

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK - CIVIL TERM - PART 6

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4 XIAOYAN LU, YIMIN WU, XIAOZHEN ZHAN AND COMPASS
5 REAL ESTATE INVESTMENT LLC

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Petitioners, Index No.
152990/2020

-against-

6 SAGEWOOD SFF III LLC AND SAGEWOOD
7 MANAGEMENT LLC

8 Respondents.
9 -----X

10 Skype Conference
11 **MOTION PROCEEDINGS** October 9, 2020

11 B E F O R E:

12 HONORABLE EILEEN RAKOWER,
13 Supreme Court Justice

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

15 LAW OFFICES OF ETHAN A. BRECHER, LLC
16 Attorneys For the Petitioner
17 244 Fifth Avenue Ste. B241
18 New York NY 10001
19 BY: ETHAN A. BRECHER, ESQ.

20 DGW KRAMER LLP
21 Attorneys For the Respondents
22 One Rockefeller Plaza Ste. 1060
23 BY: JACOB CHEN, ESQ.

24 CHERYL-LEE LORIENT
25 SENIOR COURT REPORTER

1 THE COURT: So I have a petition.
2 Petitioners would like to have respondent produce the
3 books and records of -- I'm going to call it -- Fund
4 III. And I have opposition by way of a motion to
5 dismiss. So I'll hear from the petitioners first
6 please.

7 Unfortunately, your names are not being
8 populated underneath your pictures. So please just
9 tell the reporter who you are before you speak.

10 MR. BRECHER: Good morning, your Honor. May
11 it please the Court. My name is Ethan Brecher. And
12 I'm appearing here on behalf of the petitioners.

13 It's Ethan Brecher, E-T-H-A-N middle initial
14 "A," last name is B-R-E-C-H-E-R. And my firm is Law
15 Office of Ethan A. Brecher LLC, 244 Fifth Avenue, Suite
16 B241, New York, New York 10001.

17 MR. CHEN: And good morning, your Honor.
18 This is Jacob Chen appearing on behalf of respondents.

19 THE COURT: All right. Go ahead,
20 Mr. Brecher.

21 MR. BRECHER: Good morning, your Honor.
22 This petition has been brought by the petitioners who
23 are members in what your Honor designated as Fund III.
24 It was an investment fund. And we've started the
25 petition here to obtain books and records to

1 investigate potential misconduct.

2 Just so the Court is aware, there is a
3 companion plenary action that's been agreed to be
4 stayed, by stipulation of the parties, pending whatever
5 the outcome of this particular books and records
6 petition is. But the petition seeks the books and
7 records --

8 THE COURT: Where is that action just so I
9 know?

10 MR. BRECHER: It is pending in the same
11 Court here. In New York Supreme Court, New York
12 County. It has a separate docket number.

13 THE COURT: Has it been assigned or are they
14 going to try to give it to me? No.

15 MR. BRECHER: As of this point, we just
16 filed a summons with notice and then there's a
17 stipulation staying the matter until the resolution of
18 the books and records petition.

19 MR. CHEN: There is no RJI filed in that
20 case, your Honor.

21 THE COURT: Thank you.

22 MR. CHEN: So, it has not been decided.

23 THE COURT: Thank you. Okay.

24 I'm sorry for interrupting, Mr. Brecher. Go
25 ahead.

1 MR. BRECHER: Thank you. So, the
2 respondents filed a motion to dismiss the petition and
3 asserted two grounds; although, it appears that one
4 potential ground they're not continuing to rely on
5 which is whether the petitioners are members of the
6 Fund III. They made that initial contention in their
7 moving papers, but in the reply brief, they've
8 appeared, although it's not entirely clear, to have
9 dropped that argument.

10 But, the primary argument they certainly
11 focused on in their reply brief and the first one they
12 address is whether this Court has jurisdiction,
13 essentially, to entertain a books and records case
14 under the Delaware statute.

15 A couple of things. One, in the operating
16 agreement governing the membership, there's a venue
17 provision for New York Courts to -- for venue to be in
18 New York. The business, this whole place of business,
19 is located in New York.

20 We believe that the controlling case that
21 kind of is dispositive here is the Sachs versus Adeli
22 case, S-A-C-H-S v. A-D-E-L-I, 26 Appellate Division 3d
23 52 First Department 2005, which deals with the
24 companion statute that deals with the corporations in
25 Delaware. But it's, essentially, the same thing.

