**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

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| COFUND II LLC,<br>Plaintiff,<br>v.<br>HITACHI CAPITAL AMERICA CORP.,<br>Defendant. | Case No. 16-cv-1790 (SDW) (LDW)<br><br>**TRIAL OPINION**<br><br>February 22, 2021 |

**WIGENTON**, District Judge.

This Court held a bench trial for three days in this matter regarding Plaintiff CoFund II LLC's ("Plaintiff" or "CoFund") breach of contract claim against Defendant Hitachi Capital America Corp. ("Defendant"). This Court has jurisdiction pursuant to 28 U.S.C § 1332 and venue is proper pursuant to 28 U.S.C. § 1391. Based on the testimony and evidence presented at trial, this Trial Opinion constitutes this Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure ("Rule") 52(a). For the reasons stated below, this Court finds that Defendant is liable to Plaintiff for breach of contract.

## I. PROCEDURAL HISTORY

Plaintiff brought this action on March 31, 2016, claiming that Defendant is liable for breach of contract (Count I), breach of fiduciary duty (Count II), tortious interference (Count III), conversion (Count IV), and unjust enrichment (Count V). (D.E. 1.) On November 7, 2016, this Court denied Defendant's Motion to Dismiss or Stay this action in favor of non-party Forest

Capital, LLC's ("Forest") earlier-filed bankruptcy proceeding in the United States Bankruptcy Court for the District of Maryland. (*See* D.E. 11, 20, 21.) Following Defendant's Motion for Summary Judgment, this Court dismissed Counts II – V. (*See* D.E. 83, 90, 91.) This Court held a virtual bench trial on Count I on November 10–12, 2020, and the parties subsequently submitted post-trial briefs with proposed findings of fact and conclusions of law. (D.E. 130–32, 138, 139.)

## II. FINDINGS OF FACT

This Court, writing primarily for the parties, makes the following findings of fact:

### A. The Governing Contracts

Plaintiff entered into a Master Participation Agreement ("MPA," Exs. P-1 and D-3)[1] with Forest on January 12, 2012. Under the agreement, Plaintiff purchased participations in factoring[2] transactions that Forest made with its clients. (*See* MPA § 2.) The amounts of Plaintiff's participations for particular factoring transactions (*i.e.*, its "pro rata" interests in those transactions) are set forth in 24 separate Participation Offer and Acceptance Forms that were signed by Plaintiff and Forest between January 2012 and September 2015. (Exs. P-3 to P-26; *see* Ex. P-27 at CoFund-2653 – CoFund-2667 (tracking Plaintiff's monthly outstanding participation amounts, advances, and repayments, for each Forest client from January 2012 to December 2015).)

In return for purchasing participations in the factoring transactions, Forest granted Plaintiff a first-priority security interest in the collateral relating to each factoring transaction to the extent of Plaintiff's pro rata interest in those transactions. (MPA § 5.) However, Plaintiff's interest in any factoring transaction was limited to 50% of the total funds employed in the client account,

[1] References to trial exhibits are to P-1, *et seq.*, for Plaintiff's exhibits and to D-1, *et seq.*, for Defendant's exhibits. References to trial transcripts identify the witness, volume ("TI", "T2", or "T3"), and page: line.

[2] A factoring transaction is one in which a business sells its accounts receivable (*i.e.*, invoices) to a third party in order to generate cash. (*See* Dahm, T2, 246:13–24.)

regardless of Plaintiff's initial investment. (MPA § 3(a); *see* Dahm, T2, 261:6 – 262:11.)[3] Forest was required to hold any funds in excess of Plaintiff's 50% interest in reserve for Plaintiff to use in future participations. (MPA §§ 3(b) and 3(d); *see* Dahm, T2, 262:12–15.) Plaintiff perfected its security interest in the MPA-defined collateral on January 23, 2012, by filing a UCC financing statement with the Maryland State Department of Assessments and Taxation. (Ex. P-2.)

On December 5, 2014, Defendant entered into its own agreement with Forest to lend money to Forest. (Ex. D-1 (Loan and Security Agreement or "LSA").) Under the LSA, Forest granted Defendant a security interest in a broad swath of collateral, as defined by that agreement, but also gave notice that the collateral may be subject to "Permitted Encumbrances," which the agreement identified as Plaintiff's UCC financing statement filed on January 23, 2012. (LSA §§ 1.26 and 7.7; LSA Ex. A.) On December 16, 2014, Defendant filed its own UCC financing statement with the Maryland State Department of Assessments and Taxation to perfect its security interests in "all assets of Forest now owned or hereafter acquired." (Ex. D-2 (capitalization omitted).)

Plaintiff and Defendant executed an Intercreditor Agreement (Ex. D-4) on December 19, 2014, to determine the priorities of their security interests in the collateral covered by their respective agreements with Forest. Under the agreement, the parties agreed, *inter alia*, that:

> The lien or security interest of any kind that [Plaintiff] may now have or hold in the future with respect to the CoFund Priority Collateral shall be superior to any lien or security interest that [Defendant] may now have or hereafter acquire in the CoFund Priority Collateral . . . .

