Morgan Stanley & Co., Inc. v IDT Corporation
2006 NY Slip Op 30076(U)
April 10, 2006
Supreme Court, New York County
Docket Number: 0603194/2004
Judge: Herman Cahn
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[* 1] SCANNED ON 5/1/2006

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HERMAN CAHN, Justice — PART 49

0603194/2004

MORGAN STANLEY
VS
IDT CORPORATION

SEQ # 1

DISMISS ACTION

INDEX NO. ____

MOTION DATE 3/11/05

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

FILED
MAY 01 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4-10-06

[signature], J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

---------------------------------------X

MORGAN STANLEY & CO., INCORPORATED,

Plaintiff,

-against-

Index No. 603194/04

IDT CORPORATION,

Defendant.

---------------------------------------X

IDT CORPORATION,

Plaintiff,

-against-

Index No. 603710/04

MORGAN STANLEY DEAN WITTER & CO., and
MORGAN STANLEY & CO., INCORPORATED

Defendants.

---------------------------------------X

CAHN, J.

Both of the above named involve the same parties, and similar issues. In IDT Corporation v Morgan Stanley Dean Witter & Co. and Morgan Stanley & Co., Inc. (Index No. 603710/04) (the IDT action), IDT Corporation alleges that Morgan Stanley Dean Witter & Co. and Morgan Stanley & Co., Incorporated (collectively, Morgan Stanley) obtained confidential business and financial information from IDT, and improperly shared it with Telefonica Internacional, S.A. (Telefonica), another Morgan Stanley client; used improper means, including disparaging IDT, to induce Telefonica to breach a binding agreement with IDT so that Morgan Stanley could earn lucrative investment banking fees by assisting Telefonica in entering into alternative arrangements; provided false information that tainted the arbitration between IDT and Telefonica; and extorted a $10 million fee from IDT.

In Morgan Stanley & Co., Incorporated v IDT Corporation (Index No. 603194/04) (the Morgan Stanley action), Morgan Stanley seeks, inter alia, damages pursuant to an indemnification agreement with IDT for legal fees and expenses, as well as specific performance to force IDT to honor its payment obligations under the indemnification agreement, and a declaratory judgment concerning IDT's ongoing obligations under the indemnification agreement.

The motions in the action are consolidated herein for disposition only. In the IDT action, Morgan Stanley moves to dismiss the complaint with prejudice, on the ground that it fails to state a cause of action against Morgan Stanley, is barred by the applicable statute of limitations, and fails to overcome defenses founded upon documentary evidence, CPLR 3211 (a) (1), (5), and (7).

In the Morgan Stanley action, IDT moves to dismiss the complaint, CPLR 3001 and 3211 (a) (4), and for an order, pursuant to Code of Professional Responsibility DR 5-108 (a) (1) (22 NYCRR § 1200.27 [a] [1]), disqualifying Herbert J. Stern, Esq. and Stern & Kilcullen, Morgan Stanley's counsel, on the ground of conflict of interest.

FACTS

Accepting the allegations of both the IDT and Morgan Stanley complaints as true (Leon v Martinez, 84 NY2d 83 [1994]), the following facts emerge:

Morgan Stanley was a trusted advisor to IDT, providing advice and counsel on a host of sensitive and strategic issues (IDT Complaint, ¶¶ 8-22). In the early spring of 2000, IDT sold its equity stake in a company called Net2Phone, Inc. to AT&T Corp. (id., ¶ 14). IDT alleges that, although it had handled all of the negotiations relating to the sale itself, Morgan Stanley insisted

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on being paid a fee in connection with the Net2Phone transaction (id., ¶¶ 15-16), and threatened to "blackball" IDT in the investment banking community, and cut off IDT's access to capital, if it refused to pay a fee to Morgan Stanley in connection with that transaction (id., ¶ 16). IDT asserts that, on October 4, 2000, it "reluctantly" paid Morgan Stanley a $10 million fee (id., ¶¶ 16-17). IDT also signed an engagement letter, back-dated to March 15, 2000 (the Engagement Letter), pursuant to which Morgan Stanley was to provide investment banking services for IDT over the next 21 months (id., ¶ 18). Under the terms of the Engagement Letter, $7.5 million of the $10 million fee was attributed to the Net2Phone deal, and $2.5 million was attributed to "future services" (id., ¶ 16).

In the Engagement Letter, Morgan Stanley and IDT each "waived[d] any right to trial by jury in any action, claim, suit or proceeding with respect to Morgan Stanley's engagement as financial advisor or its role in connection herewith" (Morgan Stanley Complaint, ¶ 5.e). In a written indemnification agreement attached to the Engagement Letter, IDT agreed, among other things, to indemnify Morgan Stanley "for all expenses (including fees and expenses of counsel) as they are incurred in connection with investigating, preparing, pursuing or defending any action, claim, suit, investigation or proceeding related to, arising out of or in connection with the Engagement" (id., ¶ 6). The indemnification agreement further provides that "[t]he provisions of this agreement shall apply to the Engagement and any modification thereof and shall remain in full force and effect regardless of any termination or the completion of your services under the Engagement Letter" (id.).

On August 11, 1999, IDT entered into a memorandum of understanding (the MOU) with Telefonica, with respect to Telefonica's planned $1.5 billion South American

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submarine cable network (the SAm-1 Network), a fiber-optic cable circling Latin America (IDT Complaint, ¶¶ 23-24). Pursuant to the MOU, Telefonica was to establish a new company, NewCo, to construct, operate, and sell capacity on the SAm-1 Network (id., ¶ 25). IDT committed $40-$60 million for a 10% equity stake in NewCo, and further committed to purchase at least $100 million of "capacity" on the network over a five-year period (id., ¶ 26). Under the MOU, IDT would be the anchor tenant of the SAm-1 Network, entitling IDT to "most favored nation" pricing for "capacity," and other significant benefits and opportunities (id., ¶¶ 26-27).

The MOU was a binding contract; it was negotiated between Telefonica and IDT directly (id., ¶¶ 23-29). Morgan Stanley played no role in negotiating the MOU, and it did not entail payment by either party to Morgan Stanley (id., ¶ 29).

IDT alleges that, in late 1999, without its knowledge or consent, and despite its relationship of trust and confidence with IDT, Morgan Stanley advised Telefonica to reduce or eliminate IDT's interest in the SAm-1 Network (id., ¶ 30). Morgan Stanley purported to base this advice on its intimate knowledge of IDT's confidential business and financial information (id). Morgan Stanley also began to actively promote the participation of other anchor tenants in the SAm-1 Network, to Telefonica, including soliciting the participation of other companies (id., ¶ 31). According to IDT, Morgan Stanley's goal was to replace IDT as anchor tenant, and in doing so, earn substantial investment banking fees (id.).

IDT contends that it did not learn about Morgan Stanley's conduct until document discovery took place between December 10, 2001 and March of 2002, in connection with an arbitration between IDT and Telefonica. The documents disclosed the conduct that Morgan Stanley had theretofore been concealing (see Declaration of Melissa A. Roover, Esq., ¶ 2).

Pursuant to the MOU, both parties were to "use diligent efforts" to close the transactions "by November 1, 1999" (MOU at 20 [Aff. of Joel M. Silverstein, Exh C]). IDT alleges that Morgan Stanley, as early as the fall of 1999 began, through partners in its Chicago office, to disparage IDT and its business, to Telefonica, causing Telefonica to delay its performance under the MOU (IDT Complaint, ¶ 32). The delay induced by Morgan Stanley was particularly costly to IDT, causing losses of hundreds of millions of dollars, because it prevented IDT from reselling or otherwise monetizing its capacity and equity rights in the SAm-1 Network at the height of demand for such rights (id.).

