and the Trustee negligently did not object or correct the record, or instruct legal counsel to do so, despite:
 - (i) The Unsecured Debentureholders were not a party to the Cash Store Litigation and therefore had no standing;
 - (ii) Such a stay was completely improper given that Assistive was not a defendant in the Cash Store Litigation and no further funds were being expended at that moment to pursue the litigation; and
 - (iii) The effect of BLG's letter was that the Court of Queen's Bench did not release its reserved decision as to whether an inspector under the *Business Corporations Act* should be appointed over certain corporate defendants in the Cash Store Litigation and whether the Court would grant other immediate extraordinary relief. It is likely that a Court's decision in Assistive's favour would have protected Assistive's remaining assets.
 - (d) Rather than pursue Assistive's remaining assets held by the CSF Enterprise and its principals, the Trustee, at the urging of the Investors Committee, spent the remainder of Assistive's funds paying its own fees, those of its own counsel, and then those of the

Unsecured Debentureholders' counsel. None of these fees were used to pursue the CSF Enterprise and others who fraudulently took Assistive's funds.

- (e) By the time of the CSF CCAA Proceedings, the Trustee had spent all of Assistive's remaining funds so that there were no funds left to pursue and assert Assistive's trust relationship with the CSF Enterprise in the CSF CCAA Proceedings. In contrast, various other third party lenders to the CSF Enterprise sought immediate injunctive and proprietary relief from the Ontario Courts in the CSF CCAA Proceedings. The Trustee instructed its counsel to take a passive approach to asserting Assistive's proprietary interest over funds advanced to CSF. This permitted other third party lenders to claim proprietary interests to funds and receivables that belonged to Assistive.
95. The Trustee has done nothing substantive to collect Assistive's funds and receivables from RTF and its subsidiaries and affiliates, including MCO. The Trustee and its legal counsel have merely engaged in a passive letter writing campaign and have incorrectly viewed RTF as insolvent despite contradictory sworn information from RTF's principal and accountant. As a result of the Director and Officers' efforts in the Cash Store Litigation, the Trustee had the benefit of a Court Order with which it could enforce Assistive's position.
96. The Trustee has done nothing substantive to collect Assistive's funds and receivables from the CSF Enterprise's customers, who received Loans brokered by the CSF Enterprise. These Loans were made in Assistive's name and with Assistive's funds. The Trustee could have collected them on Assistive's behalf.
97. The Trustee has done nothing substantive to collect Assistive's funds and receivables from the directors and officers of the CSF Enterprise. Some of these directors and officers planned, executed, and personally benefited from the CSF Enterprise Fraud. These directors and officers continue to hold funds defrauded from Assistive.
98. At all material times, the Director & Officers have offered to make themselves available to help the Trustee litigate against the CSF Enterprise given this was in Assistive's best interests. The Trustee has made no attempts to seek the assistance of the Director & Officers despite the Director & Officers familiarity and background with Assistive and the CSF Enterprise.

Damages

99. Even if the Assistive Shareholders are liable at all, which is expressly denied, they expressly deny that Assistive has suffered damages in an amount of \$107,851,966.66.
100. The Trustee and the Investors Committee have utterly failed to mitigate the Unsecured Debentureholders' losses.

Remedy sought:

101. The Trustee's Statement of Claim be dismissed with costs on a solicitor-client basis or on such other basis as the Court may award.