

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK: CIVIL TERM: PART 3
-----X

3 XIAO YAN LU, et. al.,
4 Plaintiffs,
5 -against-

INDEX NO:
651832/2020

6 SAGEWOOD SFF III LLC, et. al.,
7 Defendants.
-----X

New York Supreme Courthouse
60 Centre Street
New York, New York 10007
March 27, 2024

10 B E F O R E:

11 THE HONORABLE JOEL M. COHEN,
12 J U S T I C E

13 A P P E A R A N C E S:

14 THE LAW OFFICES OF ETHAN A. BRECHER LL,
15 Attorney for the Plaintiffs
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BY: JACOB CHEN, ESQ.

Karen Mangano, CSR
Senior Court Reporter

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1 THE COURT: Good afternoon, folks. Let's start
2 with appearances beginning with the plaintiff.

3 MR. BRECHER: Good afternoon, your Honor. My name
4 is Ethan Brecher, Law Office of Ethan A. Brecher, LLC on
5 behalf of the plaintiffs.

6 THE COURT: And for the defense.

7 MR. CHEN: Good afternoon. This is Jacob Chen from
8 DGW Kramer. With me is my paralegal Mark Garner.

9 THE COURT: Okay. Good afternoon. I remember this
10 case well from the motion to dismiss days and probably other
11 things. So we have competing motions for summary judgment;
12 yes?

13 MR. BRECHER: Yes.

14 MR. CHEN: Yes, your Honor.

15 THE COURT: Which suggests anyway that both sides
16 think the facts are relatively clear, and it's a question of
17 what's the legal implications of those facts. At least, in
18 large part.

19 So why don't I start with I guess -- the first
20 motion was the plaintiff's motion. Just the first one that
21 was filed. It could go either way. So why don't I start
22 with you, Mr. Brecher.

23 MR. BRECHER: Good afternoon. May it please the
24 Court, Ethan Brecher on behalf of the plaintiffs.

25 This case involves four plaintiffs who invested in

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1 a real estate fund that was operated by the defendant, and
2 for shorthand, initially invested in what was called Fund
3 II. Essentially, it was --

4 THE COURT: It's Roman Numeral II.

5 MR. BRECHER: Correct. It was an investment in
6 residential real estate, and what they were going to do.
7 The funding was going to acquire residential properties,
8 renovate and flip them hopefully for a profit.

9 So the initial investment, each plaintiff invested
10 \$200,000 in Fund II in 2017. In or around August 2018 at
11 the suggestion and encouragement of the manager, the Fund II
12 as well as what is known as Fund III, Roman numeral three,
13 Ms. Wu, they were told that there was a better opportunity
14 in Fund III and that their investment in Fund II would be
15 rolled over from Fund II to Fund III and that they would not
16 be required to make additional contributions. So they
17 signed. That is the plaintiff's signed subscription
18 agreements for Fund III; and thereafter, starting in August
19 of 2018, they were treated as Fund III members.

20 Ms. Wu who is the manager repeatedly told them in
21 text messages over the platform WeChat that they had been
22 rolled over into Fund III. Ms. Wu told the plaintiffs that
23 their investment in Fund III was guaranteed. The Fund III
24 issued K-1s -- IRS K-1s to plaintiffs for 2018 reflecting
25 that they were Fund III members and they had two plus

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1 percent interest in Fund III. These were K-1s that were
2 filed, submitted to the government.

3 THE COURT: Question about that. The version of
4 the K-1 that I see on NYSCEF anyway is the one that was sent
5 as a standalone document to the plaintiffs; right?

6 So I think with K-1s -- in other words, I don't
7 have a version -- at least, I'm not aware of one where it's
8 the Fund III tax return, the entire form with the K-1
9 included in it. Do I have that in the record somewhere?

10 MR. BRECHER: I'm looking at the docket. I don't
11 know that on the docket -- entire tax return was filed, but
12 Ms. Wu admitted at her deposition that those K-1s were
13 submitted to the government and that she authorized the
14 filing of the tax returns.

15 THE COURT: So the K-1s -- I'm trying to balance
16 here a couple of things that I've seen in the cases, and the
17 K-1 says it is a schedule to a tax form, and you did include
18 a copy of the signature page of the main tax form. I think
19 it's Form 1650. So I'm trying to be very precise about this
20 because I know there is an issue about tax estoppel here.
21 So you included the K-1s in NYSCEF 60 which is Exhibit 3 to
22 your affidavit and that's the one -- it's many pages long,
23 and it's -- it seems to be a correspondence from the
24 accounting firm to the member. So this itself is not a tax
25 return I don't think. Right?

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1 MR. BRECHER: I'm just trying to pull it up as we
2 speak here also. Well, I mean, that is --

3 THE COURT: Well, that is what it is. The thing
4 that's in NYSCEF 60 is a communication from the accounting
5 firm. And then you also introduced as NYSCEF 59 the signed
6 version authorizing the filing of -- I'm sorry. It's Form
7 1065. So that is signed by the -- it looks like Ms. Wu as
8 the managing member or somebody as the managing member. So
9 what I can't -- and you know, when you look at the K-1, it
10 says it is a schedule to Form 1065, but what I don't have is
11 a single document that says here is the tax package that was
12 sent to the government.

13 So I guess what you are saying what you have is Ms.
14 Wu saying that the document that is in here as NYSCEF 60 was
15 sent to the government.

16 MR. BRECHER: Yes. She testified to that. I think
17 I cited that in my brief.

18 THE COURT: Okay. Because you're aware the her
19 reason January ^ case which says sort in a blanket way that
20 since in that case the K-1 was not signed, it was not
21 subject to tax estoppel.

22 Now, there may be other kinds of estoppel that may
23 be applicable but -- now I could see a different result if
24 you have a signature on a Form 1065 to which the K-1 is
25 appended.

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1 You know, I think clearly signing the form is the
2 same thing as -- or arguably the same thing as signing the
3 attachment, but that's -- I was just a little unclear what
4 the record shows me here.

5 MR. BRECHER: Well, that was the authorization to
6 file the 1065.

7 THE COURT: Right. Do we have the 1065 filing?

8 MR. BRECHER: I don't think I put it on the docket.
9 I'm not 100 percent sure. I know Ms. Wu testified that he
10 authorized that it was filed, so I don't think they dispute
11 that the 1065 was in fact filed.

12 THE COURT: Right. I just don't know when the
13 1065. I genuinely don't know the answer to that. I'm just
14 relying on the fact that there is an Appellate Court
15 decision anyway saying that K-1s are not signed or the K-1
16 in this case was not signed. I don't know whether when one
17 submits a form 1065, a K-1 goes along with it to the
18 government because tax estoppel is a representation -- is
19 about representations made to the federal government under
20 penalty of perjury. Regular estoppel can be a
21 representation made to your client.

22 So for example, I think the K-1 that was sent to
23 them -- you know, you have some argument that that is a
24 representation made by the defendant to your client
25 directly. So there is -- it's not -- wouldn't be

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1 irrelevant, but the tax estoppel case law, I think requires
2 that it be a representation to the government, and I just
3 wasn't sure as I looked through the documents whether I have
4 that.