1 It says that the language in the statute that
2 says that jurisdiction is exclusively in Delaware for
3 the purposes of the statute, the Sachs case says that
4 that language in the statute cannot divest the Court
5 in New York of the right to entertain a claim under
6 that statute as long as the jurisdiction exists. And
7 it's based on a long series of U.S Supreme Court cases
8 that we have cited in our moving papers.

9 So we believe that the Sachs case, the
10 Supreme Court case -- there's another case that I,
11 actually, found this morning that I also cite. It's a
12 Supreme Court, New York Supreme Court, level case of
13 A&G Research versus GC Metrics. It's 19 Misc.,
14 M-I-S-C, 3d 1136. It's a 2008 case by Judge Scheinkman
15 out of Westchester Supreme Court dealing with a New
16 Jersey statute.

17 But the same principle applies that under the
18 law, this Court is entitled to hear this case, that, it
19 makes -- I think the Court should, we respectfully
20 submit, exercise jurisdiction over it, because the
21 business, itself, is based out of New York City, the
22 operating agreement has a venue provision for New York
23 as well. The respondents have cited in their reply
24 brief --

25 THE COURT: Before we get into that, let's

1 just talk for a minute. Because, you know, the Sachs
2 case doesn't -- and this is why I stopped you when you
3 said there's another matter that's been filed, because
4 there's a difference between an action which the only
5 subject matter of the action is a books and record
6 request, "we want to see the books and records" -- and
7 I think that that's what Delaware is talking about when
8 they say you have exclusive jurisdiction over that.
9 This is Delaware corporation moving pursuant to 18-305.

10 If anybody is not speaking, please, mute
11 yourself. Okay. Let's try again.

12 So I think that's what Delaware is talking
13 about if you're a Delaware firm or Delaware partnership
14 or an LLC, as the case may be here, and you've moving
15 pursuant to 18-305. I'm still echoing.

16 So if that is the only subject matter that's
17 being considered, I think that's what the Delaware
18 Courts want is exclusive jurisdiction.

19 However, in the Sachs case, the Court of
20 Appeals went further and they said, "If an action
21 concerns a commercial transaction in New York and it's
22 a matter of which the New York Courts would otherwise
23 have proper jurisdiction, then commodity does not
24 prevent the New York Courts from executing that
25 jurisdiction." So "Sachs" kind of drew that

1 distinction between an action which is just for books
2 and records pursuant to a Delaware statute and an
3 action where we are otherwise concerned with the case.
4 There's a fraud alleged in Sachs. And so, New York is
5 otherwise concerned with the case. So you're telling
6 me now.

7 So I first read this and I thought "Okay.
8 It's just a books and records case." But now you're
9 telling me there's more to it and there's already been
10 a case filed. So, I just wanted to make that
11 distinction for what you're going to say further.

12 I've read the papers and I've read the cases
13 that both sides cite. But go ahead, Mr. Brecher.

14 MR. BRECHER: Thank you. As you've noted,
15 your Honor, I'm sure you saw in our papers also, the
16 Delaware Courts itself, the Chancery Court, even itself
17 said that in one of the cases that we cited that it's
18 not exclusive to Delaware anyhow.

19 And as indicated there is a choice of law
20 provision -- I'm sorry, a choice of venue provision in
21 the operating agreement. There were several -- I
22 wanted to address some of the cases that Sagewood
23 addressed in its brief.

24 THE COURT: And just because you mentioned
25 it, I just want our reader to know that there's a

1 choice of law provision too, but it says, "Delaware
2 law."

3 MR. BRECHER: Right. So this Court would be
4 required to apply Delaware law. This Court and I think
5 the First Department in the Court of Appeals has said
6 in any number of cases that the Courts in New York are
7 able to apply law from foreign jurisdictions in New
8 York. I think that case that I mentioned, the A&G case
9 talks about that. That was a 2008 case. But yes,
10 there's no issue about this Court applying foreign law.

11 The Antebi, A-N-T-E-B-I, versus Thor Gallery
12 case, which Justice Sherwood decided in which the
13 respondent cited in its brief, we believe is
14 distinguishable; for one reason, Justice Sherwood
15 didn't cite the Sachs case. The second reason is that
16 the plaintiff did not even dispute that Delaware was
17 the exclusive forum for statutory books and records
18 claim. So that issue or this particular issue wasn't
19 join in that case. So that case didn't decide the
20 issue.

