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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COFUND II LLC,

Civil Action No. _____

Plaintiff,

vs.

COMPLAINT

HITACHI CAPITAL AMERICA CORP.,

Defendant.

Plaintiff CoFund II LLC (hereinafter "CoFund"), a New Jersey limited liability company with its principal place of business located at 55 Lane Road, Suite 430, Fairfield, New Jersey 07004, complains of defendant Hitachi Capital America Corp. (hereinafter "Hitachi") and says:

JURISDICTION

1. Plaintiff CoFund is a New Jersey limited liability company with its principal place of business located at 55 Lane Road, Suite 430, Fairfield, New Jersey 07004.
2. Plaintiff CoFund is a citizen of the State of New Jersey.
3. Defendant Hitachi is a Delaware corporation with its principal place of business in the State of Connecticut.
4. Defendant Hitachi is a citizen of both Delaware and Connecticut.
5. This court has original jurisdiction of this civil action pursuant to 28 U.S.C. §

1332(a)(1) in that it is a civil action where the matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between citizens of different states.

FIRST COUNT

6. Forest Capital LLC (hereinafter “Forest”) was in the business of factoring and providing other forms of commercial financing to clients with approved credit.

7. In order to meet the funding needs of some of Forest’s clients, Forest and CoFund established a framework for CoFund to participate in such funding from time to time.

8. On or about January 12, 2012, CoFund entered into a Master Participation Agreement (hereinafter “the MPA”) with Forest Capital, LLC.

9. Under the terms of the MPA, from time to time, Forest offered and sold to CoFund, and CoFund accepted and purchased, participations in factoring transactions that Forest made with its clients.

10. As security for each participation, Forest granted to CoFund a first priority security interest in the Financing Documents, as defined in the MPA, and the Collateral, as defined in the MPA, relating to each Transaction, as defined in the MPA, to the extent of CoFund’s pro rata interest in the Transaction.

11. To perfect the aforesaid first priority security position in the Financing Documents, on January 23, 2012, CoFund filed a UCC financing statement with the Maryland Division of Assessments and Taxation. The filed financing statement described the covered collateral as “[a]ll right, title and interest of debtor, as lead lender, relating to or arising from extensions of credit by debtor to third-party borrowers from time to time, including, but not limited to, advances against the purchase price of accounts, but only to the extent of secured party’s pro rata interest as a participant

therein (if any) pursuant to that certain Master Participation Agreement between debtor and secured party dated January 12, 2012.”

12. On or about December 5, 2014, Hitachi and Forest entered into a Loan and Security Agreement whereby Hitachi agreed to lend, and Forest agreed to borrow, moneys to fund Eligible Purchased Accounts as defined in the Loan and Security Agreement.

13. To secure the timely repayment of the moneys, Forest granted to Hitachi a security interest in, and a lien on, the Collateral as defined in the Loan and Security Agreement.

14. In paragraph 7.7 of the Loan and Security Agreement, Forest represented and warranted to Hitachi that the Collateral, as defined in the Loan and Security Agreement, “is not subject to any liens, mortgages, pledges, encumbrances, claims (legal or equitable), or charges of any kind except Permitted Encumbrances.” The only Permitted Encumbrance was the security interest held by CoFund.

15. On December 16, 2014, Hitachi filed a UCC financing statement with the Maryland Department of Assessments and Taxation. The filed financing statement described the covered collateral as “all assets of debtor now owned or hereafter acquired.”

16. On or about December 19, 2014, the Hitachi Business Finance Division of Hitachi and CoFund entered into a written Intercreditor Agreement (hereinafter “the Agreement”) whereby the parties agreed on the relative priority of each party’s security interest in the collateral covered by their respective agreements with Forest.

17. According to the Agreement, “[t]he lien or security interest of any kind that CoFund may now have or hold in the future with respect to the CoFund Priority Collateral [as defined in the Agreement] shall be superior to any lien or security interest that Hitachi may now have or hereafter

acquire in the CoFund Priority Collateral until CoFund terminates its UCC financing statement.

18. In relevant part, Section 4 of the Agreement, entitled “Rights and Remedies”, provided as follows:

Unless and until and indebtedness owing to Hitachi or CoFund has been satisfied in full and the applicable financial documents are terminated, Hitachi and CoFund agree that with respect to that collateral as to which it is an Inferior Creditor (“Collateral”) it will not:

- A. Enforce or seek to realize upon its security interest in or lien upon such Collateral;
- B. Interfere in any manner with the Superior Creditor’s (i) security interest or lien upon such Collateral or (ii) exclusive right and discretion, without consultation with or the consent of the Inferior Creditor, to enforce, foreclose, and otherwise realize upon such Collateral without regard to the interests of the Inferior Creditor and without any obligation to protect or preserve the value of such Collateral for such Inferior Creditor.
- C. Notify persons obligated, with respect to such Collateral, to remit same (including Proceeds arising there from) to the Inferior Creditor.

If, notwithstanding the foregoing provisions of this Section 4, any party receives Collateral (including Proceeds) with respect to which it is an Inferior Creditor and there is unpaid Borrower indebtedness due to the Superior Creditor with respect to such Collateral, the Inferior Creditor receiving such Collateral shall be deemed to have received such Collateral (including Proceeds) for the use and benefit of the Superior Creditor and shall hold it in trust and shall immediately turn it over to the Superior Creditor to be applied upon the indebtedness of Borrower.

Hitachi shall hold all funds representing CoFund Priority Collateral in trust for CoFund.

19. Furthermore, on or about December 29, 2014, Manufacturers and Traders Trust

Company (hereinafter “M&T”), Forest, and Hitachi entered into a Blocked Account Agreement (hereinafter “the BAA”). Forest deposited into the blocked account all moneys paid to it by its clients, and/or Forest’s clients deposited directly into the blocked account moneys that they owed to Forest. In both cases, some of the clients in question were clients with whom CoFund had a participation interest pursuant to the MPA.

20. Under the terms of the BAA, Forest was not able to withdraw any moneys from the blocked account. Rather, in accordance with the BAA, M&T “transfer[red], by wire transfer, all available funds on deposit in the Blocked Account to the account of [Hitachi]” maintained at Bank of America in Chicago, Illinois.

21. Hitachi has breached its obligations under the Agreement. Among other things, Hitachi has received CoFund Priority Collateral (including Proceeds), but has not turned the same over to CoFund. In addition, some of the moneys deposited into the blocked account represented moneys to which CoFund was entitled under its MPA with Forest, and some of the moneys that Hitachi transferred from the blocked account to its Bank of America account in Chicago represented moneys to which CoFund was entitled under its MPA with Forest.

22. The indebtedness owing to CoFund has not been satisfied in full.

23. As a result of Hitachi’s breach of its obligations to CoFund under the Agreement, CoFund has been damaged.

WHEREFORE, CoFund II LLC demands judgment against defendant Hitachi Capital America Corp. for:

a. An accounting of all moneys deposited into the blocked account that was the subject of the Blocked Account Agreement among M&T, Forest and Hitachi;

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