IDT contends that, at one point, word reached IDT that Morgan Stanley had been denigrating IDT to Telefonica (id., ¶ 34). IDT's CEO, immediately confronted the New York Morgan Stanley partners who were in charge of it's relationship with IDT, demanding to know why Morgan Stanley's Chicago partners had been denigrating IDT to Telefonica (id., ¶ 35). He was assured that if any such statements were being made, they would stop immediately (id.).

Ultimately, IDT asserts, Morgan Stanley convinced Telefonica to renege on the MOU and to offer, instead, a much less valuable deal to IDT on essentially "take it or leave it" terms (id., ¶¶ 36-40). Specifically, Morgan Stanley advised Telefonica to "merge" NewCo with a different entity, Emergia, and have Emergia own, not just manage, all of the assets of the SAm-1 Network, and provide marketing for the network (id., ¶¶ 36-37). Moreover, Morgan Stanley urged that, although IDT was entitled to purchase a 10% equity interest in NewCo under the MOU, IDT should be offered no more than a 5% interest in Emergia (id., ¶¶ 37-38).

IDT alleges that, as part of an effort to convince it to agree to this reduced role in the SAm-1 Network, Morgan Stanley prepared and orally presented to IDT a valuation of the

SAm-1 Network that showed that its interest in the proposed new deal would be more valuable than its interest would have been worth under the MOU (id.). Morgan Stanley assured IDT that a 5% interest in Emergia (which Morgan Stanley valued at $9.5-$11 billion) was far more valuable than a 10% interest in NewCo (which Morgan Stanley valued at $1.4 billion) (id., ¶ 38). Thus, according to Morgan Stanley, IDT's interest in Emergia would be worth roughly $500 million. This deal, however, never came to pass, because, according to IDT, Morgan Stanley successfully instigated Telefonica to breach the MOU (id., ¶ 41).

The Arbitration Proceeding:

In May 2001, IDT commenced an arbitration against Telefonica, which principally sought damages arising out of Telefonica's claimed breach of the MOU (id., ¶ 44). The Arbitration Panel issued its decision in November 2003, finding that the MOU had been breached in or about October 2000, but awarding IDT a fraction of the damages it had hoped for (id.).

IDT did not have an arbitration agreement with Morgan Stanley, and thus, Morgan Stanley was not a party to the Arbitration (id., ¶ 45). IDT alleges that Morgan Stanley's "fraudulent" valuations of the deals offered to IDT were submitted to the Arbitration Panel, which did not know that Morgan Stanley had prepared those valuations in support of its own efforts to earn investment banking fees by procuring substitute anchor tenants for the SAm-1 Network (id., ¶ 45). Thus, IDT alleges, the Arbitration Panel specifically considered – and based its damages award in part-upon Morgan Stanley's false valuations with respect to the deals offered to IDT, and the supposed difference between the MOU, and the new structure that had been proposed by Telefonica, at Morgan Stanley's instigation (id).

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For instance, in deciding that IDT suffered no damage as a result of Telefonica's breach, the Arbitration Panel found that NewCo did not become Emergia in the new deal, but rather, was only "CableCo," or one part of Emergia. According to IDT, this finding is at odds with the prior representations made to it by Morgan Stanley and Telefonica (id., ¶ 46). Moreover, during the arbitration, Morgan Stanley now valued NewCo's share of Emergia's assets at approximately $3 billion, a dramatic decrease from the valuation it had touted in discussions with IDT (id., ¶¶ 46-48).

In the Arbitration, IDT claimed that Telefonica refused to fulfill its obligations under the MOU, and that, as a result, IDT was entitled to substantial damages. IDT claimed damages in the amount of: (1) $759 million in lost profits due to Telefonica's allegedly wrongful refusal to sell "capacity" to IDT on the terms set forth in the MOU; (2) $790 million to $990 million for Telefonica's allegedly wrongful refusal to sell IDT 10% of NewCo; and (3) $1.042 billion for lost profits stemming from Telefonica's wrongful refusal to form a joint venture (Arbitration Award at 3-4 [Silverstein Aff., Exh C]).

In the Arbitration Award, the panel held as follows:

> 1. Respondent [Telefonica] is to pay Claimant [IDT] the sum of ... $21,313,390.47 .. which is comprised of ... $16,883817.00 ... for Respondent's breach of the capacity purchase section of the MOU, plus interest in the amount of ... $4,429,573.47 ....
>
> 2. There are no recoverable damages for Respondent's breach of the equity purchase section of the MOU.
>
> 3. Claimant's claim for breach of the joint venture section of the MOU is denied and dismissed.
>
> 4. All of Respondent's counterclaims are denied and dismissed.

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> 5. The parties are to bear their own attorneys' fees, costs and expenses incurred in connection with this arbitration.

Id. at 70-72. The arbitration award was paid in full during IDT's fiscal quarter ending April 30, 2004.

IDT asserts that, prior to commencing the IDT action, it negotiated unsuccessfully with Morgan Stanley (Aff. of Melvyn I. Weiss, ¶ 2). Having failed to arrive at a settlement, IDT commenced an action against Morgan Stanley and an affiliate in the United States District Court for the Southern District of New York. This action was discontinued, when it became apparent that there was no diversity.

Morgan Stanley commenced its action in this Court shortly after IDT commenced its action in the Federal Court. In Count One, Morgan Stanley seeks damages under its indemnification agreement with IDT, for legal fees and expenses incurred in defending against both the federal action and demands leading up to the federal action, and prosecuting its action here (Morgan Stanley Complaint, ¶¶ 13-20). In Count Two, it seeks specific performance, including an injunction, to force IDT to honor its obligations under the indemnification agreement (id., ¶¶ 21-23). In Count Three, it seeks a declaration concerning IDT's ongoing obligations under the indemnification agreement (id., ¶¶ 24-28). In Count Four, it seeks a declaration that IDT waived its right to a jury trial in the Engagement Letter (id., ¶¶ 29-35). In Counts Five and Six, it seeks declarations of non-liability to IDT, including with respect to the claims asserted in IDT's federal action (id., ¶¶ 36-49).

IDT commenced its action in this court, in which it asserts similar claims to those it previously asserted in its federal action. The IDT complaint contains five causes of action: (1)

breach of fiduciary duty; (2) intentional interference with existing contract; (3) intentional interference with prospective business relations; (4) misappropriation of confidential and proprietary business information; and (5) undue enrichment.

DISCUSSION

I. Morgan Stanley's Motion to Dismiss the IDT Action

Morgan Stanley moves to dismiss the IDT action on the grounds that it is barred by collateral estoppel, the three-year statute of limitations, and IDT's failure to state the claims asserted.

A. Collateral Estoppel

Morgan Stanley contends the IDT action is barred by collateral estoppel, because IDT's present claims seek to re-litigate the same claims which IDT had a full and fair opportunity to litigate in the Arbitration. According to Morgan Stanley, in resolving the claims and counterclaims in the Arbitration proceeding, the Arbitration Panel necessarily resolved the very issues that IDT is attempting to litigate in this action: whether and to what extent Telefonica breached the MOU, and whether IDT suffered damage as a result.