5 MR. BRECHER: Well, if you look at the Page 1, your
6 Honor, of Exhibit 60, the letter from the accountant says
7 that this information has been provided to the IRS with the
8 U.S. partnership return of Income Form 1065. So that the
9 accounting firm that was acting on behalf of the fund
10 provided this to the clients. We have the form Ms. Wu
11 signed which she admitted that was her signature on the
12 document authorizing the filing of the 1065 so --

13 THE COURT: I see. And --

14 MR. BRECHER: I think she said it was filed as well
15 at her deposition.

16 THE COURT: Okay. That's helpful. All right. I'm
17 sorry for the interruption, but as I was looking through the
18 documents preparing for today, I realized that I didn't have
19 it in that form.

20 Okay. Go ahead.

21 MR. BRECHER: So your Honor, so the 2018 tax return
22 shows for the plaintiffs a 2.128 percent ownership interest
23 in Fund III. And then later, the -- the plaintiffs --
24 besides getting notices from the Fund III saying they were
25 members of Fund III, in September of 2019 the plaintiffs

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1 each received from Fund III -- from a bank account from Fund
2 III that was denominated as a distribution and the return
3 of -- a partial distribution and a partial return of capital
4 from Fund III. So they were treated in all respects as Fund
5 III members.

6 The schedule that was attached to the operating
7 agreement which listed members of Fund III reflected the
8 plaintiffs' interest in Fund III.

9 THE COURT: That was a communication from the fund?

10 MR. BRECHER: That was attached to the operating
11 agreement of the fund. The operating agreement itself had a
12 schedule to the members of the fund, and that was actually
13 something that the defendants attached I think at
14 Document 85 which is Schedule A to the Fund III operating
15 agreement which listed the plaintiffs as members.

16 So the official records of the fund itself reflect
17 the plaintiffs had an interest in the fund, and the -- then
18 -- there was an issue the defendants had raised that they
19 had been given what we will call the amended K-1s. So if
20 you look at documents --

21 THE COURT: Well, it's just the next year K-1.

22 MR. BRECHER: Right; but it wasn't an amended K-1
23 fixing the prior year. It was a 2019 K-1 which showed that
24 at the end of the year a zero percent interest and a
25 distribution, but the top of the K-1, if you look at it

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1 itself, there is a box. It can be -- this says it's a final
2 K-1 or it could be an amended K-1. There are different
3 boxes that could be checked, and this indicates a final K-1.

4 What the defendants have represented was that this
5 was an amendment to the prior year K-1 to fix it to show
6 that it was an error, but that's not what it actually
7 reflects.

8 So the sum total of the evidence here we believe
9 is -- it's documentary. The manager told them they were
10 rolled over. She told them there was a guarantee. She
11 admitted that at her deposition. She got distributions and
12 fund capital. The fund documents show they were members of
13 Fund III. The document sent to the IRS show that they were
14 members. There is -- there can be no dispute that they were
15 in fact members of Fund III from at least starting in August
16 of 2019.

17 We had also made an application as part of our
18 motion for an adverse inference because Ms. Wu testified
19 that she communicated over WeChat and WhatsApp with Mr. Chu
20 as essentially the accountant for the fund. He admitted
21 that they had these kind of communications and then those
22 communications never produced. And while we were told what
23 the defendants claimed that Ms. Wu was simply mistaken about
24 these communications existing; however, she never submitted
25 an affidavit disclaiming --

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1 THE COURT: Did you seek to -- I don't even know
2 whether this could work or not, but did you seek any means
3 of checking either her personal devices or even having -- I
4 don't even know who owns WhatsApp these days, but to find
5 out if these things could be retrieved.

6 MR. BRECHER: I did not. So we had asked for the
7 production. They said first she said there were and he -- I
8 mean, she didn't even say. Her attorney said that she was
9 mistaken, so we don't even have an affidavit from her.

10 THE COURT: The interesting and somewhat refreshing
11 thing about this case is the defendants don't really dispute
12 the basics. They just say there was a mistake. They
13 assumed that the funds that had been contributed to Fund II
14 were available to, you know, "rollover" to acquire shares of
15 Fund III, and they kind of later figured out that they
16 weren't there or something like that.

17 So I don't really -- they don't really deny the
18 communications. They said she genuinely believed the
19 rollover was effective. It's just it wasn't, and so their
20 point and they made this a lot during the motion to dismiss
21 hearing is that at the end of the day, the legal impact of
22 the mistake is since the funds were not in fact rolled over,
23 then as a matter of law, they are --- you can't be a member.
24 So the fact that Ms. Wu wished it, thought it, hoped that it
25 would be happening doesn't make it so.

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1 MR. BRECHER: Well, she represented that there was
2 a guarantee that the funds were -- that they were or would
3 be rolled over. So there was a promise that that would be
4 accomplished, and they represented to the government that my
5 clients were members.

6 THE COURT: So the question is if people represent
7 things that are demonstrably -- that they thought were true
8 but it turns out they are not, what's the impact of that?

9 Let's assume best case scenario finder of fact were
10 to conclude Ms. Wu believed to the bottom of her heart that
11 the rollover happened. Everything that was necessary for it
12 to happen actually did but later found out that it hadn't.
13 What's the end result of that mistake? Do you have a claim
14 against her? Do you -- do you get a declaration that well,
15 they made the representation they are Fund III's agents?

16 Fund III in its own name essentially represented to
17 us this is -- you know, these are basic concessions and
18 admissions that certain things took place.

19 Is that enough?

20 MR. BRECHER: I think it is. So I mean, the two
21 claims that are basically in the case after the motion to
22 dismiss are declaratory judgment and a breach of contract
23 because one of the things assuming for the moment if they
24 were members of Fund III, they were supposed to have
25 dissolved the fund by August of 2020, and they didn't.

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1 THE COURT: Well, we will get to that.

2 MR. BRECHER: But they -- they -- they say, oh,
3 it's all a mistake. Sorry. Everything we said, everything
4 we did is just undone.

5 THE COURT: Because your client's money was already
6 lost in Fund II, and the interesting thing about this is
7 this all may be accurate factually from above that the
8 rollover couldn't happen because the funds weren't there
9 anymore because they had already been wasted.

10 So what I'm left with is what do you do now. You
11 know, the mistake is made. Are they bound by it because
12 that's what their agent said or are you -- is your client
13 just out of luck because the funds that they were hoping to
14 roll over next existed.

15 MR. BRECHER: I don't think you can assume that
16 this was just a mistake.

17 THE COURT: I'm not saying anything, but you're
18 moving for summary judgment.

19 A jury or a judge could find -- let's say they find
20 that her testimony is accurate, that she genuinely thought
21 it happened, but it didn't, I have to answer the question
22 of, you know, look, her thinking that what she said was true
23 is irrelevant. For you to win -- for your clients to win, I
24 have to say, look, she is an agent. She owns the managing
25 member or the managing member is the agent to the world of

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1 Fund III. They write communications on Fund III and in Fund
2 III's name.

