UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDY W. SOLEY, Plaintiff, -against- PETER J. WASSERMAN, Defendant.	**OPINION & ORDER** 08 Civ. 9262 (KMW) (FM)

KIMBA M. WOOD, U.S.D.J.:

Plaintiff Judith W. Soley brings this diversity action against her younger brother, Defendant Peter J. Wasserman, asserting a variety of claims arising out Wasserman's conduct as Soley's financial advisor over approximately the past thirty years. On May 14, 2010, after multiple claims in her original complaint were dismissed, Soley filed an Amended Complaint. [Dkt. No. 20]. On July 6, 2010, Wasserman moved to dismiss the Amended Complaint pursuant to Federal Rules of Civil Procedure 8(a)(1), 12(b)(1), and 12(b)(6). [Dkt. No. 24]. The Court granted in part and denied in part Wasserman's motion to dismiss on September 29, 2011. *See Soley v. Wasserman*, 823 F. Supp. 2d 221, 225 (S.D.N.Y. 2011) (Wood, J.) [Dkt. No. 36]. In relevant part, the Court denied the motion to dismiss Soley's claims for breach of fiduciary duty and equitable accounting.

Following discovery, both parties now move for summary judgment. (*See* Def.'s Mot. for S.J. & In Limine Relief [Dkt. No. 62]; Pl.'s Mot. for Partial S.J. [Dkt. No. 66]). In the alternative, Wasserman seeks in limine relief. For the reasons that follow, the Court grants Wasserman's motion in part and denies the motion in part. The Court also denies Soley's motion.

I. STANDARD OF REVIEW

A. Summary Judgment

Summary judgment is appropriate only if the record before the court establishes that there is no "genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating that no dispute of a material fact exists. *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005). In evaluating whether the moving party has met its burden, a court must "construe the evidence in the light most favorable to the non-moving party and . . . draw all reasonable inferences in the non-moving party's favor." *Stonewell Corp. v. Conestoga Title Ins. Co.*, 678 F. Supp. 2d 203, 208 (S.D.N.Y. 2010) (Wood, J.) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)); *see also In re "Agent Orange" Prod. Liab. Litig.*, 517 F.3d 76, 87 (2d Cir. 2008).

A motion for summary judgment should be denied "if the evidence is such that a reasonable jury could return a verdict" in favor of the non-moving party. *NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 178-79 (2d Cir. 2008); *see also* Fed. R. Civ. P. 56(e). Accordingly, where adjudication of a claim requires assessing credibility or deciding between conflicting versions of events, summary judgment is not appropriate. *See Jeffreys*, 426 F.3d at 553-54; *Hayes v. N.Y.C. Dep't of Corr.*, 84 F.3d 614, 619 (2d Cir. 1996). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), but must show that there is "significant, probative evidence" on which a reasonable factfinder could decide in its favor. *Anderson*, 477 U.S. at 247.

B. In Limine Relief

The Federal Rules of Evidence favor the admission of all relevant evidence. *See* Fed. R. Evid. 402. Evidence is relevant if it "tend[s] to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Similarly, Rule 702, which governs the admissibility of expert testimony, "embodies a liberal standard of admissibility." *Nimely v. City of New York*, 414 F.3d 381, 396 (2d Cir. 2005). Expert testimony shall be excluded, however, when it is "unhelpful and therefore superfluous and a waste of time." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 643 F. Supp. 2d 482, 493-94 (S.D.N.Y. 2009) (Scheindlin, J.).

"A district court's inherent authority to manage the course of its trials encompasses the right to rule on motions *in limine*." *Carofino v. Forester*, 450 F. Supp. 2d 257, 270 (S.D.N.Y. 2006) (Leisure, J.) (citing *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984)). A district court will "exclude evidence . . . *in limine* only when the evidence is clearly inadmissible on all potential grounds." *United States v. Ozsusamlar*, 428 F. Supp. 2d 161, 164 (S.D.N.Y. 2006) (Leisure, J.).