21 The Werther, W-E-R-T-H-E-R, versus WIV New
22 York case is also distinguishable I think on two
23 grounds; one is that, we don't believe it had a choice
24 of venue provision in that case. And also, it was
25 based on the internal affairs doctrine and it didn't

1 address this issue that we believe here that, under the
2 law, that this Court may entertain the books and
3 records case.

4 And I think that this was also -- this may
5 have also been decided before the Delaware case which
6 itself says that Delaware wasn't the exclusive
7 jurisdiction for that.

8 And then, the final case that was more recent
9 from Justice Ostrager the Alan, A-L-A-N, versus Ahmad,
10 A-H-M-A-D, case. In that case, the books and records
11 application was made under a contract and, in fact, was
12 granted in that case. So, I think it's just not
13 applicable.

14 I also note one thing, in the Antebi case
15 that, that was, actually, a case where Justice Sherwood
16 said that the parties would be entitled, I guess in the
17 plenary action, to production of books and records
18 during the ordinary course of discovery. There had
19 been some issue that had been determined in the
20 plaintiff's favor during the course of the case. So
21 it's a little bit different.

22 So the issue really then comes on this
23 question, "Does the statute bar this Court from
24 entertaining the action altogether?" If you believe
25 that the -- you know, with the combination of these

1 things, the choice of venue, the language in the Sachs
2 case, the language in the Delaware case, the other
3 Supreme Court -- U.S Supreme Court case that we cited
4 where one state cannot bar another state from hearing a
5 case that the -- from hearing a claim under a statute
6 like this, that this Court does have jurisdiction and
7 that it should exercise it, because we have, as I
8 indicated, plenary action.

9 I can see if I can get, on my screen, without
10 disconnecting everybody here, the index number for that
11 case. Hold on a moment.

12 THE COURT: All right. I'm going to ask you
13 to actually tell me what the causes of action are in
14 that case. But just, while you look for that, I want
15 to make a brief record.

16 For the reader of our record, a number of
17 members got involved in --

18 Okay. I've muted everybody except for
19 myself. So let's see if that helps. Everybody
20 remember, before you speak, you're going to have to
21 unmute yourself.

22 Do you still have an echo?

23 So I don't know where it was coming from, but
24 that seems to have helped.

25 So a number of members got involved with Fund

1 II. And I believe they each invested \$200,000. And I
2 didn't see the pitch book for Fund II, but if it's
3 anything like Fund III, it was to invest in different
4 real estate transactions and buy certain homes -- 1300
5 square feet or whatever -- flip them, try to make a
6 profit and distribute back to the members.

7 There came to be a time where the members
8 were questioning the management of Fund II which was
9 managed by Mr. Wu. And Mr. Wu then came forward with a
10 new idea "Let's all invest in Fund III. And your
11 investment in Fund II will rollover to be your capital
12 investment in Fund III."

13 And, the members communicated through the
14 WeChat application and there were a number of screen
15 shots of the conversations that were provided with
16 these papers. And there was a pitch book with regard
17 to Fund III. And as I indicated, there were going to
18 be certain real estate investments which they hoped to
19 flip profits and distribute funds back to the members.

20 There were three individuals who were
21 members. I think it's an LLC called Compass which was a
22 husband/wife LLC and the managing member would be
23 Sagewood. And those were all the participants in Fund
24 III.

25 The managing member, pursuant to the

1 operating agreement, was able to manage it, was able to
2 make decisions for it. And, of course, all of the
3 members agreed, by signing the operating agreement,
4 that they understood the riskiness of the investment
5 and could afford to lose their entire capital
6 investment.

7 And there were numerous communications over
8 the course of over a period of one to two years where
9 there were calls for capital investment. There were
10 communications that said that "This is for information
11 purposes only. Your capital investment in Fund II
12 rolls over and becomes your capital investment in Fund
13 III."

14 At one point in time, there's a communication
15 that shows zero capital investment due and owing,
16 meaning, they were fully funded.

17 The operating agreement does give venue in
18 New York. And it says to apply Delaware law, because
19 there's a choice of law provision there.