3 The bottom line is Fund III is just stuck with the
4 mistakes that might have been made.

5 MR. BRECHER: I think it's --

6 THE COURT: And if those Fund III members want to
7 sue Ms. Wu, they can sue Ms. Wu if they feel like they have
8 a claim because the percentages of the other Fund III
9 members in the K-1 that you showed me which includes your
10 clients at two percent, their percentages are according to
11 the defendants too low in those, right; and presumably, the
12 other partner's member -- percentages went up in 2019
13 because they didn't have to account for your client's shares
14 anymore.

15 MR. BRECHER: You know, it's unclear.

16 If you look at the schedule of -- that's attached
17 to the operating agreement, my clients are included in it,
18 and you add it up, it's 100 percent.

19 THE COURT: Right. So by definition, the next time
20 they met that schedule which your client may or may not
21 have, everybody else's percentages would have gone up.

22 MR. BRECHER: Right. Presumably, if my client were
23 eliminated from that. We don't know that. I mean, I
24 haven't seen the 20 --

25 THE COURT: But the part of the defense case that

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1 resonates to some extent with me, although there are some
2 parts that don't is the cash that was used to fund whatever
3 these acquisitions were that led to the profits in fact did
4 not include your client's cash, let's say, if they are
5 correct. So we would be diluting the recovery of these
6 other partners.

7 MR. BRECHER: Well, not if you believe the schedule
8 that they created themselves which is entitled to
9 significant deference.

10 I mean, my client didn't create that schedule that
11 they attached to the operating agreement.

12 THE COURT: You are not living in my hypothetical
13 right now.

14 I get it. Your argument is they are stuck with
15 this because this is their representation, but in terms of
16 the actual cash that went into funding Fund III, if it is
17 true that it didn't include your client's \$600,000, it was
18 just these other people that funded it.

19 MR. BRECHER: 800.

20 THE COURT: \$800,000. It was all funded by these
21 other people and your client would now be getting the
22 returns on money invested by other people.

23 MR. BRECHER: Well, I don't think that's true
24 because what Ms. Wu told them, there was a guarantee, so
25 somebody -- maybe Ms. Wu put the money in. It wasn't taken

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1 from the other members.

2 THE COURT: You are still changing my hypothetical.
3 I understand your client, but in the real world, is there --
4 you have had all this discovery now.

5 Have you seen any evidence that your client's
6 \$800,000 in fact was in the accounts of Fund III and being
7 used to buy real estate and make all this money?

8 MR. BRECHER: I mean, the answer is no, I can't
9 trace the money. They have money, but it's hard to know,
10 you know. Money is fungible.

11 THE COURT: Well, you should -- I mean, I don't
12 know whether the work was all done, but if you got full
13 discovery from Fund III, you would see all of their cash
14 incoming and outgoing, and you would be able to tell whether
15 they received 800,000 from your client.

16 MR. BRECHER: But they represented the money was
17 never sent.

18 THE COURT: Right; but you can check that by
19 looking at their bank statements.

20 MR. BRECHER: Yeah. I mean, I'm just trying to
21 remember. I don't recall specifically, but I don't think we
22 were ever able to determine whether my client's money was
23 transferred or not. So we have all these other --

24 THE COURT: Did you get the financial records of
25 Fund III?

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1 MR. BRECHER: We got some financial records. I
2 don't --

3 THE COURT: You didn't -- I would have hoped that
4 you would have gotten enough to see all the money that came
5 in from investors and all the money that went out for buying
6 real estate or things like that. I would hope that they
7 would have been able to give you that. So you -- there
8 should be a way -- it shouldn't be a mystery at this point.
9 There should be a way to know here's all incoming and
10 out-flowing and you can add it up and see whether it
11 included your client's 800,000. Couldn't you?

12 MR. BRECHER: Yeah. I don't know that we got those
13 records actually.

14 THE COURT: Well, that's problematic; right?

15 MR. BRECHER: Right; but I mean --

16 THE COURT: I assume you sought them.

17 MR. BRECHER: We tried to get as much as we could
18 so.

19 THE COURT: Okay. If we go to trial, is there
20 other experts who have kind of poured over all that stuff
21 and said we can verify?

22 MR. BRECHER: We don't have any experts.

23 THE COURT: Defendant doesn't have one either who
24 says we can verify; here is all money that came in and it
25 doesn't include their \$800,000.

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1 MR. BRECHER: Neither side has an expert.

2 THE COURT: Okay.

3 MR. BRECHER: I mean, you know, whatever it's
4 worth, I mean, this is, you know -- this is -- you know,
5 what they say is Fund II somehow had this catastrophic, you
6 know, loss. They are suing the guy who supposedly absconded
7 with the money and we were told he is judgment proof or
8 whatever.

9 It's like my client's 200,000 -- some of them took
10 from their kids' college funds and stuff and like so -- but
11 we did what, you know --

12 THE COURT: Well, the forensic work that I'm
13 thinking about is not complicated. This Schedule A adds up
14 to \$10 million. It has actual numbers that add up to
15 \$10 million and that's 100 percent of the capitalization in
16 Schedule A. So there should be some not terribly
17 complicated analytics that could see if Fund III received
18 \$10 million or instead only nine million two.

19 MR. BRECHER: I mean, just off the top of my head,
20 I remember seeing something that was like \$8 million or
21 something. So I don't have the exact -- I'm not --

22 THE COURT: No. It's okay, but I mean, that's the
23 test of it all; right. If this schedule is to be believed,
24 they should have received \$10 million.

25 MR. BRECHER: Yeah.

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1 THE COURT: And that should be a knowable fact based
2 on their bank accounts; right? I mean, you don't need to be
3 a CPA to -- all right. Let's move to the breach of
4 contract.

5 The thing about the dissolution, one question I
6 have is I don't know when the last discovery was taken, but
7 do you know -- and I'll ask Mr. Chen -- has this now been
8 dissolved and distributed or is it still running?

9 MR. BRECHER: I don't know. As of the last time
10 that I'm trying to remember when I took Ms. Wu's deposition
11 which I think would have been in December 2022, I think, I
12 think the fund was still active and we filed a summary
13 judgement motion in August of or September -- yeah. As of
14 the last we knew, it was still --

15 THE COURT: Now in some ways that's good for you,
16 right, because if the fund had been dissolved and everything
17 had been distributed to the partners, you wouldn't really
18 have anywhere to go to get recovery if you win.

19 MR. BRECHER: Right. Well, I mean, if they --
20 that's probably true because, you know, if we are Fund III
21 members, then we are in a fund and hopefully there is
22 something there.

23 THE COURT: Right; because dissolution -- if Fund
24 III has been dissolved and therefore, liquidated, you have
25 no where to recover from. So it's probably better for you

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1 if Fund III is still sitting there with 10 million or 8
2 million or whatever it is.

3 MR. BRECHER: Well, I mean, I don't know that this
4 is in the record, but the last we heard is that there was,
5 you know, under \$1 million left in the fund.

6 THE COURT: So what does that tell us about whether
7 they did in fact wind it up or not.

8 MR. BRECHER: They might have started. I don't
9 know.

10 THE COURT: The end result of this process if we --
11 if I don't grant summary judgment or even if I do, is a
12 trial or recovery.

13 So how do we -- well, you know what, I'll ask maybe
14 the folks who should know what's going on with this at this
15 point.