There are two necessary requirements for the invocation of the doctrine of collateral estoppel: (1) there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the second action; and (2) there must have been a full and fair opportunity to contest the decision now said to be controlling (Schwartz v Public Administrator of Bronx County, 24 NY2d 65 [1969]; see also Ryan v NY Tel. Co., 62 NY2d 494 [1984]). The doctrine "appli[ies] as well to awards in arbitration as [it does] to adjudications in judicial proceedings" (American Ins. Co. v Messinger, 43 NY2d 184, 189-90 [1977]).

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However, collateral estoppel will be applied only if there was a full and fair opportunity for the party to contest the issues sought to be precluded in the earlier proceeding (Singleton Mgt. Inc. v Compere, 243 AD2d 213 [1st Dept 1998]). Whether a party had such a full and fair opportunity to litigate a prior determination involves an inquiry into the realities of the earlier proceeding (id.). For example, when a plaintiff does not have all the facts required to plead a cause of action for fraud at the time it filed the first action, the ruling will not bar a subsequent claim for fraud (Allen Group, Inc. (Allen Test Prods. Div.) v Adduci, 136 AD2d 803 [3d Dept 1988]).

"[C]ollateral estoppel is an equitable doctrine – not a matter of absolute right" (PenneCom B.V. v Merrill Lynch & Co., Inc., 372 F3d 488, 493 [2d Cir 2004]). Its invocation is influenced by consideration of fairness in the individual case (see Blonder-Tongue Labs, Inc. v Univ. of Ill. Foundation, 402 US 313, 333 [1971] ["In the end, decision [on an issue of collateral estoppel] will necessarily rest on the trial courts' sense of justice and equity"]; Conte v Justice, 996 F2d 1398, 1400 [2d Cir 1993] [doctrine is "premised on notions of due process and fairness"]). Thus, one "who comes to equity must come with clean hands" (Amarant v D'Antonio, 197 AD2d 432, 434 [1st Dept 1993]), and equitable relief, like collateral estoppel, "can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage" (PenneCom B.V. v Merrill Lynch & Co., 372 F3d at 493 [quoting Bein v Heath, 47 US 228, 247 [1848]; accord Valentine v Metropolitan Life Ins Co., 2004 WL 2496074 [SD NY 2004]).

Accepting IDT's allegations as true, Morgan Stanley's own conduct prior to and during the Arbitration bars Morgan Stanley from asserting collateral estoppel at this early stage

of the proceedings.

Here, IDT alleges that "deceptions by Morgan Stanley were perpetrated on both IDT and the Arbitration Panel, and falsely served to minimize the loss caused to IDT by Telefonica's breach (IDT Complaint, ¶ 47), and that "Morgan Stanley devised a fraudulent scheme to dupe both IDT and the Arbitration Panel as to the 'distinction' between NewCo and Emergia and the valuation of those companies" (id., ¶ 53). IDT further alleges that, although the Arbitration Panel held in its favor on liability, IDT did not have a full and fair opportunity to litigate its claims against Telefonica, because, due to Morgan Stanley's tortious behavior, IDT was deprived of the opportunity to litigate the extent of its losses fully and fairly. IDT is entitled to conduct discovery on this issue to attempt to prove the full extent of its losses in the Arbitration, and on the issue of whether Morgan Stanley should be precluded by its alleged unclean hands from asserting the equitable doctrine of collateral estoppel.

PenneCom B.V. v Merrill Lynch & Co., (372 F3d 488, supra), dealt with a situation very similar to the one presented here. In that case, PenneCom, the plaintiff, had entered into a share purchase agreement to sell a subsidiary to Elektrim. Elektrim refused to close the share purchase agreement, and asserted a variety of pretexts as bases for its refusal to close. PenneCom them commenced an arbitration against Elektrim. During the arbitration proceeding, Elektrim and Merrill Lynch, its investment banker, tried to convince the arbitration panel that the pretexts were valid reasons that excused Elektrim's performance. The arbitration panel ruled that Elektrim had breached the share purchase agreement, but awarded PenneCom only a fraction of the damages it sought.

Thereafter, PenneCom learned that Merrill Lynch had actually devised the

pretexts asserted by Elektrim in support of its failure to close. PenneCom commenced an action against Merrill Lynch in federal district court, asserting that Merrill Lynch had "falsely minimized the loss caused to PenneCom by Elektrim's breach" (id. at 490). Although the district court granted Merrill Lynch's motion to dismiss on collateral estoppel grounds, the Second Circuit reversed and vacated, finding that PenneCom's allegations of unclean hands on the part of Merrill Lynch required denial of Merrill Lynch's motion (id.). Specifically, the Court found that PenneCom's complaint alleged that Merrill Lynch and Elektrim had "devised a fraudulent scheme to dupe the arbitrators both as to Elektrim's justification for abandoning its contractual commitment and as to the extent of loss incurred by PenneCom for Elektrim's breach" (id. at 493). The Court further stated that "PenneCom's allegations go the very heart of whether its damages claims were fully and fairly adjudicated in the earlier proceeding," and, as a result, "before the court invokes collateral estoppel to bar PenneCom from relitigating the extent of its loss resulting from Elektrim's breach, PenneCom must be allowed discovery to collect evidence which might support a finding either that PenneCom was not afforded a full and fair opportunity to prove its loss in the arbitration, or that Merrill Lynch should be precluded by its own (alleged) misconduct from asserting the equitable doctrine of collateral estoppel" (id.).

Accordingly, Morgan Stanley's motion to dismiss the complaint in the IDT action on the ground of collateral estoppel, is denied.

B. Statute of Limitations

Morgan Stanley also contends that all of IDT's claims are time-barred.

1. Tortious Interference with Contract

With respect to IDT's cause of action for tortious interference with contract,

Morgan Stanley argues that the essence of this claim is that it intentionally induced Telefonica to breach the MOU, and thereby caused IDT to lose the benefits of that deal. Morgan Stanley argues that IDT's claims for that breach accrued by May 25, 2001, when IDT commenced the Arbitration against Telefonica. This was almost three and half years before IDT commenced this action on November 5, 2004. Under these circumstances, Morgan Stanley contends, IDT's claim for tortious interference with contract is barred under the three-year statute of limitations set forth in CPLR 214 (4).

Contrary to Morgan Stanley's contentions, IDT's tortious interference with contract claim is timely, because, as a pleading matter, IDT could not have pled this cause of action until after the Arbitration Panel had determined that the MOU was a valid and binding agreement. Breach of contract and tortious interference with that contract "are not the same or identical causes of action, but, rather, wholly separate and distinct legal wrongs, giving rise to different causes of action" (Singleton Management, Inc. v Compere, 243 AD2d at 216). The existence of a valid contract is an essential element to a claim of tortious interference with contract (id.). Whereas, with a cause of action sounding in contract, a claim accrues from the date of breach, "as a general proposition, a tort cause of action cannot accrue until an injury is sustained" (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]; accord American Federal Group, Ltd. v Edelman, 282 AD2d 279 [1st Dept 2001]). "[A]ccrual occurs when the claim becomes enforceable, i.e., when all the elements of the tort can be truthfully alleged in a complaint," because the "Statute of Limitations [can] not run until there is a legal right to relief" (Kronos, Inc. v AVX Corp., 81 NY2d at 94; accord Britt v Legal Aid Soc., Inc., 95 NY2d 443 [2000]; LaBello v Albany Medical Center Hosp., 85 NY2d 701 [1995]).