20 And at some point in time, there's even a
21 return on the investment. There is a disgorgement of
22 20,000 out of the 200,000 back to each of the members
23 and a profit of, roughly, three, three and a half
24 thousand dollars. And I saw the check that went out
25 to, at least, Compass for that amount.

1 So, there came a point in time where the
2 members were insecure and they sent a demand, pursuant
3 to Delaware 18-305. They wanted to inspect the books
4 and records.

5 Pursuant to 18-305, the Fund III had five
6 business days to produce. There were stipulations that
7 were signed extending that time, a number of times,
8 before this petition was brought.

9 Again, my petition solely seeks production of
10 books and records. The motion to dismiss discusses a
11 number of things, the first being subject matter
12 jurisdiction, whether or not this Court should be
13 entertaining a books and records demand of a Delaware
14 LLC or partnership. It's treated as a partnership in
15 the operating agreement. And indeed there are K-1s
16 that are produced. So, it establishes a partnership.

17 And the second thing that was raised was
18 something within the operating agreement which says
19 that your capital contribution must be in cash. And
20 since these were not cash contributions, but rather
21 rolling over from Fund II to Fund III, the motion to
22 dismiss says you're not even members of Fund III,
23 because you didn't make your cash capital contribution.

24 So, that's what Mr. Brecher was referring to
25 when he said he wasn't sure if they abandoned that

1 claim or whether there was a waiver. And there's talk
2 about whether in Delaware there can be a waiver of this
3 sort under Delaware law. But, that's what Mr. Brecher
4 was referring to when he said he wasn't sure if it was
5 abandoned.

6 So Mr. Brecher, I'm going to go back to you
7 and I'm going to do it for this reason. I first viewed
8 this petition as just looking for books and records
9 under Delaware 18-305 and looked at cases that speak to
10 that. There are Courts in this jurisdiction who say,
11 "No, if that's the only subject matter" -- unlike in
12 Sachs where New York, actually, has an interest in the
13 matter because there was a fraud alleged -- "then,
14 we'll send it to Chancery Court where that Court has
15 jurisdiction over the books and records demand."

16 But cases like Sachs do speak about "Well, is
17 there something more to this case? New York really
18 does have an interest in this dispute."

19 And similar to Antebi, is it, eventually,
20 going to be produced in discovery? In other words, is
21 it inevitable that the books and records are going to
22 be produced? Why are we sending you to Chancery Court
23 in Delaware to get production if you're going to get it
24 in discovery in the underline dispute?

25 So in a sense, this came in backwards for me,

1 because I got the petition, don't know anything about
2 the other matter. But if the other matter has a
3 foundation upon which you want a claim, New York has
4 the dispute, then I want to hear about it.

5 So why don't you tell me what the claims are
6 in your other action. You have to unmute yourself.

7 MR. BRECHER: Okay. Thank you, Judge. So
8 the other action is filed in the New York State Supreme
9 Court, County of New York. It was filed on May 28,
10 2020. There's index number 651832/2020, summons with
11 notice.

12 The allegations that have been asserted there
13 are fraudulent inducement, conversion, breach of
14 fiduciary duty, unjust enrichment, breach of contract,
15 fraudulent and negligent misrepresent --

16 THE COURT: I was just telling you to slow
17 down so we can get you.

18 MR. BRECHER: Oh, all right. So let me go
19 back to the list. Fraudulent inducement, conversion,
20 breach of fiduciary duty, unjust enrichment, breach of
21 contract, fraudulent and negligent misrepresentations,
22 inequitable accounting and the imposition of a
23 constructive trust and seeking damages of not less than
24 \$720,000 which is the -- after the amount that was
25 returned to them from Fund III, that's the balance.

1 THE COURT: Actually, what's the basis for
2 the claim of fraud?

3 MR. BRECHER: Well, we believe that there is
4 some -- what happened here is that my clients
5 originally invested in Fund II. At some point, they
6 start asking questions about Fund II and they're told
7 "Don't worry. You know what? We'll rolled you over
8 into Fund III."

9 They get rolled over into Fund III. There's
10 K-1s. They get checks issued out of Fund III. They
11 get other documents reflecting that they are invested
12 in Fund III.

13 And then, towards the third quarter of 2019
14 they're told "Oh, you're not in Fund III. You never
15 were in Fund III. You never contributed anything" in
16 spite of the K-1s that were issued to them as well as
17 the checks that they, actually, received with money
18 that was drawn on a Fund III bank account.