16 The position I have heard from them is Ms. Wu
17 extended it --

18 MR. BRECHER: That's what she --

19 THE COURT: -- within her discretion.

20 MR. BRECHER: She testified to that.

21 THE COURT: And where did you see this \$1 million
22 left? Because I mean, it could be that's one million left
23 in the bank, that they have assets in terms of real estate.

24 The way this was supposed to work, they were
25 supposed to use the investors' cash to buy real estate and

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1 then sell the real estate at a profit and then distribute
2 the cash; right?

3 MR. BRECHER: Right.

4 THE COURT: So the fact that there's not a lot of
5 cash doesn't necessarily mean they don't have assets.
6 Whatever it is --

7 MR. BRECHER: We learned that through the
8 court-ordered mediation. So we had -- I think we learned
9 that through the mediation.

10 THE COURT: Okay. Well, I mean, let me not get
11 into that then. But all right.

12 So in terms of the summary judgment, the document
13 seems to suggest that she has -- the managing member has
14 discretion to keep the fund open. It doesn't say anything
15 about it being in writing necessarily at least in the
16 provision I have read. So how can I grant summary judgment
17 that she should have wound it down in August of 2020 which
18 again would be I think terrible for you if she had. But
19 what do I have to grant summary judgment on that if she has
20 discretion to keep it open?

21 MR. BRECHER: Well, I don't think they specifically
22 opposed our motion on that point so --

23 THE COURT: It's a little unclear. I wasn't sure
24 either. I mean, we just looked at the contract and saw the
25 reference to discretion, so I'm kind of curious to see what

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1 they say about that as well.

2 So all right. Let me hear from the defendants.

3 MR. CHEN: Good afternoon, your Honor.

4 THE COURT: Good afternoon.

5 MR. CHEN: So as the Court noted, and I don't
6 disagree with, and I agree with Mr. Brecher here, my client
7 made a mistake. We are upfront about this. We are honest
8 about this. Ms. Wu made representations to Mr. Brecher's
9 client telling them their funds were going to be rolled over
10 from Fund II to Fund III. She believed it was going to
11 happen.

12 THE COURT: Not going to happen. She said that it
13 had happened.

14 MR. CHEN: She both believed that it was going to
15 happen and she did believe that it had happened. But when
16 she first made the representations, she had the intent of
17 rolling over the funds from Fund II to Fund III, but as Mr.
18 Brecher's own arguments and representations to the Court
19 have noted, he does not present the Court with any actual
20 evidence on a motion for summary judgment following the
21 close of discovery that any funds were ever rolled over from
22 Fund II to Fund III.

23 THE COURT: What he has is what we like to say in
24 the evidence trade, a bunch of admissions by the defendants
25 that the rollover happened. Not that it was planned. Not

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1 that it was intended, but that it happened. And with
2 something like a rollover, the only people who would know
3 are the people within the fund because by definition, they
4 were told not to send any more money. So they have a bunch
5 of admissions.

6 MR. CHEN: Well, as my favorite writer George
7 Martin likes to write, Words are wind.

8 THE COURT: Words are wind?

9 MR. CHEN: Financial records are financial records.
10 Mr. Brecher has had discovery. He asked for financial
11 records. We gave them financial records. He does not have
12 a single wire transfer from Fund II to Fund III.

13 THE COURT: Well, that just proves that the
14 representations were false.

15 The question of whether they are binding on the
16 fund anyway because they were admissions by an agent is
17 really what I think the crux of this question is.

18 MR. CHEN: I think -- your Honor, think about it in
19 analogy of this way. If the bank makes a mistake, if you
20 write a check to somebody else and the bank misses the
21 decimal point and ends up giving one hundred times more than
22 when you wrote the check for, the bank made a mistake. That
23 does not entitle you to keep the money that the bank gives
24 you.

25 THE COURT: By statute, that's true.

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1 MR. CHEN: By statute, that's true; but also in --
2 there is no case that the plaintiffs cite to which show that
3 if you make an error in representation about how much money
4 was sent, you get to then decide that the actual money that
5 was sent and keep it.

6 THE COURT: But I don't even know if now they have
7 visibility as to what happened.

8 You know, you have this schedule. There's an awful
9 lot of very strange documentation here, Mr. Chen. These are
10 not casual representations; right. I mean, this is a
11 capitalization table in a schedule attached to the
12 partnership agreement.

13 There are tax returns which include K-1 schedules
14 which are schedules to signed tax returns, and I don't know
15 why the doubt about whether the rollover happened or not
16 should be resolved against the party who is simply relying
17 on what they were told because you don't have, you know,
18 clear proof that the money was not rolled over.

19 MR. CHEN: Well, your Honor, proving a negative is
20 fundamentally impossible. We could produce all of the
21 financial records --

22 THE COURT: Well, if only we had admissions to
23 solve -- break the tie. Well, we do.

24 MR. CHEN: But we also have statements from my
25 clients with personal knowledge that were submitted on a

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1 motion for summary judgment that no rollover actually
2 happened, and they explain the circumstances.

3 Fund II was looted by one of the shareholders, one
4 of the managers of Fund II. And actually, we have an
5 inquest scheduled in that case on May 3rd going after the
6 previous managers of Fund II. It's an inquest because they
7 didn't participate in the proceedings, but we got an
8 inquest. We have a schedule. We will prove damages, and
9 there is a chance --

10 THE COURT: Now, your client Ms. Wu and Sagewood LT
11 were also the managers of Fund II; right?

12 MR. CHEN: So Fund II was previously managed by a
13 joint venture which was controlled by Mr. Kenneth Tse as the
14 construction individual and then my client Jane Wu was
15 through another entity co-managers. So there was one entity
16 that was managing Fund II and the entity was divided in
17 control. So Kenneth Tse who was the construction --

18 THE COURT: T-S-E?

19 MR. CHEN: That's right. He has a background in
20 construction real estate development. He was the person
21 responsible for doing all the construction, and he was the
22 one who was managing --

23 THE COURT: Again, Ms. Wu -- so she's not in the
24 dark about what's going on in Fund II.

25 MR. CHEN: And to her credit, once she learned that

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1 Kenneth Tse was looting the company, she did rally the
2 members of Fund II and rallied them together to go remove
3 the management company and to appoint Sagewood as the sole
4 manager of the company which allowed us to then proceed in
5 action against Kenneth Tse and in our efforts to recoup
6 whatever money that was looted from the company.

7 THE COURT: And when did all that happen --

8 MR. CHEN: Right --

9 THE COURT: -- in connection with when these
10 various admissions or representations were being made?

11 MR. CHEN: So I think the taking over of the
12 company was around the same time representations were made
13 because Ms. Wu had to reach out to Mr. Brecher's client to
14 get them to sign documents in order to get the company out
15 of the management of Mr. Tse.

16 THE COURT: Right; but when Ms. Wu recommended that
17 they move out of Fund II to Fund III, that presumably was
18 because she was seeing problems in Fund II of some sort.