(Intercreditor Agreement § 2.B.) The agreement defined "CoFund Priority Collateral" as "only those amounts received by [Forest] which represent CoFund's Pro Rata interest in a Transaction

[3] Specifically, MPA § 3(a) states that "[CoFund's] Investment in a Transaction as of any Settlement Date shall not exceed fifty percent (50%) of the aggregate principal amount of Advances to the Client then outstanding (Participant's 'Maximum Permitted Investment')." The MPA further defines "Settlement Date" as "the last business day of each month." MPA § 1.

as well as CoFund's Pro Rata interest in the tangible and intangible assets and property securing the obligations relating to each Transaction." (Intercreditor Agreement § 1.A.)[4]

The Intercreditor Agreement also provided, in relevant part:

> If . . . any party receives Collateral (including Proceeds) with respect to which it is an Inferior Creditor and there is unpaid [Forest] 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 [Forest]. . . .
>
> [Defendant] shall hold all funds representing CoFund Priority Collateral in trust for [Plaintiff].

(*Id.* § 4.D.)

Subsequently, on December 29, 2014, Forest, Defendant, and non-party Manufacturers and Traders Trust Company ("M&T") entered into a Blocked Account Agreement ("BAA"). (Ex. P-30.)[5] Under the terms of the LSA and BAA, Forest and/or Forest's clients deposited all moneys that Forest's clients paid/owed to Forest into a blocked M&T account. (LSA § 8.11(a).)[6] Also under the terms of the BAA, Defendant had "sole dominion and control" of the blocked account and Forest was unable to withdraw any moneys from the blocked account to pay Plaintiff. (BAA § 4(b).) Rather, M&T "transfer[red]. . . all available funds on deposit in the Blocked Account to

[4] Similarly, the Intercreditor Agreement stated that "[t]he lien or security interest of any kind that [Defendant] may now have or hold in the future with respect to the Hitachi Priority Collateral shall be superior to any lien or security interest that [Plaintiff] may now have or hereafter acquire in Hitachi Priority Collateral." (Intercreditor Agreement § 2.A.) Hitachi Priority Collateral consisted of all of Forest's property except CoFund Priority Collateral. (Intercreditor Agreement § 1.B.)

[5] The BAA was executed pursuant to the LSA. (*See* BAA at 1 ("WHEREAS, pursuant to that certain Loan Agreement, to be entered into on or about December 5, 2014 . . . .").)

[6] LSA § 8.11(a) specifies that Defendant's "dominion of funds," comprising "all payments due [to Forest]" from "all Customers," is a requirement of the loan provided in the LSA. (LSA § 8.11(a) ("The loan shall be on dominion of funds. . . . . [Forest] shall have no right to withdraw any funds from [the blocked account], all of [Forest's] funds therein belong to [Defendant].").) The BAA implements this provision by requiring that "the Blocked Account shall be under the sole dominion and control of [Defendant]." (BAA § 4(b).)

the account of [Defendant]." (BAA § 4(a).) This was corroborated by Defendant's sole witness, Toby Dahm, a Senior Vice President at Defendant during the relevant time period. (*See* Dahm, T2, 272:4–7 ("[B]asically all of Forest Capital's inbound cash came into a . . . blocked account. That blocked account then [wa]s swept to Hitachi to pay down its line of credit.").)

By this process, Plaintiff contends, Defendant received Cofund Priority Collateral that Plaintiff is entitled to under the MPA. Defendant has not turned over these funds to Plaintiff, allegedly in breach of the Intercreditor Agreement, which requires Defendant to "hold all funds representing CoFund Priority Collateral in trust for [Plaintiff]." (Intercreditor Agreement § 4.D.)

**B. Forest's Default and Bankruptcy**

By letter on December 24, 2015, Plaintiff notified Forest and Defendant that Forest was in default under the MPA with respect to its obligations to Plaintiff. (Ex. P-38.) On December 29, 2015, certain Israel-based junior creditors of Forest sent a letter to Forest's then outside counsel, copied to Plaintiff and Defendant, noting their own dispute with Forest and the need to reach a "settlement agreement between all creditors, including the [junior creditors], which will adhere to the different parties' rights and references vis-à-vis Forest Capital and its available assets." (Ex. D-44 at 1; *see* Dahm, T2, 286:1 – 288:1.) The same junior creditors sent another letter in February 2016 reiterating their position. (Ex. D-45 at 1; *see* Dahm, T2, 305:4–17.)

Plaintiff also sent a letter to Defendant on March 21, 2016, requesting an immediate accounting of all collateral Defendant had received from Forest since December 9, 2014, and the immediate turnover of CoFund Priority Collateral. (Ex. P-58.) During this time, Defendant maintained a collateral reserve in Plaintiff's favor to protect any interest Plaintiff may have. (*See* Dahm, T2, 306:20 – 307:7.) Mr. Dahm testified that, after Defendant collected out on its loan to Forest, it released the blocked account along with its collateral reserve for Plaintiff back to Forest.

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