19 Then they're told "You're not even in Fund
20 III at all." Then they further inquired into that,
21 they were told -- they get no answer. There's never
22 been an answer as to what happened and where the money
23 is and what's happened to it. It's gone. It may be
24 gone, it may not be gone. But there's no answer to
25 that.

1 We believe that something amiss has occurred
2 here, whether the money has been misappropriated,
3 whether it was invested contrary to the investment
4 purpose that was designated in the investment
5 memoranda, that, the money -- that the combination of
6 being told "You're not in Fund III" even though there's
7 numerous pieces of evidence showing that they are and
8 then the silence that there's some kind of -- something
9 seriously amiss at what happened here. So, that's the
10 factual underpinning of the claim.

11 And the real issue is, where's the money and
12 what happened to it and why are they told they're not
13 in Fund III when they're in Fund III, that, there's
14 something wrong. That's the factual basis of what we
15 are proceeding on at this point in trying to recover
16 the money, because the money is not, you know --
17 there's just a silence, essentially, is what the answer
18 is at this point.

19 MR. CHEN: So, your Honor, if I may present
20 my, I guess, my support for the motion and reply to
21 Mr. Brecher's points and arguments raised.

22 THE COURT: Yes. I was nodding, because I
23 was trying to --

24 MR. CHEN: Thank you very much, your Honor.

25 THE COURT: Mr. Brecher, if I could remind

1 you to moot yourself. Great.

2 MR. CHEN: So I just want to first complete
3 the record that your Honor laid out I think very
4 succinctly. Also, it's very detailed but there's some
5 additional information that weren't exactly on the
6 papers.

7 So the petitioners were investors in Fund II.
8 Now what happened, unfortunately, in Fund II was that a
9 lot of money was given to a general contractor who we
10 believe misapplied all of the funds that were given to
11 him on some other projects.

12 We brought an action against the general
13 contractor for Fund II, but he appears to be judgment
14 proof. And the guarantee we had was with a piece of --
15 was a company that he owned with property in Brooklyn,
16 but it turns out that the bank is foreclosing on that
17 property as well. So, basically, there was not a lot
18 of recovery that could be had against the contractor
19 who misapplied all of the funds. So, Ms. Wu --

20 THE COURT: Wait. If I'm understanding
21 you -- let me just look. I want to just look at
22 the --

23 So, just so the record is clear, the summons
24 with notice that I have in the action that you were
25 just referring to, Mr. Brecher, actually, names

1 Sagewood too -- Fund II in as a defendant.

2 So, while my petition was really directed to
3 Fund III "Show me your books and records," the
4 preliminary proceeding that you're describing,
5 Mr. Brecher, is against Fund III Sagewood Management;
6 the managing member and Fund II and Mr. Wu; the
7 managing member. So I just wanted to clarify why
8 there's more facts coming into our record and it goes
9 way beyond this petition. But, go ahead.

10 MR. CHEN: That is correct, your Honor. So,
11 Ms. Wu did in fact indicate to the petitioners that she
12 wanted to rollover their investment from Fund II into
13 Fund III. However, the operating agreement of Fund III
14 does not, actually, give Ms. Wu the discretion and the
15 authority in order to do so. Because the operating
16 agreement states very clearly that all capital
17 contributions have to be made in cash. So she could
18 not have simply rolled over their contributions even
19 though she wanted to at the time.

20 Now as your Honor directly notes, that the
21 current petition before the Court is simply for the
22 production of books and records pursuant to Delaware
23 law. A Delaware statute which gives Delaware Chancery
24 Court exclusive jurisdiction.

25 There have been multiple cases in New York

1 Courts which have held that a petition that only deals
2 with the Delaware law would be dismissed insofar as it
3 seeks production of books and records to be brought in
4 the Delaware Chancery Court.

5 Now, there's a simple solution I think to
6 this issue. The petitioners here are also the
7 plaintiffs in the companion case that they have
8 mentioned. This Court could simply dismiss this
9 petition.

10 The plaintiffs, in this action that they
11 brought, can file their complaint. And then, they can
12 seek discovery in that action, which they're entitled
13 to do presuming that their complaint is with merits, on
14 a good grounds and is not dismissed for other reasons.