II. FACTUAL BACKGROUND

This Court's September 29, 2011 Opinion, familiarity with which is assumed, details the factual allegations set forth in the Amended Complaint. *See Soley*, 823 F. Supp. 2d at 225-28. That Opinion permitted only Soley's breach of fiduciary duty and equitable accounting claims to proceed. *Id.* at 225. The Court further limited those claims to the allegations relating "to Patriot Partners and those investment accounts over which Wasserman had discretionary authority." *Id.*[1] After reviewing the Parties' summary judgment submissions, the Court recounts only the

[1] Having limited the remaining scope of this case, the Court does not consider allegations, Rule 56.1 statements, or legal arguments relating to any already dismissed claims.

undisputed facts relevant to Soley's remaining claims. These facts are drawn from the Parties' Rule 56.1 Statements of Fact. ("Def.'s 56.1;" "Pl.'s 56.1").[2]

Since 1974, Wasserman "has traded equities and options for his own account and through various entities." (Def.'s 56.1 ¶ 3). In 1991, Wasserman formed and served as the General Partner of Patriot Partners, L.P., a partnership used "to invest for its own account in securities and other investment instruments." (*Id.* ¶¶ 4-5). Soon after, Patriot Partners distributed a "Private Offering Memorandum . . . to potential investors, including Soley." (*Id.* ¶ 6). Soley entered into a Partnership Agreement and purchased a partnership interest by transferring $500,000 from her personal brokerage account to Patriot Partner's account. (*Id.* ¶¶ 7-8). The Partnership Agreement imposed various obligations, including requiring Wasserman to "maintain books and records at the principal office of the Partnership." (Pl.'s 56.1 ¶¶ 59-61). In 2004 and 2005, Soley and Wasserman were the sole partners of Patriot Partners. (*Id.* ¶ 112).

From its inception until 2003, Patriot Partners utilized the accounting services of Grant Thorton, LLP to perform independent, certified audits and tax preparation services. (Def.'s 56.1 ¶ 11). Discovery has yielded auditing records for 1991, 1996-2001, and 2003. (*Id.* ¶ 13). "Throughout the period of [Patriot] Partners' existence, from 1991 through 2005, Soley's accountant, Barry Kamras, received . . . financial and tax reporting of Soley's interest in Partners and used that information in preparing Soley's personal tax returns." (*Id.* ¶ 19 (citing Barry Kamras Dep. 6-10, 17-19, 22-24, 59, 144-45)).

In October 1998, Soley directed the transfer of $150,000 from her personal account to Patriot Partners' account ("the October 1998 transfer"). (Def.'s 56.1 ¶¶ 21-22; Pl.'s 56.1 ¶ 66).

[2] Each party has submitted a response to the opposing party's Rule 56.1 Statement. Plaintiff's counsel, through a letter to the Court, objects to the timeliness, form, and substance of Defendant's response. The Court finds Plaintiff's objections to be without merit, but nonetheless relies on the responses only to determine whether certain facts are disputed. Thereafter, the Court draws only upon the documentary and testimonial evidence to determine whether genuine issues of material fact actually exist.

The October 1998 transfer was accounted for in Patriot Partner's books as "Wasserman Recap: Loan to Partnership (10/98)." (Pl.'s 56.1 ¶ 67). In January 1999, $50,000 was transferred from Patriot Partners' account to Soley's account. (Def.'s 56.1 ¶ 23; Pl.'s 56.1 ¶ 68). In August 1999, Soley wrote to Wasserman to request repayment of "the remainder of the $150,000 'loan.'" (Def.'s 56.1 ¶ 31; Pl.'s 56.1 ¶ 96). As discussed in detail below, the Parties dispute the nature of the October 1998 transfer, whether Patriot Partners properly accounted for the transfer on its books, and whether the October 1998 transfer was properly repaid. (*See infra* Parts III, IV).