19 MR. CHEN: So I believe the chronology is this, and
20 I am fairly certain of it but not 100 percent.

21 The chronology was Ms. Wu became aware of the
22 Kenneth Tse's wrongdoings. She reached out to the
23 shareholders of Fund II to remove Kenneth Tse in which they
24 did and then while in the process of trying to recover the
25 funds that were looted from the company, that's when she had

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1 a conversation with Mr. Brecher's clients and other members
2 about rolling over the funds possibly from Fund II to Fund
3 III.

4 THE COURT: You keep adding that "possibly." The
5 thing that makes this hard for your side here is that that's
6 not the way the representations were made. It wasn't let's
7 think about can we possibly some day rollover. It is we
8 have rolled it over. It's there now. You have a two
9 percent interest in Fund III. You -- here's your
10 distribution based on ongoing operations of Fund III.
11 That's past tense. This happened. This is not anymore this
12 may happen. And this is by definition after she already
13 knew about the -- what was going on in Fund III and presume
14 -- Fund II, I mean, and presumably after she took over as
15 the sole manager.

16 How do you explain the continuing representations
17 that a rollover in fact occurred, and you know, at trial,
18 why would I not direct a verdict or at this point now say
19 Fund III can not avoid the representations that it made?

20 MR. CHEN: Well, can not avoid -- so I think the
21 Court notes that whether or not a rollover actually happened
22 is a question of fact, and that question of fact requires
23 either witnesses or documents or evidence that are on a
24 motion for summary judgment at least undisputed.

25 Now, I would say Mr. Brecher in his time here has

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1 not actually argued that the rollover actually literally
2 happened, that money from Fund II actually made its way to
3 Fund III.

4 In fact, he says kind of the opposite that he has
5 on his motion for summary judgment no actual evidence to
6 present to the Court of the money being moved from Fund II.

7 THE COURT: Well, have you undertaken the
8 relatively simplistic analysis I described to look at all
9 the money that came in to Fund III over time and all the
10 money that went out of Fund III over time to trace it
11 exactly where it came from?

12 MR. CHEN: See, that goes to the question of
13 proving a negative. My client can say that no money ever
14 moved from Fund II to Fund III.

15 THE COURT: I'm asking a much more rudimentary
16 question.

17 Fund III had operations. They took in money from
18 somewhere and then spent it on real estate and then either
19 made profits or didn't.

20 There should be a way to trace all of its money
21 coming in.

22 MR. CHEN: There is. My client can point to all
23 the money that came in and to say which members it came
24 from, but it's a real estate company, and it's -- there --
25 at least at the onset, there was a fair bit of money coming

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1 in. And if Mr. Brecher says there is a transaction that he
2 does not understand, then I can explain to him and to the
3 Court and to a jury why that transaction was not a rollover
4 of funds. But otherwise, the money didn't all come in at
5 one time.

6 THE COURT: But there would be individual in the
7 general ledger in their accounting records, you know, wire
8 transfer in, wire transfer out. There's a way to do this to
9 prove hopefully without any doubt where the money to this
10 Fund III came from and where it went.

11 MR. CHEN: So absolutely. Absolutely, your Honor.
12 All of the wire transfers in have names. So we have records
13 of all of the wire transfers in, and there are no wire
14 transfers in from Mr. Brecher's clients into Fund III.

15 THE COURT: Well, they wouldn't be coming that way,
16 right, because the way this was -- again, this is an
17 interesting situation because all the strange facts which
18 you normally don't see are all agreed.

19 Their wire went into Fund II. So the wire you
20 would see if there was one would be from Fund II to Fund
21 III.

22 MR. CHEN: Exactly, your Honor, because it's a
23 rollover. If there was -- there were payments from Fund II
24 to Fund III, there would be a wire transfer or a check or
25 some document from Fund II showing money going out of Fund

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1 II into Fund III.

2 THE COURT: It would be helpful if one side or the
3 other had come in with some sort of a forensic accountant
4 saying we have done all that, Judge, and we can tell you
5 exactly where this -- whether it's \$10 million came from and
6 here's where it all is, but nobody seems to have done that.

7 MR. CHEN: So my client has put in a sworn
8 statement saying that as people with personal knowledge of
9 Fund II and Fund III, there are no such rollovers.

10 In discovery, we have given Mr. Brecher all of the
11 discovery, all of the financials for Fund III, and he is not
12 coming to the court saying that he does not have financials,
13 that he is missing something. That's not something that he
14 is claiming, and he's also gotten the books and records for
15 Fund II. He has the books and records and financials of
16 both Fund II and Fund III and at no point has he come to the
17 court saying documents are being hidden from me. There are
18 financial records which I think exist, but no one has given
19 to me.

20 Having had these records in his possession, if
21 there was one single transaction that was -- that looked
22 like a rollover of funds from Fund II to Fund III, he would
23 have brought that to the attention of the Court in a way
24 that we can not because for us to bring it to the attention
25 of the Court, we would need to bring to the Court every

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1 single transaction and tell the Court that none of these are
2 what Mr. Brecher is looking for.

3 THE COURT: Again, this is why I started with what
4 happens if there really was a mistake. Because you know,
5 regardless of whether the rollover did or didn't happen,
6 they were told that by the fund in its own name and by the
7 fund's manager in her own name on multiple occasions and in
8 very credible ways including receiving distributions which
9 is as real as it gets. And you know, they had been told way
10 back at the beginning maybe they could have proceeded
11 against Mr. Tse and protected themselves, but they were not
12 able to because they were told they had no interest in that
13 fund anymore. So these folks were significantly harmed and
14 disadvantaged by being misled.

15 MR. CHEN: I do think, your Honor, you touched on
16 another really critical issue which is if my clients messed
17 up which they did, how exactly were the plaintiffs harmed?
18 And I think, your Honor, you hit the nail right on the head.
19 Fund II was looted. They lost their investment in Fund II.
20 The recourse -- the harm they suffered was the recourse or
21 the harm they suffered was to go after the individuals in
22 Fund II responsible for their loss.

23 Now to bring a derivative action, one of the legal
24 requirements is you have to show that the managing members
25 won't bring the lawsuit themselves. They can't show that.

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1 Fund II did bring a lawsuit against Kenneth Tse.
2 Kenneth Tse put in an answer. We propounded discovery
3 demands upon them. They ignored that. We had to go to
4 court to strike their answer which the Court eventually did,
5 and then we had to schedule an inquest which took a
6 tremendously long period of time for unclear reasons. Now
7 we finally have a date for inquest.

8 Once inquest is completed, Fund II will do whatever
9 it can to recover whatever it can from Mr. Tse, and that
10 will be distributed to members of Fund II whenever that is
11 required.

12 THE COURT: What Court is that pending in?

13 MR. CHEN: I believe it's in Queens. Sorry. If I
14 can confer with my --

15 THE COURT: It's not in front of me.

16 MR. CHEN: It's not in front of you, your Honor.

17 MR. BRECHER: I think it's in Supreme Court,
18 Queens.

19 THE COURT: That's fine.

20 MR. BRECHER: State Supreme Court.

21 MR. CHEN: Yeah, I believe it's in Supreme Court,
22 Queens, but I don't have that.

23 THE COURT: Well, that's fine. So -- but your
24 point is that at the time it was too late to do anything
25 about it, but because -- at least -- I don't know whether

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1 this -- these facts are known or not, whether at the time
2 they were first told that they were rolling over, you know,
3 if they had been told the truth, then might there have been
4 assets available that they could have gone after that are no
5 longer there. I don't know the answer to that.