15 So it seems like that would make the most
16 sense as opposed to them trying to seek documents in
17 this petition when they have to go to Delaware in order
18 to get the Court to determine whether or not they have
19 standing as members of Fund III.

20 I mean, as the Court has read all the cases
21 that are presented in my supporting papers and reply
22 papers, I don't want to rehash them unless the Court
23 has specific questions about it.

24 And the last thing I would note is that in
25 our reply papers we did not give up the argument that

1 the petitioners lack standing. We address, for
2 example, the issue of waiver and we address the issues
3 raised in the opposition papers. But in our moving
4 papers, we spelled out clearly why we believed that the
5 petitioners did not have standing because of the
6 operating agreement. And the operating agreement does
7 not allow the managing member, Ms. Wu and Sagewood, in
8 order to allow for a rollover of capital contributions.

9 THE COURT: So Ms. Wu made a commitment
10 regarding "Don't worry this will rollover from Fund II"
11 and made that commitment in her capacity as Sagewood
12 management. And now, you're saying that the operating
13 agreement prohibited her from doing that. But she had
14 apparent authority to do it. And so, you want to go
15 after Ms. Wu, good ahead.

16 MR. CHEN: Our position is that she thought
17 that she could. That she -- you know, we don't
18 disagree that she made representations to Sagewood II
19 members that their contributions could be rolled over,
20 but it turns out that she could not. She didn't have
21 the authority to do so. And her lack of authority is
22 in the operating agreement which the Sagewood II
23 members received. Now, to the extent that they want to
24 claim that --

25 THE COURT: Who signed the operating

1 agreement on behalf of Sagewood?

2 MR. CHEN: Ms. Wu signed the operating
3 agreement. But to the extent that the Sagewood II
4 members want to claim that they are -- that the company
5 should be estopped, that, they were harmed, they can
6 very well do so, but I don't believe they can. The
7 Sagewood II members, the petitioners in this case,
8 cannot point to any harm that they have incurred as a
9 result of any reliance of statements by Ms. Wu of
10 things that she did not have the authority to do.

11 There's no dispute that they are members of
12 Sagewood II and that they continue to be members of
13 Sagewood II. There's no disagreement. There's no
14 issue. No one is challenging their status as members
15 and no one is challenging their right to pursue the
16 action against Sagewood II.

17 THE COURT: You're challenging them as
18 members of Sagewood III. But yet, Sagewood III gave
19 them a return on their investment. So aside from all
20 of these things that Ms. Wu signs, with apparent
21 authority, on behalf of Sagewood Management LLC,
22 there's actually funds that they disbursed back to the
23 members as members of Fund III.

24 MR. CHEN: That's correct, your Honor.
25 Ms. Wu did not consult counsel before issuing, you

1 know, the tax forms. But, you know, upon consulting
2 counsel with respect to this petition, we realized that
3 she made a mistake in updating these members into
4 Sagewood III without being told to do so.

5 THE COURT: So did you filed amended
6 returns?

7 MR. CHIN: I would have to check with her if
8 they have, in fact, filed amended returns to indicate
9 that they're not members. As the litigation counsel,
10 I'm not entirely sure what happens at the transactional
11 site.

12 THE COURT: Do you want to respond,
13 Mr. Brecher?

14 MR. BRECHER: Well, first of all, these are
15 facts that are not facts about Fund II. And this
16 authority, there's no affidavit submitted by Ms. Wu.
17 The only filing that was made was by Mr. Zhan in his
18 own affidavit that he doesn't have personal knowledge
19 of these things.

20 My clients received K-1s from Fund III --
21 they never got a -- issued by an accounting firm that
22 was retained by the fund. And they never got amended
23 K-1s indicating that those filings were inaccurate.

24 You have seen and we have submitted
25 affidavits from my clients they got checks from Fund

1 III, money, original contribution as well as profits
2 returned to them.

3 So this argument that this was just a mistake
4 is, you know, a -- you know, sort of a self-serving
5 after the fact effort to justify what occurred here.

6 It is clear that this rollover occurred.
7 That was always represented not only to them in
8 communications, but also to the United States
9 government in the form of the K-1 filings.

10 So, we believe that the membership is clear.
11 You know, if they couldn't do it, what they
12 communicated was a waiver then on their part of their
13 conduct and the authority of the managing member to do
14 this in multiple ways.