Beginning around 1997, based on Wasserman's suggestions, "Wasserman, Soley[,] and a mutual family friend, Arthur (Casey) Stern, made investments together in certain stocks," including investments in "TAPI," "NEXM," "NTII," and "CRDM" (collectively, the "Joint Stock Investments"). (Def.'s 56.1 ¶¶ 40-42; Pl.'s 56.1 ¶¶ 120, 122). These investments were purchased at private offerings, and each "became publically tradeable before October, 2002." (Def.'s 56.1 ¶¶ 44-45). Since the time of the investments, Wasserman has sold some shares (Pl.'s 56.1 ¶ 127) and still owns others (*id.* ¶ 129). Wasserman admits he "has not paid Soley for her interest in any of the Joint Stock Investments" (*id.* ¶ 132), but the Parties dispute whether Wasserman has provided an accounting of these investments.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Breach of Fiduciary Duty Claim

As noted above, this Court previously held that the Amended Complaint stated a claim for breach of a fiduciary duty "with respect to (1) Patriot Partners, and (2) investment accounts over which Wasserman had full trading authority." *Soley*, 823 F. Supp. 2d at 233. "To establish a claim for breach of fiduciary duty, a plaintiff must prove (1) the existence of a fiduciary relationship; (2) misconduct by defendant constituting a breach of its fiduciary duty to plaintiff;

and (3) damages to plaintiff directly caused by defendant's misconduct." *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 726 F. Supp. 2d 291, 305-06 (S.D.N.Y. 2010) (Wood, J.) (citing *Berman v. Sugo LLC*, 580 F. Supp. 2d 191, 204 (S.D.N.Y. 2008) (Patterson, J.)). Although Wasserman does not dispute the existence of a fiduciary relationship, the Parties disagree regarding whether Wasserman breached his duties and whether Soley can prove damages resulting from any breach.

Plaintiff's expert, Stuart L. Fleischer, calculates damages based on several asserted breaches of Wasserman's fiduciary duties, including:

> (1) Damages resulting from Wasserman's "failure to fully and timely repay money [Soley] loaned [Patriot Partners]" in the October 1998 transfer.
>
> (2) Damages resulting from Wasserman's "failure to distribute [Soley's] remaining partnership interest (her capital) at the time that Patriot Partners effectively ceased business [on December 31, 2003]."
>
> (3) Damages resulting from Wasserman's failure "to adhere to the investment strategy [Wasserman] communicated to and was understood by . . . Soley at the time these investments were made."

(See Tofel Aff. Ex. A, Fleischer 5/31/12 Corrected Expert Report 1-2.). In the instant motion, Wasserman seeks summary judgment as to each of these contentions.

(1) Characterizing the October 1998 Transfer

Wasserman contends that any claim based on the October 1998 transfer is untimely. Characterizing the transfer as a loan with no specified repayment date, Wasserman argues that any resulting claim accrued on the date of the loan. (*See* Def.'s Mem. in Supp. of S.J. 11 ("Def.'s Mem.") (citing *In re Kharisma Jewelry, Inc.*, 165 B.R. 371 (Bankr. E.D.N.Y. 1994))). Applying the six year statute of limitations,[3] Wasserman argues that this claim is untimely because the original complaint was filed nearly ten years after the transfer. [Dkt. No. 1].

[3] The Parties agree that a six year statute of limitations applies but disagree as to whether to characterize this claim as a breach of a contractual obligation or a breach of fiduciary duty.