6 And who -- you know -- but what we do know is if
7 they weren't given that opportunity because they were told
8 they didn't need to worry about it because they were now in
9 a totally different fund, safe, and it's just a very
10 peculiar position.

11 And you know, you made the same argument on motion
12 to dismiss which I rejected that it didn't provide a
13 complete defense. And now all that's happened is you say
14 that the evidence bears it out that, well, the rollover
15 didn't happen.

16 But again, so how are you -- let's -- how do you
17 deal with the various arguments that regardless of whether
18 it happened or not, your client is not able to get out from
19 under its own representations and admissions, that it did
20 happen?

21 MR. CHEN: I think that this argument is very
22 squarely addressed by the operating agreement of Fund III.

23 The operating agreement of Fund III has a very
24 clear ironclad provision with respect to waiver.

25 THE COURT: Is that the point that the

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1 contributions have to be cashed?

2 MR. CHEN: It's to some point the contributions
3 have to be cashed but also to the broader point of if --
4 basically, Mr. Brecher's clients are saying that
5 notwithstanding what the operating agreement says, there
6 should be estoppel, there should be -- they should be --

7 THE COURT: What does the agreement say because if
8 a rollover happened, it -- if it happened, it would be
9 cashed. You are taking it from -- you would be liquidating
10 their investment in Fund II, taking the remaining -- the
11 resulting cash and moving it to Fund III. It would be
12 entirely consistent with -- in other words, the story they
13 were told would be consistent with a legitimate investment
14 in Fund III; wouldn't it?

15 MR. CHEN: Your Honor, if the rollover happened, if
16 the money from Fund II went into Fund III, we wouldn't have
17 this case.

18 THE COURT: I understand, but it's not -- from their
19 perspective, there was no violation of any -- they don't
20 need to prove some waiver of it. Their case is based on the
21 fact that Fund III is essentially estopped from denying what
22 it represented and admitted on numerous occasions had
23 occurred. Not might occur. Had occurred.

24 MR. CHEN: So a core provision of estoppel is that
25 estoppel needs some kind of harm, that it would make sense

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1 for my client to be estopped. And so if your -- your Honor,
2 if your counter-factual were accurate in that, for example,
3 if the plaintiffs could have recouped the money and they
4 didn't, then maybe they might have --

5 THE COURT: There's no way of knowing that, and
6 there's no way of knowing that because they were deprived of
7 the opportunity to even try.

8 MR. CHEN: So I would state that they -- that the
9 looting of Fund II was what caused their damages which
10 caused their harm.

11 THE COURT: But we -- the record right now, and I
12 think this is where the absence of information may not
13 really help you, the record that we have now doesn't really
14 reflect what would have happened if they had gone after Fund
15 II right away as soon as there was a whiff of something
16 going wrong which only Ms. Wu would know and these people
17 would not. The plaintiffs wouldn't know. So they did reply
18 to their detriment.

19 Now, we can't -- no one can prove what would have
20 happened had they done that, but there is a fair amount of
21 law that the defendants can't rely on the difficulty of
22 proof when they're responsible for the difficulty of proof
23 existing.

24 MR. CHEN: I don't believe, your Honor, it is a
25 difficulty of proof. For the plaintiffs to have to go after

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1 Mr. Tse personally, they would need to establish -- it would
2 have to be a derivative lawsuit. They wouldn't be able to
3 sue Mr. Tse on their own, right, because the money was taken
4 from the company and any money that comes in would have to
5 be divided among all the members of Fund II. Not the
6 plaintiffs only. So they couldn't bring their own lawsuit.

7 THE COURT: But they could have tried something to
8 protect themselves.

9 MR. CHEN: But the money wasn't there.

10 Once you invest money into Fund II, the money is no
11 longer yours. The money belongs to Fund II. So it was Fund
12 II that suffered a financial loss that Fund II had the right
13 to bring a lawsuit to recover.

14 THE COURT: I guess the fact remains that whoever
15 fumbled the ball in trying to either stop Mr. Tse from
16 walking away with the money if in fact he had walked away
17 with it already, it certainly wasn't the investors. And Ms.
18 Wu is the center, meaning, she is involved in all of these
19 funds, and it's just an odd position to say that, well, it's
20 these plaintiffs are out of luck.

21 Now, I do get it that it's a zero sum game. And if
22 these folks have an interest in Fund III, then there's some
23 dilution of the other investors, and the question is, well,
24 what do you do about that. And one answer is, well, those
25 investors can go after their manager for diluting them

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1 without getting the cash. I don't know, but that's the
2 conundrum that I find myself in.

3 MR. CHEN: I can address that.

4 Ms. Wu does not have the money. She does not have
5 hundreds and hundreds of thousands of dollars in order to
6 reimburse all the other members of Fund III, the ones who
7 actually put the money into the company to allow the company
8 to buy and sell real estate. She doesn't have the money.
9 The management company doesn't have the money.

10 With most LLCs, the management company actually
11 owns a relatively --

12 THE COURT: That just means that their claim may
13 not be worth very much, but the manager of Fund III conveyed
14 I would think in Fund III's name two percent ownership
15 shares of Fund III to these plaintiffs.

16 MR. CHEN: And that, your Honor, goes to the waiver
17 argument.

18 It is -- and I do understand there's a fine line
19 between -- whether it's an estoppel argument or a waiver
20 argument, but our position is for Fund III to issue
21 membership interest to the plaintiffs based on not having
22 actually received money but just based on Ms. Wu saying that
23 the company received money is not enough; that because the
24 operating agreement which plaintiffs had -- the plaintiffs
25 had the operating agreement, so they are aware of the terms

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1 of the operating agreement. There is a certain procedure to
2 follow in order to get a waiver, and this case would be the
3 waiver.

4 THE COURT: They would have no way of knowing that
5 a waiver was needed because what they were told was behind
6 the scenes a rollover occurred and a rollover is not
7 something that requires a waiver because it's going to be
8 cash. They're saying fear not. Your money, your actual
9 cash is now in Fund III, and they had no reason to question
10 that because they would not be making a wire transfer. They
11 already made it, and they were specifically told in another
12 piece of just horrendous evidence, you do not have to make
13 this payment. You do not have to make a contribution to
14 Fund III over and over again.

15 So it's hard for me to imagine a more innocent
16 victim of all of this than these plaintiffs.

17 MR. CHEN: Absolutely, your Honor, and this goes
18 back to the analogy I made at the beginning of my oral
19 argument which is if the bank makes an error and issues more
20 money than you should be entitled to and then you spend the
21 money innocently without realizing there was a bank error,
22 you don't get to keep the money simply because an error was
23 made, and the plaintiffs here were harmed. I don't disagree
24 with that. I don't dispute that, but they were harmed by
25 the person who stole the money from Fund II. That was the

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1 actual cause of their actual financial harm.

2 THE COURT: I don't think that analogy is really
3 very close. This was not a one time, you know, bank error
4 in your favor. This was over a long period of time with,
5 you know, schedules of ownership, tax forms, which generally
6 are binding on the taxpayer receiving distributions.