Thus, until the validity of the MOU had been established, which Morgan Stanley concedes had to be done via the Arbitration (Morgan Stanley Mem of Law at 4, citing Section 11 of the MOU), IDT did not have a ripe cause of action (see Kronos, Inc. v AVX Corp., 81 NY2d at 94 ["Since damage is an essential element of [tortious interference with contract], the claim is not enforceable until damages are sustained"]; American Federal Group, Ltd. v Edelman, 282 AD2d at 279 ["a cause of action for tortious interference with contract generally accrues when an injury is sustained, not discovered"]).

Thus, the statute of limitations for IDT's tortious interference with contract claim did not begin to run until the Arbitration Panel rendered its decision on October 31, 2003, and established the validity of the MOU. Therefore, this claim was commenced well within the three-year limitation period.

2. **Breach of Fiduciary Duty**

Morgan Stanley asserts that a three-year statute of limitations period applies to IDT's claim for breach of fiduciary duty. In fact, where the relief sought is equitable in nature, the limitations period for a breach of fiduciary duty claim is six years (see 196 Owners Corp. v Hampton Mgt. Co., 227 AD2d 296 [1st Dept 1996]). Thus, where, as here, a complaint seeks both equitable and monetary relief, but the gravamen of the complaint is equitable in nature, the six-year statute should apply (Spitzer v Schussel, 7 Misc 2d 171, 173 [Sup Ct, NY County 2005] [applying six-year statute on the ground that "[a]lthough the relief sought in these claims is a mix of both equitable and monetary remedies, the gravamen of the complaint is equitable in nature"]).

While the complaint seeks "full compensatory damages" in the Prayer for Relief (IDT Complaint, Prayer for Relief, ¶ A), the majority of the relief sought is equitable in nature.

IDT seeks an order "directing Morgan Stanley to return to IDT the "$10,000,000 in fees paid by IDT to Morgan Stanley (id., ¶ B), as well as an order directing Morgan Stanley to "disgorge to IDT any profits it obtained from Telefonica, or any other entity, in connection with the SAm-1 Network" (id., ¶ C). IDT also seeks the imposition of "appropriate punitive damages" (id., ¶ D). Taken as a whole, the complaint primarily seeks to force Morgan Stanley to disgorge the amounts it obtained through improper means, and seeks to deter such conduct in the future by means of such equitable relief and punitive damages (see Gomez v Bicknell, 302 AD2d 107, 113-114 [2d Dept 2002], lv dismissed in part, denied in part 100 NY2d 574 [2003]) Accordingly, the six-year statute of limitations applies (see Spitzer v Schussel, 7 Misc 3d 171, supra), and IDT's breach of fiduciary duty claim is timely.

Moreover, even assuming that Morgan Stanley was correct in asserting a three-year statute of limitation, IDT's breach of fiduciary duty claim would still be timely. "As a general proposition, a tort cause of action cannot accrue until an injury is sustained" (Kronos, Inc. v AVX Corp., 81 NY2d at 94). Accepting its allegations as true, IDT did not suffer damage until the Arbitration Panel handed down its decision on October 31, 2003, awarding damages in an amount less than the full extent of the harm suffered by IDT, because Morgan Stanley's breach of fiduciary duty and other misconduct had infected the arbitration.

New York's limitation period on claims for breach of fiduciary duty "does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has otherwise terminated" (Westchester Religious Institute v Kamerman, 262 AD2d 131, 131-132 [1st Dept 1999], citing Matter of Barabash, 31 NY2d 76 [1972]; see also Golden Pacific Bancorp v FDIC, 273 F3d 509 [2d Cir 2001]). The Engagement Letter, dated March 15, 2000, provided

that Morgan Stanley would perform work for IDT over the course of the following 21 months, i.e., until January 15, 2002. In the Morgan Stanley action, Morgan Stanley maintains that it fulfilled its duties under the Engagement Letter, and seeks to enforce its terms. Thus, according to Morgan Stanley's own complaint, the earliest that Morgan Stanley's fiduciary relationship with IDT was terminated was January 15, 2002, which is within three years of the commencement of this action.

3. Unjust Enrichment

Morgan Stanley argues that the unjust enrichment claim is nothing more than a repetition of the tortious interference claim and that thus, the three-year statute of limitations applies. The two claims, however, are distinct, both factually and legally. The unjust enrichment claim concerns the $10 million fee, as well as any other fees by which Morgan Stanley was unjustly enriched (IDT Complaint, ¶ 77). In contrast, the tortious interference claim focuses on Morgan Stanley's conduct in convincing Telefonica to delay its performance under, and ultimately breach, the MOU (id., ¶¶ 59-61).

Thus, contrary to Morgan Stanley's arguments, a six-year statute of limitations applies to IDT's unjust enrichment claim (CPLR 213 [1]; see also Fed. Natl. Mortgage Assoc. v Mebane, 208 AD2d 892 [2d Dept 1994]). A claim for unjust enrichment accrues "upon the occurrence of the wrongful act giving rise to a duty of restitution" (Golden Pacific Bancorp v FDIC, 273 F3d at 520 [internal citation and quotations omitted]). IDT claims that Morgan Stanley unjustly enriched itself by, inter alia, coercing the $10 million fees from IDT in October of 2000 (Complaint, ¶¶17, 77). IDT contends that it does not know precisely when Morgan Stanley unjustly enriched itself by accepting fees from Telefonica and others. However, since the

MOU was signed in August 1999, it is clear that all such conduct must have occurred within six years of the filing of this action. Accordingly, the unjust enrichment claim is timely.

4. Misappropriation of Confidential Information

Morgan Stanley contends that IDT's cause of action for misappropriation of confidential information is barred by the three-year statute of limitations.

The statute of limitations is an affirmative defense (Calcutti v SBU, Inc., 224 F Supp 2d 691 [SD NY 2002]). "Questions of fact that arise in applying a statute of limitations are for the trier of fact" (id. at 697). Thus, if a court cannot determine from the record before it precisely when the statute began to run, the court cannot make a finding that the claims are time barred because to do so would be to "invade the province of the jury" (id. at 698, citing Maslan v American Airlines, Inc., 885 F Supp 90, 93 [SD NY 1995]).

Here, IDT has raised material issues of fact as to whether its misappropriation of confidential information claim is timely under the three-year statute of limitations. IDT alleges that it did not learn that Morgan Stanley had misappropriated its confidential information until IDT's counsel obtained documents in discovery during the Arbitration. This was between December 10, 2001 and March of 2002, (see Roover Decl., ¶ 2). IDT further alleges that documents were produced in the Arbitration over a fairly long period of time (see id.). As such, there are triable issues as to when IDT, through its counsel, learned of Morgan Stanley's misappropriation of confidential information.

IDT also alleges that Morgan Stanley is engaged in both active and passive concealment of its conduct. Where, as here, a fiduciary relationship is alleged to exist, and there are allegations of concealment, the doctrine of equitable estoppel may be applied to toll the

statute of limitations, or preclude a litigant's reliance on it (Niagra Mohawk Power Corp. v Freed, 288 AD2d 818 [4th Dept 2001]; accord Matter of Piccillo, ___ AD3d ___, 2005 WL 1377871 [4th Dept 2005]). According to IDT, Morgan Stanley's claimed acts of active concealment include false assurances provided to IDT's top executive, Howard Jonas, by a Morgan Stanley partner when Jonas questioned him about rumors that Morgan Stanley had been denigrating IDT. IDT also alleges that Morgan Stanley engaged in passive concealment by failing to disclose to IDT its misappropriation and misuse of IDT's confidential information.