15 So there's clearly a -- we believe that
16 that's -- saying that they're not members, because it
17 was a mistake, there's not even an affidavit from
18 Ms. Wu saying that she had a misunderstanding here.
19 There's nothing from her here whatsoever. So whatever
20 Mr. Chen submitted is entirely hearsay not much else.

21 THE COURT: All right. Is there anything
22 else?

23 Wait, wait you're muted.

24 MR. CHEN: Just very briefly. Our argument
25 is simply that the operating agreement doesn't allow

1 her to admit them as members. And we put that in our
2 papers.

3 And with respect to the issue of waiver
4 that's raised in the opposition papers I believe we've
5 addressed that as well. And that waiver -- well, for
6 one, I would say that this issue would have to be
7 decided by the Delaware Chancery Court whether or not
8 there has been a waiver; and two, should this Court,
9 you know, reach the issue of whether or not there was a
10 waiver, a waiver requires, you know -- a waiver is a
11 very strict -- it has a very strict requirement. And
12 in this case, we don't think that they've met that
13 strict requirement, because there was no -- it's the
14 petitioner that bears the burden of showing there was a
15 voluntary and intentional relinquishment of a known
16 right and we don't believe they've met that, because
17 they have not submitted, you know, papers and documents
18 to show that there was a right that was known by Ms. Wu
19 that was relinquished. Thank you, your Honor.

20 THE COURT: All right. Thank you. I'm
21 going to do this in the reverse. With regard to the
22 motion to dismiss, which claims that there's no subject
23 matter jurisdiction because it's simply an application
24 to produce books and records of a Delaware entity, I am
25 going to -- I'm looking at the case law and it does, in

1 the First Department, say that, that does not divest
2 New York of its interest in adjudicating this matter.

3 And, indeed, I think that the cause of action
4 brought under the other index number demonstrates that
5 New York does have an interest in adjudicating this
6 matter.

7 And, as the Court of Appeals has said, if an
8 action concerns a commercial transaction in New York
9 and it is a matter on which the New York Courts would
10 otherwise have proper jurisdiction, comity does not
11 prevent the New York Courts from exercising that
12 jurisdiction.

13 With regard to -- so now, I take your motion
14 to dismiss to argue "They don't have standing to ask
15 for these books and records, because they're not
16 members of Fund III." Indeed, they are apparently
17 members of Fund III by virtue of the fact that Ms. Wu,
18 in her capacity as the managing member of Fund III,
19 communicated with them that they were members, gave
20 them a return on their investment on the bank account
21 of Fund III, gave them K-1s regarding their membership
22 in Fund III.

23 And to now say they're not members is
24 certainly going to come up in the litigation regarding
25 Fund II, Fund III, Wu, Sagewood all of those

1 defendants.

2 But for our purposes, they have shown that
3 they have standing and the burden would then shift to
4 Fund III to show that they have some improper interest
5 here or they want to see the books and records for some
6 improper purpose and you have not shown that.

7 And so, the petition to see the books and
8 records is granted. You are to produce the books and
9 records within the next five days, five business days,
10 pursuant to the Delaware statute. And the motion to
11 dismiss is denied.

12 Wait. Wait. You're muted. You're muted.
13 No, Mr. Chen you're mooted.

14 MR. CHEN: Sorry, your Honor. Thank you so
15 much for noticing. I would have gone on for a while
16 without noticing it.

17 Would it be possible to get an extension of
18 time to produce the books and records? We'll need
19 to --

20 THE COURT: Absolutely not. I'll cut you
21 right off. This petition was filed, pre-pandemic
22 actually, in March. You had numerous extensions that
23 were granted to you by stipulation. And at this point
24 in time, we are now seven months later, you have five
25 business days to produce them. And that's it.

1 MR. CHEN: Thank you, your Honor.

2 MR. BRECHER: Thank you, your Honor. Can I
3 just add -- this is a little unusual, because we're not
4 in the courtroom, if the Court report could just send
5 a -- indicate how we can get a copy of the transcript.
6 I'm not sure how we can do that.

7 THE COURT: Yes, the reporter can give you
8 her information.

9 COURT REPORTER'S CERTIFICATION

10 I hereby certify that the foregoing is a
11 true and accurate transcript of the
12 proceedings.

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Cheryl-Lee Lorient
Cheryl-Lee Lorient
Senior Court Reporter

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