7 You know, it's a lot. It's not a -- you know, a --
8 one of those quickly reversible mistakes that is obvious.
9 You know, this is -- you know, and I do think they were in a
10 different position because of all of the representations.

11 Let me turn to the last part, their argument about
12 breach.

13 Is this fund still -- has this fund been dissolved?

14 MR. CHEN: The fund has not been dissolved. It is
15 still operating, and I believe the reason why it's still
16 operating is that there is maybe one or two pieces of
17 property remaining that have not been successfully sold.

18 THE COURT: So a bunch of investments were -- so a
19 bunch of disbursements have occurred to the other partners.

20 MR. CHEN: That is correct. And on the breach of
21 contract claim, the reason why we didn't fully vigorously
22 oppose it is because we have no objection. We have no
23 issues with the company being closed down and the assets
24 sold. I mean, that's not something that we are opposing.

25 Ms. Wu's authorizing the extension of the company

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1 because she was in charge of Fund III and had the authority
2 to do so.

3 THE COURT: Right. And it makes sense. If your
4 money is invested in real estate which is what its purpose
5 was, you want to try to turn that into --

6 MR. CHEN: Exactly. No one wanted a fire sale of
7 all the properties that had to be completed within a month
8 which would have destroyed any of the value in all of the
9 purchases and renovations.

10 And I think as the Court correctly pointed out, if
11 the company was dissolved in 2020, then all the
12 distributions were made, and plaintiffs would then at the
13 end of all of this might eventually get a judgment against a
14 company that had been dissolved many years ago.

15 THE COURT: Well, they would have had whatever the
16 assets that existed at the time, I suppose.

17 THE COURT: Okay. Anything further Mr. Brecher
18 before I take a short break? Anything further, Mr. Chen? I
19 should ask you. Anything else you want to add?

20 MR. CHEN: Let me just quickly check my notes.

21 THE COURT: You were pretty thorough I think.

22 MR. CHEN: Thank you, your Honor.

23 Nothing further.

24 THE COURT: Mr. Brecher, anything further?

25 MR. BRECHER: The only thing I would add, your

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1 Honor, is the testimony was that -- from Ms. Wu is that she
2 didn't tell them in August of 2019 that there is this big
3 problem at Fund II. She just -- she concealed that
4 information from them. So this is a better -- you know,
5 Fund III is better. So they had no idea that --

6 THE COURT: Well, I think the suggestion to
7 rollover happened in August of 2018.

8 MR. BRECHER: I'm sorry. Yeah. I apologize.

9 When that suggestion was made, Ms. Wu didn't tell
10 them. I think she admitted it at her deposition. She
11 didn't tell them about it. She knew there was a problem in
12 Fund II, but she didn't tell them about it. She just
13 promoted Fund III as a better opportunity, so my clients
14 followed her lead on that.

15 THE COURT: All right. Thank you. I'm going to
16 take a short break.

17 (Whereupon at this time there was a recess taken.)

18 THE COURT: All right. This is a fascinating case,
19 and I agree with both sides that there really is no need for
20 a trial here because the facts, the good, the bad and the
21 ugly are all pretty much agreed, and the question is what
22 does the law do based on this given set of facts in terms of
23 the plaintiffs' rights to Fund III in a situation as we have
24 here where they invested in Fund II, were told by the
25 co-manager of Fund II and the manager of Fund III that the

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1 -- that their funds -- they were not told about anything
2 untoward in Fund II at that time. Their funds were rolled
3 over into Fund III upon their agreement which they agreed.

4 Thereafter followed a torrent of representations
5 and omissions that the rollover had occurred. They were
6 asked to and did sign a subscription agreement to Fund III.
7 They were treated as Fund III members in communications both
8 by Fund III and by Ms. Wu as manager of Fund III. They were
9 issued K-1s which the record shows were -- was information
10 that was sent to the IRS and reflecting their ownership
11 interest in Fund III. There were enumerable messages from
12 the manager and agent of Fund III confirming their interest
13 in Fund III. They received notices from Fund III. They
14 were listed in an ownership group attached to the Fund III
15 operating agreement. They received a distribution and a
16 partial return of capital from Fund III. It is difficult to
17 imagine a more compelling record of admissions than that.

18 In my view, the overwhelming factual record
19 supports summary judgment for the plaintiffs on their
20 declaratory judgment that they are in fact -- they have the
21 ownership interest in Fund III that was repeatedly
22 represented to them and confirmed by admissions.

23 The legal support for that going through the
24 record, there was a number. I think I begin with the fact
25 that based on the fact that all of the statements are

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1 admissions of the defendants, that they are overwhelming and
2 I -- again, I think just so the appellate record is clear, I
3 think that the -- there does seem to be, you know,
4 reasonable grounds to conclude that plaintiffs' investment
5 in Fund II was not in fact liquidated and then rolled over
6 into Fund III. They would have no way of knowing that. And
7 in fact, the record is still a little mirky to me which is
8 surprising given that we are at the -- past discovery. But
9 even assuming that is true, I still think that the
10 defendants can not get past the -- again, the torrent of
11 admissions that the rollover did occur.

12 I think plaintiffs relied on it to their detriment.
13 So there is estoppel at a very, very deep level. It's not
14 possible for us to reconstruct what plaintiffs might have
15 done if they had been told the truth right at the beginning
16 and that the rollover couldn't occur because the funds were
17 already in danger, and maybe they were still there at that
18 time. There's really no way of knowing, but the -- the
19 reason there's no way of knowing is all at the feet of the
20 defendants.

21 This is very much unlike the bank making an error
22 in your favor where you have every reason to know that you
23 don't have millions of dollars in the bank and you just
24 receive it and spend it anyway.

25 The only party who could have known the

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1 behind-the-scenes accounting between Fund II and Fund III
2 was Ms. Wu who was the co-manager of one and the sole
3 manager of the other.

4 So I think just on pure evidentiary grounds if we
5 went to trial, whether it's a jury trial or a bench trial --
6 I can't recall -- I think that the admissions that bind the
7 defendants are overwhelming that -- and that they can not be
8 heard at this point to deny the plaintiffs' ownership
9 interest in Fund III.

10 There are other layered-in arguments that have been
11 made that I think have differing levels of strength. I
12 think the tax estoppel argument is strong here. The 2018
13 tax return of Fund III which, you know, we have two
14 different pieces of. We have the document indicating or
15 signed document where the Fund III manager confirms the
16 accuracy of the tax return. We have the accountant for the
17 fund sending the K-1 which just as a stand-alone document is
18 not signed perhaps, but it is an attachment to a signed tax
19 return. And when you put documents NYSCEF 59 and 60
20 together, I think that indicates that a representation was
21 made to the United States government by Fund III that these
22 plaintiffs did in fact each have a two percent membership
23 interest in Fund III, and I don't think they can be relieved
24 of that estoppel. This is unlike the Harounian case on
25 which the defendants rely which happened to be one of my

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1 cases on appeal. That's United Hay versus
2 H-A-R-O-U-N-I-A-N, 213 AD3d, 443, First Department, 2023
3 where in that case, it was the plaintiff who had issued an
4 initial tax return suggesting that the defendant had
5 received a distribution only to later amend it and change
6 that it was in fact a theft, and the explanation was that
7 the initial tax return, he didn't want to make his father
8 look like a criminal.