These allegations raise triable issues of fact as to whether the doctrine of equitable estoppel should apply to toll the statute of limitations until such time as IDT discovered Morgan Stanley's conduct (Niagra Mohawk Power Corp. v Freed, 288 AD2d 818, supra; see e.g. In re Watson, 8 AD3d 1092, 1094 [4th Dept 2004]).

C. Failure to State a Cause of Action

1. Breach of Fiduciary Duty and Misappropriation of Confidential Information

Morgan Stanley argues that IDT's claims for breach of fiduciary duty and misappropriation of confidential information are not pleaded with sufficient particularity and that therefore, they should be dismissed.

Pursuant to CPLR 3016(b), "[w]here a cause of action or defense is based upon misrepresentation, fraud ... breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Courts have interpreted CPLR 3016 (b) to mean that allegations should be sustained when "the pleadings [are] sufficiently detailed to apprise defendants of the conduct on which this claim was predicated, in satisfaction of CPLR 3016(b)" (Wiener v Lazard

Freres & Co., 241 AD2d 114, 123 [1st Dept 1998]). Here, IDT's complaint sufficiently informs Morgan Stanley of the improper conduct upon which each claim is based.

With respect to the breach of fiduciary duty claim, Morgan Stanley contends that IDT has not sufficiently identified the conduct by which Morgan Stanley breached its fiduciary duties. However, contrary to these contentions, the complaint sets forth numerous specific instances in which Morgan Stanley, by virtue of the access to confidential business and financial information it gained by acting as IDT's investment advisor, allegedly breached its duties of trust and confidence (see e.g. Complaint, ¶ 30 [Morgan Stanley provided IDT's confidential and proprietary business and financial information to Telefonica, with whom IDT was engaged in arms-length negotiations, and advised Telefonica to reduce or eliminate IDT's interest in the SAm-1 Network]; id., ¶ 31 [Morgan Stanley actively promoted the participation of other anchor tenants in the SAm-1 Network]; id., ¶ 34 [Morgan Stanley disparaged IDT to Telefonica and, when confronted about it by IDT's top executive, falsely assured IDT that any disparagement would cease immediately, and that Morgan Stanley was not trying to interfere with the Telefonica MOU]; id., ¶ 35 [Morgan Stanley presented valuations of NewCo and Emergia to IDT for the purpose of advantaging Telefonica and Morgan Stanley in their efforts to renegotiate the MOU with IDT]; id., ¶¶ 37-38 [Morgan Stanley's valuations were relied upon by Arbitration Panel]).

These allegations adequately state a claim for breach of fiduciary duty (see Wiener v Lazard Freres & Co., 241 AD2d 114, supra; Official Comm. of Unsecured Creditors v Donaldson, Lufkin & Jenrette Sec. Corp., 2002 WL 362794, at *2-3 [SD NY 2002] [sustaining claims for breach of fiduciary that stated "in only the most general of allegations," that

investment banking firm hired by plaintiff "devised a scheme to attract [plaintiff] as a potential merger partner" with false valuations of target company]).

In its cause of action for misappropriation of confidential information, IDT alleges that Morgan Stanley misappropriated and misused "confidential and proprietary business and financial information" which had been entrusted to it by IDT as its "investment banking advisor" by "disclos[ing] that information to Telefonica "without IDT's knowledge and consent" (Complaint, ¶¶ 70-72). Morgan Stanley contends that IDT's allegations that Morgan Stanley misappropriated confidential information and defrauded IDT and the Arbitration Panel are overly broad and conclusory, and are thus not pleaded with sufficient particularity to support IDT's claims for misappropriation of confidential information.

To the contrary, the complaint is precise in pleading that Morgan Stanley had access to – and ultimately misused – "the Company's financial books, records, future budgets and projections" (id., ¶ 19). IDT alleges that Morgan Stanley used this confidential information to induce Telefonica to, inter alia, breach the MOU, promote other candidates for the anchor tenant position in the SAm-1 Network, and renegotiate IDT's interest in NewCo (id., ¶¶ 33, 36, 38-39, 71). These allegations are "sufficiently detailed to apprise [Morgan Stanley] of the conduct on which this claim was predicated" (Wiener v Lazard Freres & Co., 241 AD2d at 114).

It is further noted that the detailed actions underlying the claims of this nature, are usually not known to the victims of the acts, but the details are known to the actors themselves. In any event, particulars can be sought by various discovery devices, including demands for a bill of particulars, and interrogatories.

Morgan Stanley also argues that the Court should assume that any of IDT's

confidential information that Morgan Stanley disclosed to Telefonica was probably available to Telefonica through proper means, such as due diligence (Morgan Stanley's Mem of Law at 18). This argument, however, must be rejected (see Franke v Wiltschek, 209 F2d 493, 495 [2d Cir 1953] [citations omitted] ["It matters not that defendants could have gained their knowledge from a study of ... plaintiffs' publicly marketed product. The fact is they did not. Instead they gained it from plaintiffs via their confidential relationship, and in so doing incurred a duty not to use it to plaintiffs' detriment. This duty they have breached"]).

2. Unjust Enrichment

Morgan Stanley contends that, because it and IDT had a written contract for the provision of investment banking services relating to IDT's sale of Net2Phone shares – the Engagement Letter – which provided for the $10 million fee IDT paid to Morgan Stanley, IDT's attempt to recover that $10 million fee through a claim for unjust enrichment is precluded as a matter of law.

"A cause of action for unjust enrichment is stated where plaintiffs have properly asserted that a benefit was bestowed ... by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor" (Wiener v Lazard Freres & Co., 241 AD2d at 119 [quoting Tarrytown House Condominiums v Hainje, 161 AD2d 310, 313 [1st Dept 1990]). The IDT complaint alleges at least three categories of benefits reaped by Morgan Stanley as a result of IDT"s bestowing its confidential information, trust and repose. First, IDT alleges that Morgan Stanley coerced it to pay $10 million in unearned fees in 2000 (IDT Complaint, ¶¶ 17, 77). Second, IDT alleges that, after breaching its duties of trust and confidence, Morgan Stanley collected fees from Telefonica in connection with its search for tenants to replace IDT (id., ¶ 43).

Third, IDT alleges that Morgan Stanley collected fees from potential replacement tenants. IDT alleges, Morgan Stanley used economic coercion and other wrongful means to obtain benefits for itself that should have properly accrued to IDT.

To preclude a claim for unjust enrichment, there must be valid and enforceable contract between the parties concerning the subject of the claim for unjust enrichment. (see e.g. Clark-Fitzpatrick, Inc. v Long Island R.R. Co., 70 NY2d 382 [1987]). The Engagement Letter does not meet that test.

IDT has specifically alleged that the Engagement Letter was obtained by Morgan Stanley through economic coercion, and is therefore void (IDT Complaint, ¶¶ 16-18). It is well-settled that a contract is voidable for economic duress where a party is forced to agree to it by means of a wrongful threat precluding the exercise of the party's free will (see e.g. Austin Instr. Inc. v Loral Corp., 29 NY2d 124 [1971]).

Moreover, the Engagement Letter does not govern the subject matter of the IDT action. It does not cover the question of whether Morgan Stanley was entitled to make IDT's confidential business and financial information available to its other clients. Rather, the Engagement Letter mentions specific permissible conduct, and no more. In any event, at most, all Morgan Stanley can assert is that there is an issue of fact as to whether the Engagement Letter could apply to the misconduct alleged in the IDT complaint. Where there is a bona fide dispute as to the existence of a contract, or its application to a dispute, dismissal of a claim for unjust enrichment is improper, and the plaintiff should be permitted to proceed upon a theory of quasi-contract (see Reade v Cardinal Health, Inc., 12 AD3d 224 [1st Dept 2004]; Old Salem Dev. Group Ltd. v Town of Fishkill, 301 AD2d 639 [2d Dept 2003]).