Although Wasserman characterizes the transfer as a loan from Soley to Wasserman, Soley contends that the transfer was actually an investment or loan to Patriot Partners, not Wasserman individually. Based on its review of the Parties' submissions, the Court finds that the nature of the October 1998 transfer remains in dispute. (*Compare* Luttinger Aff., Ex. G02302 (characterizing transfer as a loan from Wasserman to Patriot Partners), *with* Soley Aff. ¶ 15 (describing transfer as a "short-term investment" in Patriot Partners), *and* Soley Aff., Ex. J (characterizing the transfer as a "short-term" "loan" to Patriot Partners)). This dispute is material to the resolution of this claim because although Wasserman argues that a claim for non-payment of a personal loan will accrue on the date of the loan (in 1998), Soley points out that an action for non-payment of liabilities invested by a Partriot Partners partner would accrue upon the partnership's dissolution (in 2006). (*See* Soley Aff. Ex. B., at 35-36 (Partnership Agreement noting that debts or liabilities of the Partnership are "due and payable" "immediately prior to the termination of the Partnership")). Accordingly, because the nature of the October 1998 transfer remains a disputed material fact, summary judgment is denied.

(2) Whether Soley Requested Return of Her Partnership Interest, and, If So, When

Based on a review of Patriot Partners' activities, Soley's expert concluded that the Partnership "effectively ceased conducting business at December 31, 2003." (Tofel Aff. Ex A, Fleischer 5/31/21 Corrected Report 1). The report calculates damages for Wasserman's "failure to distribute [Soley's] remaining partnership interest (her capital)" from this date. Wasserman argues that this claim was not pled in the Amended Complaint and contends that Soley "cannot show . . . any basis on which [Wasserman] would have been obligated to distribute her interest at any particular point in time." (*See* Def.'s Mem. 14-15; Def.'s Reply Mem. in Supp. 7 (arguing

that Soley cannot demonstrate "that she made the required written request to redeem her interest as of year-end 2003, and that she did not withdraw or alter such request")).

As an initial matter, the Court finds that the allegations of the Amended Complaint gave Wasserman fair notice of this claim. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002). The Complaint alleges that Wasserman "[d]ominated and controlled [Soley's] financial affairs without regard to her interests," and specifically notes that Soley "repeatedly" requested that her partnership affairs be "wound up and her share of its assets returned." (*See* Am. Compl. ¶¶ 63, 22). Moreover, the Complaint includes measurements of Soley's capital investments in Patriot Partners as of the end of 2003, followed by indications that no actions appeared to have been taken between 2004 and 2006. (*See id.* ¶¶ 20-21 & accompanying tbl.). These allegations clearly put Wasserman on adequate notice.

Furthermore, in a sworn affidavit to this Court, Soley directly states that "[b]eginning in or about 1999, [she] repeatedly asked Wasserman to redeem [her] interest in Patriot Partners." (*See* Soley Aff. ¶ 22). Although Soley's testimony is the most direct evidentiary support for a demand date this early, Soley provides additional documentary evidence indicating that she did in fact make a demand well prior to the close of the partnership in 2006. (*See* Wybrial Aff., Ex EE (Dec. 29, 2004 email from Wasserman to Soley)). Accordingly, because there remains a dispute of fact as to when (and whether) Soley requested the return of her partnership share and also as to Wasserman's response, summary judgment is inappropriate.

(3) Alleged Failure to Adhere to Stated Investment Strategy

Soley's expert report considers a third basis for damages: that Wasserman allegedly failed "to adhere to the investment strategy [that he] communicated to and was understood by . . . Soley at the time these investments were made." (*See* Fleischer Report 2). In particular, the

VI. CONCLUSION

For the reasons stated above, the Court GRANTS in part and DENIES in part Defendant's motion for summary judgment and in limine relief, and DENIES Plaintiff's motion for summary judgment.[7]

The parties shall, by February 25, 2013, submit to the Court a joint letter outlining any steps that need to be taken before the case is Ready for Trial. The parties must file a joint pretrial order by March 22, 2013. The parties shall advise the Court by March 22, 2013 whether they consent to trial of this case before a Magistrate Judge. The case will be deemed Ready for Trial April 4, 2013.

SO ORDERED.

Dated: New York, New York
February 11, 2013

Kimba M. Wood
United States District Judge

[7] Given that the Court has denied the majority of each motion for summary judgment, the Court does not award either side fees or costs.