9 In any event, both I and the First Department
10 viewed the fact that there was an amendment of the tax
11 return that was alleged to be the estoppel was material.
12 Here, that didn't happen. The 2018 tax return was never
13 amended. It was -- I guess the next year, they just changed
14 all the numbers around, but I don't think that's the same
15 thing. They never connected or sought to correct any
16 representation made in the 2018 return which remains. So I
17 think tax estoppel applies here. There is an argument for
18 collateral estoppel based on the books and records case that
19 was in front of Judge Rackower, but I'm not going to rely on
20 that. I think you can argue that by granting books and
21 records to the plaintiff in that case which is the plaintiff
22 here, she had to have concluded that they were in fact
23 members of Fund III, but her actual ruling does not come
24 across to me anyway as her making a final factual finding on
25 that point. She says that they are apparently members and

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1 then later says that the issue of their ownership is going
2 to come up in subsequent litigation, frankly, this one, and
3 says she says, "But for our purposes, they, meaning the
4 plaintiffs, have shown that they have standing and the
5 burden would then shift to Fund III to show that they have
6 some improper interest here or they want to see the books
7 and records for some improper purpose and Fund III has not
8 shown that."

9 So she went on to grant the books and records
10 petition. So the best you can say is that implicit there
11 was some finding that plaintiffs' likelihood of showing that
12 they were members, but I am not comfortable relying on that
13 as a binding collateral estoppel ruling, but I do think the
14 tax estoppel ruling and then more importantly, the regular
15 equitable estoppel of having misrepresented to the
16 plaintiffs for years or for a period of time about their
17 ownership is more than sufficient to bind the plaintiffs --
18 to bind the defendants here. So -- and I do not think that
19 the defendants' arguments about, you know, there not being a
20 waiver of the rules of Fund III, all of that goes by the way
21 side because they are estopped from disputing that there was
22 an actual rollover here of cash from plaintiffs' end
23 investment into the new entity. That's regardless of
24 whether or not it actually happened because there may be no
25 way to piece it together at this point, and I think that

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1 based on their numerous representations and reliance
2 inducing representations, they are estopped from making
3 those arguments.

4 The -- so I am granting summary judgment on
5 plaintiffs' claim for a declaratory judgment of membership
6 in Fund III, plaintiffs' claim for breach. Well, I'm sorry.
7 I'm also granting summary judgment in plaintiffs' favor
8 dismissing defendants' claim of breach that was a
9 counterclaim I think where they said plaintiff had failed to
10 make their contribution into Fund III. I think all of the
11 representations and everything else obviously undermine that
12 claim as a matter of law because defendants are estopped
13 from disputing that plaintiffs did contribute as they were
14 required to do into Fund III. The plaintiffs' motion for
15 breach of contract because the fund was not dissolved in
16 2020 is a sort of a peculiar one, and I'm denying that
17 motion, and I don't see a need for a trial on it.

18 I think that, you know, the defendants have the
19 better of it that the record is that this was within
20 manager's discretion to continue the fund. It didn't have
21 to be in writing. There is sufficient evidence that the
22 fund continued, and frankly, it doesn't prejudice the
23 plaintiffs that the fund continued.

24 What does prejudice is that they were continuing to
25 make distributions which is a function of them not being

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1 dissolved. But -- so I think that the defendants actually
2 get summary judgment on that claim. I don't see a breach of
3 contract here. Plaintiffs remain and have a declaration
4 that they should have been a member of Fund III, and you
5 know, the other claim's I think for an accounting. Those
6 are claims that are not subject to the summary judgment
7 motion, but I think they flow from my mind that they are a
8 member of Fund III, and that's where ultimately the monetary
9 part of this case will go is -- an accounting will have to
10 be undertaken if plaintiffs were a member.

11 Well, since plaintiffs are a member of Fund III and
12 did not participate in the distributions between -- that
13 have been made, there is going to have to be an accounting
14 made of what they are owed in respect of their membership
15 interests. So that's I think the only thing remaining. I
16 don't think there is a breach because the fund wasn't
17 dissolved. And so the question is how do we undertake the
18 accounting in light of that.

19 Now, typically an accounting is a procedure where
20 the defendant would have to undertake to go through their
21 records and render an accounting, and then there could be
22 some back and forth, and you can challenge the accounting.
23 So I guess I'll give you a little time to talk about the
24 best way to do that. I suspect there will be an appeal.
25 That doesn't necessarily have to stop the accounting from

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1 going forward just to finish this up so that the record is
2 complete, but those are my findings. So I don't think there
3 is a need for a trial. There is a need for an accounting,
4 and I think the accounting is both as to the manager and as
5 to the fund if I'm not mistaken. I think those were the
6 claims, but whatever they are in the complaint, they are.
7 And so why don't you meet and confer on a schedule for that
8 accounting going forward. It may not be terribly
9 complicated, but I want to at least make sure it's getting
10 underway. I'll issue a short order incorporating by
11 reference my ruling on the record. I'll ask parties to
12 jointly obtain the transcript and upload it to NYSCEF. I
13 think since both were movants, it makes sense to submit
14 that, and I think that's all I have for you today.

15 MR. CHEN: Your Honor, I do have one question.
16 With respect to -- with respect to if Fund II is in fact
17 able to recover on any of the money, your order seems like
18 it would be requiring a double recovery.

19 THE COURT: No. In my view, by seeking a
20 declaration of membership in Fund III, these plaintiffs have
21 given up any membership interest in Fund II.

22 MR. CHEN: Thank you, your Honor.

23 THE COURT: I mean, maybe there was a different
24 view, but I can't be members of both, and they have
25 litigated long and hard to be deemed members of Fund III and

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1 that necessarily involves giving any interest in Fund II at
2 least from my perspective.

3 MR. BRECHER: I think that's probably right, but
4 one other thing.

5 THE COURT: I think the record should indicate how
6 quietly Mr. Brecher said that.

7 MR. BRECHER: My throat was blocked.

8 THE COURT: It was catching in your throat to admit
9 to that.

10 Look, you can make an argument if you want if it
11 turns out that that's where the pot of gold is, but then the
12 representations and all of the admissions start to flip.
13 You can't be in both places at once.

14 MR. BRECHER: Understood.

15 THE COURT: Okay.

16 MR. BRECHER: I do have one other question.

17 There was a counterclaim that was asserted by Fund
18 III against the plaintiffs for -- to pay back the amounts
19 that they --

20 THE COURT: Yeah. I -- you may have missed that.
21 I briefly granted your motion for summary judgment
22 dismissing that.

23 MR. BRECHER: Thanks. Just wanted to clarify.

24 THE COURT: All right. Thanks, everyone. Good
25 job. It's an odd case, and you both argued it well.

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Appreciate it.

MR. BRECHER: Thank you, Judge.

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL MINUTES TAKEN OF THIS PROCEEDING.

Karen Mangano

KAREN MANGANO, CSR
Senior Court Reporter

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