3. **Tortious Interference with Prospective Business Relations**

IDT has failed, however, to plead the requisite elements of a claim for tortious interference with prospective business relations, and this cause of action must be dismissed. In order to state this claim, a plaintiff must show (1) business relations with a third party; (2) defendant's interference with those business relations; (3) defendant acted with the sole purpose of harming the plaintiff or used dishonest, unfair or improper means; and (4) injury to the relationship (71 Pierrepont Assocs. v 71 Pierrepont Corp., 243 AD2d 625 [2d Dept 1997]).

The allegations that, in tortiously interfering with the MOU and IDT's prospective economic advantage, Morgan Stanley was motivated by a desire "to earn lucrative investment banking fees" (see generally IDT Complaint), are fatal to the claim for tortious interference with prospective economic advantage. "[A] cause of action for prima facie tort or intentional interference with prospective economic advantage does not lie absent an allegation that the action complained of was motivated solely by malice or to inflict injury by unlawful means other than by self-interest or other economic considerations" (Entertainment Partners Group, Inc. v Davis, 198 AD2d 63, 64 [1st Dept 1993])

For the above reasons, IDT's third cause of action is dismissed.

4. **Punitive Damages**

Morgan Stanley contends that IDT's claim for punitive damages in each of its five causes of action should be dismissed, because IDT does not allege that the general public was the victim of any alleged wrongdoing. Contrary to this contention, however, "[p]unitive damages are available in a tort action where the wrongdoing is intentional or deliberate, has circumstances of aggravation and outrage, has a fraudulent or evil motive, or is in such a conscious disregard of

the rights of another that it is deemed willful and wanton" (Swersky v Dreyer & Traub, 219 AD2d 321, 325 [1st Dept 1996] [citation omitted]). "That the harm alleged might not have been aimed at the general public does not alter this result" (id., citing Giblin v Murphy, 73 NY2d 769, 772 [1988] [upholding punitive damages award in breach of fiduciary duty action where defendant's conduct was "grossly negligent and reckless" and amounted to "a wanton disregard of plaintiff's rights"]). In fact, "New York courts have considered punitive damages to be particularly appropriate for tortious conduct involving deliberate action 'systematically conducted for profit'" (Universal City Studios, Inc. v Nintendo Co., Ltd., 797 F2d 70, 77 [2d Cir 1986]).

Accordingly, IDT's punitive damages claims are not subject to dismissal at this time.

II. IDT's Motion to Dismiss the Morgan Stanley Action

IDT does not raise any pleading defect with respect to the Morgan Stanley complaint. Rather, it seeks dismissal of the Morgan Stanley action as a matter of discretion pursuant to CPLR 3001 and 3211 (a) (4). IDT argues that Morgan Stanley has engaged in "gamesmanship," and shown bad faith, in filing this tactical, pre-emptive declaratory judgment action, and that thus, the Court should refuse to entertain jurisdiction over the action. According to IDT, the disputes between the parties should be litigated in a traditional action for affirmative relief, with IDT and Morgan Stanley in their "natural" positions as plaintiff and defendant. Thus, IDT contends, this action should be dismissed in favor of the IDT action, which asserts claims against Morgan Stanley that include, but go far beyond, the claims asserted in this action, which only concern the Engagement Letter.

IDT's motion to dismiss is denied.

IDT argues that this action should be dismissed, pursuant to CPLR 3001, based on the Court's discretion to decline to render a declaratory judgment. IDT ignores the fact that the first and second causes of action seek damages and specific performance, not declaratory relief. Dismissal is not appropriate under these circumstances (see e.g. 5 Weinstein-Korn-Miller, NY Civ Prac ¶ 3001.00 ["A declaratory judgment cause of action may also be combined with other causes of action"; Siegel, NY Prac § 436, at 707 [3d ed] ["CPLR 3017(b) makes clear that declaratory relief need not be sought by itself, but can be joined with a demand for more traditional relief, and it usually is"]). Indeed, IDT cites no case holding that an entire case can or should be dismissed as a matter of discretion when only some of the claims seek declaratory relief.

Second, IDT suggests that, because the two actions are co-extensive, and involve essentially the same claims, the Morgan Stanley action should be dismissed in favor of the IDT action, which will definitively dispose of all the claims between the parties. However, the IDT action does not address, or even mention, the indemnification agreement, which forms the basis of several of Morgan Stanley's declaratory judgment causes of action. In addition, Morgan Stanley seeks indemnification not only with respect to IDT's action, but also with respect to IDT's prior federal action, and claims made prior to the institution of litigation. IDT's action, therefore, will not resolve all of the disputes between the parties.

IDT also moves to dismiss pursuant to CPLR 3211(a)(4), which authorizes dismissal of an action where "there is another action pending between the same parties for the same cause of action in a court of any state for the United States." The court has broad discretion

in considering whether to dismiss an action pursuant to CPLR 3211(a)(4) (Whitney v Whitney, 57 NY2d 731 [1982]).

IDT contends, citing White Light Productions, Inc. v On the Scene Productions, Inc. (231 AD2d 90, 96 [1st Dept 1997]), that "[s]pecial circumstances warrant deviation from the general rule" where, as here, "the action sought to be restrained is vexatious, oppressive or instituted to obtain some unjust or inequitable advantage." IDT asserts that the Morgan Stanley action presents extraordinary circumstances warranting dismissal, because Morgan Stanley filed this action solely and exclusively in the hopes of gaining some tactical advantage in casting itself as the equitable plaintiff and, as such, has engaged in rank gamesmanship and forum-shopping.

Courts have declined jurisdiction over a first-filed declaratory judgment action in favor of a later-filed action, but only rarely, and in extraordinary circumstances not present here. For example, in Salomon Bros., Inc. v W. Va. State Bd. of Investors, 152 Misc 2d 289 [Sup Ct, NY County 1990], affd 168 AD2d 384 [1990],appeal denied 77 NY2d 807 [1991]), the court dismissed a declaratory judgment action in favor of two damages actions filed in West Virginia. The West Virginia damages actions were filed only three days later. In addition, damages had not yet begun to accrue for the declaratory judgment plaintiff. Critically, the court was most concerned about forum shopping, and about parallel actions in disparate fora. Accordingly, the court found, upon application of traditional forum non conveniens criteria, that West Virginia was a more appropriate forum.

Unlike the foregoing circumstances, the IDT action was filed a month, not three days after the Morgan Stanley action, damages have already accrued for Morgan Stanley, and both actions are in the same forum.

Likewise, White Light Productions, Inc. v On the Scene Productions, Inc. 237 AD2d 90, supra) does not support IDT's motion to dismiss. In that case, which involved parallel actions in New York and California, the court was concerned with apparent forum shopping, and the possibility of inconsistent legal rulings. Here, in contrast, neither forum shopping nor conflicting legal rulings are concerns, as both cases are pending in IDT's chosen forum.

Since both actions are before the same court, many of the problems, etc., raised by IDT can be handled by the court in rulings during the course of the actions.

Accordingly, IDT's motion to dismiss the Morgan Stanley action is denied

III. IDT's Motion to Disqualify

IDT moves to disqualify Herbert Stern, Esq. (Stern) and his firm, Stern & Kilcullen, from representing Morgan Stanley in this matter. It argues that Stern has an impermissible conflict of interest stemming from prior representation of IDT in a substantially related matter, in violation of Code of Professional Responsibility DR-5-108 (a) (1) (22 NYCRR § 1200.27 [a] [1] ["a lawyer who has represented the former client in a matter shall not ... [t]hereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client"). IDT contends that Stern previously represented it, including working on the sale of IDT's interests in Net2Phone to AT&T. IDT further contends that, in connection with that representation, Stern had close and frequent contact with Net2Phone executives, and was privy to extensive confidential information concerning Net2Phone and IDT.

In support of its motion to disqualify, IDT submits the affidavit of Glenn Williams, Net2Phone's general counsel, in which Williams alleges the following: together with

Steven Greenberg (Greenberg), Stern formerly was a member of a small law firm called Stern & Greenberg. Net2Phone was a former IDT subsidiary in which IDT retained a large stake. Stern & Greenberg represented Net2Phone from its inception in June 1999. Greenberg left Stern & Greenberg in late August of 2000 (Williams Decl., ¶ 8). Stern continued to represent Net2Phone for a time thereafter. Williams alleges that, while Stern & Greenberg represented Net2Phone, Stern understood that IDT, the owner of a majority stake in Net2Phone, was also a client (id., ¶ 5).

At the beginning of 2000, IDT contemplated the sale of some or all of its remaining Net2Phone equity. In April of that year, after lengthy negotiations, IDT agreed to sell AT&T a 32% equity stake in Net2Phone for more than $1 billion (the Net2Phone transaction) (id., ¶ 3). Stern & Greenberg played an active role in ensuring that the Net2Phone transaction was consummated (id., ¶ 4).

Working with attorneys and executives from IDT, Net2Phone and AT&T, Stern & Greenberg completed the necessary pre-transaction notification to the U.S. Department of Justice and the Federal Trade Commission (id., ¶¶ 4-5). Williams alleges that, to complete the notification form required to be filed under the Hart Scott Rodino Antitrust Improvement Act of 1976 (the HSRA), Stern & Greenberg required access to confidential information. They obtained this information by participating in extensive conference calls and meetings with Net2Phone and IDT executives (id.). The transaction closed in August of 2000 shortly after the HSRA waiting period expired.

Stern & Greenberg also served as special counsel to the Net2Phone Board of Directors (id., ¶ 7). Greenberg attended Net2Phone Board meetings, and was privy to

confidential business plans and information (id.). Williams asserts that, given the size of their firm – Stern and Greenberg were the sole partners – Stern was aware of both Net2Phone and IDT confidential information. Williams further asserts that, after Greenberg left Stern & Greenberg, Stern continued to represent Net2Phone, and continued to acquire confidential information about Net2Phone and IDT (id., ¶ 8).

A party seeking disqualification of its adversary's lawyer pursuant to Code of Professional Responsibility DR-108 (a) (1) has the burden of proving: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel; (2) that the matters involved in both representations are substantially related; and (3) that the interests of the present client and former client are materially adverse (Jamaica Pub. Serv. Co. v AIU Ins. Co., 92 NY2d 631 [1998]). Only "where the movant satisfies all three inquiries does the irrebutable presumption of disqualification arise" (Tekni-Plex, Inc. v Meyner & Landis, 89 NY2d 123, 132 [1996]).

IDT's motion for disqualification is denied. Stern vigorously disputes IDT's version of events and, argues that: (1) there was never any prior attorney-client relationship between IDT and Stern & Greenberg; (2) the matters as to which Stern & Greenberg represented Net2Phone were not "substantially related" to the matter at issue in this lawsuit; and (3) disqualification is precluded by DR 5-108(c) because Greenberg, the only lawyer in the firm who represented Net2Phone in connection with the Net2Phone transaction, terminated his association with the firm in late August 2000, and there is no evidence that any lawyer at the firm has any "confidences" or "secrets" of IDT that are material to this matter.

With respect to the existence of a prior attorney client relationship, Stern alleges

that he and Stern & Greenberg "have never been retained or paid by IDT, and have never represented or had an attorney client relationship with IDT" (Stern Aff., ¶ 2). Stern further asserts that, prior to his departure from Stern & Greenberg on September 1, 2000, Greenberg did represent Net2Phone (id., ¶ 3). However, Greenberg never represented IDT (id.). In support of this contention, Stern submits a retainer agreement, dated August 9, 1999, pursuant to which Net2Phone retained Stern & Greenberg to represent it "as Special Counsel on certain corporate matters" (id., Exh A). IDT does not present any evidence of a retainer agreement between it and Stern & Greenberg. Moreover, Stern's declaration that he never represented IDT is confirmed by IDT's own press release of March 31, 2000 (Reply Aff. of Joel M. Silverstein, Exh G), which reflects that IDT was represented by separate counsel – Sullivan & Cromwell – in connection with the Net2Phone transaction (see also Second Aff. of Howard Jonas, ¶ 3).

Moreover, the mere fact that Net2Phone is a former IDT subsidiary is irrelevant to a conflict of interest analysis. A parent and subsidiary corporation are, as a general rule, presumed to be distinct legal entities (Alexander & Alexander of NY, Inc. v Fritzen, 114 Ad2d 814 [1st dept 1985], affd 68 NY2d 968 [1986]). However, this distinction may be called into question by a showing of dominion and control by the parent over the subsidiary (id).

Stern presents evidence that, during the relevant period, Net2Phone was a separate, publicly traded corporation with its own officers and board of directors, several hundred employees, and hundreds of millions of dollars in assets (see Silverstein Aff., ¶¶ 2-6; Exhs A-E). In contrast, IDT fails to present any evidence that it exercised complete dominion and control over Net2Phone. Under these circumstances, and given the lack of a retainer agreement with IDT, there is no basis for treating IDT as having had an attorney-client relationship with Stern &

Greenberg (see Brooklyn Navy Yard Cogeneration Partners L.P. v PMNC, 174 Misc 2d 216, 217 [Sup Ct, Kings County 1997], affd 254 AD2d 312 [2d Dept 1998]; see also ABA Comm on Ethics and Professional Responsibility, Formal Op. 95-390 ["It is the Committee's opinion that the Model Rules of Professional Conduct do not prohibit a lawyer from representing a party adverse to a particular corporation merely because the lawyer (or another lawyer in the same firm) represents, in an unrelated matter, another corporation that owns the potentially adverse corporation, or is owned by it, or is, together with the adverse corporation, owned by a third entity. The fact of corporate affiliation, without more, does not make all of a corporate client's affiliates into clients as well"]).

Furthermore, counsel will only be disqualified where the party seeking the relief meets its burden by establishing a substantial relationship between the issues in the present litigation and the subject matter of the prior representation, or where counsel had access to confidential material substantially related to the litigation (Lighting Park, Inc. v Wise Lerman & Katz, 197 AD2d 52 [1st Dept 1994]; Prudential Securities, Inc. v Wyser-Pratte, 187 AD2d 306 [1st Dept 1992]). Here, IDT has not met that burden.

In order to meet the substantial relationship test, the issues in the present litigation must be "identical to" or "essentially the same as" those in the prior case before disqualification will be granted (Lighting Park, Inc. v Wise Lerman & Katz, 197 AD2d 52, supra). Although IDT asserts that "[t]he subject matter of this lawsuit is substantially related to the AT&T transaction" (IDT Mem of Law at 6), the only evidence it presents in support of this assertion is the declaration of Net2Phone General Counsel Glenn Williams. Williams avers that, after IDT announced its deal to sell the majority of its Net2Phone stock to AT&T, Stern & Greenberg

"were responsible for complying on behalf of Net2Phone and IDT with the Hart Scott Rodino Antitrust Improvements Act of 1976 (HSRA)" and in this role (1) "participated in extensive conversations among attorneys and executives from IDT, Net2Phone and AT&T regarding the AT&T transaction"; (2) "[a]long with other outside counsel ... prepared the required HSRA notifications," and (3) "represented Net2Phone at a meeting with DOJ officials in Washington D.C." (Williams Decl ¶¶ 3-6).

These allegations, however, do not satisfy IDT's burden of showing that "the matters involved in both representations are substantially related" (Jamaica Public Service Co., 92 NY2d at 635). At issue here is the nature and scope of the investment banking relationship between IDT and Morgan Stanley, the parties' mutual obligations arising from that relationship, including how the $10 million fee was first negotiated and agreed to, and the parties' compliance or non-compliance with such obligations. IDT has offered no evidence that these issues are substantially related to the limited role Williams assigns Stern & Greenberg in the Net2Phone transaction – assuring Net2Phone's and IDT's compliance with the HSRA. Most importantly, IDT has not presented any evidence that Stern & Greenberg represented IDT in connection with any aspect of its investment banking relationship with Morgan Stanley, or became privy to any "confidences" or "secrets" of IDT relevant to that relationship, or that Stern & Greenberg's purported role in assuring HSRA compliance in the AT&T transaction has any substantial relationship to the matters at issue in this action.

IDT's failure to demonstrate any substantial relationship between Stern & Kilcullen's current representation of Morgan Stanley and its prior representation of Net2Phone, without more, warrants denial of the disqualification motion (Jamaica Pub. Serv. Co., 92 NY2d

at 636-637).

Absent a substantial relationship, disqualification is warranted only upon a showing that Stern received specific confidential information and that it is substantially related to the present litigation (Lighting Park, Inc. v Wise Lerman & Katz, 197 AD2d 52, supra). Although IDT contends that Stern had access to IDT's confidential information, and that it is substantially related to the present matter, IDT fails to distinguish between its own allegedly confidential information and that of Net2Phone. Thus, IDT generally alleges that "Mr. Greenberg attended *Net2Phone* Board meetings, and was privy to confidential business plans and information" (IDT Mem of Law at 3 [emphasis added]); "Mr. Greenberg's presence at [*Net2Phone*] Board meetings and knowledge of confidential information must, necessarily be imputed to Stern" (id. at 8 [emphasis added]); "Mr. Greenberg attended *Net2Phone* Board meetings, and was therefore privy to confidential internal discussions on a wide range of issues" (Williams Declaration, ¶ 7 [emphasis added]); "after Mr. Greenberg departed from Stern & Greenberg, Mr. Stern acquired confidential information regarding *Net2Phone* finances, commercial practices and strategies" (id., ¶ 8 [emphasis added]).

Moreover, IDT offers only the kind of "generalized assertions of access to confidences and secrets" that the Court of Appeals has held insufficient to meet the burden on this motion (Jamaica Pub. Serv. Co., 92 NY2d at 638). Thus, IDT's counsel's generalized assertions that "Stern had personal knowledge of all of the details of the [Net2Phone]" [IDT Mem of Law at 4], and that Stern "was privy to extensive confidential information concerning Net2Phone and IDT" [Weiss Aff., ¶ 4] are insufficient. Moreover, IDT's counsel's statements do not constitute personal knowledge and, thus, are not of probative value in this regard. (see e.g.

Israelson v Rubin, 20 AD2d 668, 669 [2d Dept], affd 14 NY2d 887 [1964]).

Further, the declaration of Glenn Williams – the only affiant proffered by IDT in its moving papers who claims to have personal knowledge – also fails to support IDT's assertion. Williams declares only that the firm, Stern & Greenberg – as distinct from Stern personally – had involvement in and knowledge of the Net2Phone transaction. The only individual Stern & Greenberg attorney that Williams identifies as providing services to Net2Phone at the time of the transaction (which Williams identifies as April through August 2000) is former partner Greenberg (Williams Decl., ¶ 7). Williams does not refer to any services personally performed by Stern for Net2Phone until after Greenberg left Stern & Greenberg in August 2000, after the Net2Phone transaction was complete (id., ¶ 8).

In response, Stern confirms that: (1) Greenberg was the only Stern & Greenberg attorney who represented Net2Phone between April and August 2000 (Stern Aff., ¶ 3); (2) "During Greenberg's tenure with the firm, [Stern] had no personal involvement in that representation, and received no confidential information concerning IDT or Net2Phone" (id.).; (3) Stern never – either before or after Greenberg's departure – received any confidential information concerning IDT (id., ¶ 4); (4) though, after Greenberg left Stern & Greenberg, Stern did represent Net2Phone for a few months beginning in mid-September 2002, this representation involved a dispute between Net2Phone and two former employees who had become employed with a competitor of Net2Phone, and in no way involved IDT or Morgan Stanley, much less the particular matters at issue here (id., ¶ 5); and (5) this representation was Stern's only professional relationship with Net2Phone, and occasioned no communication of any confidential financial information concerning IDT (id., ¶ 6).

Disqualification is also precluded by DR 5-108 (c), which provides, in pertinent part:

> [W]hen a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm *only if the law firm or any lawyer remaining in the firm has information protected by section 1200.19(b) of this Part that is material to this matter.*

DR 5-108 (c) (22 NYCRR1200.27 [c]) (emphasis added). Section 1200.19(b), in turn, protects "a confidence or secret of a client." "Confidence" and secret" are defined as follows:

> Confidence refers to information protected by the attorney-client privilege under applicable law, and secret refers to information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

DR 4-101 (a) (22 NYCRR §1200.19 [a]).

IDT's assertions that there was "constant cross pollination between Stern and Greenberg that warrants imputation to Stern of Greenberg's purported "knowledge of confidential information" (IDT Mem of Law at 7-8) are without support in the record. They are flatly contradicted by Stern's explicit denial, and by his affirmation that, "as to a number of matters which, like the Net2Phone matter, Mr. Greenberg or I handled personally and individually ... there was typically no 'cross-pollination' or sharing of substantive information between us" (Stern Aff., ¶ 4).

IDT submits, for the first time on reply, the affirmation of Stephen Greenberg, Esq., Stern's former partner. He affirms that he and Stern discussed each matter in the office every day, and that he provided detailed confidential information about Net2Phone, IDT and the

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Net2Phone transaction to Stern. First, the affirmation is of small probative consequence, given the fact that Greenberg has filed suit against Stern and his firm, alleging that he is owed a substantial amount.

Second, Stern submits his time records for 2000 (Second Stern Aff., Exh A), disposing of Greenberg's foregoing assertions. The time records reveal that Stern never billed any time for the Net2Phone transaction, or for any IDT matter. Moreover, Stern avers that he reviewed Greenberg's time sheets and billings to Net2Phone, and that not a single entry reflected any contact with Stern on any Net2Phone or IDT matter. Stern also avers that the firm has never submitted a bill to IDT.

Accordingly, because neither the Morgan Stanley action nor the IDT action "would be tainted by the participation of [Stern or his firm]" (S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 444-445 [1987]), the disqualification motion is denied.

The Court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that Morgan Stanley's motion to dismiss the complaint in IDT Corporation v Morgan Stanley Dean Witter & Co. and Morgan Stanley & Co., Inc. (Index No. 603710/04) is granted to the limited extent that the third cause of action is dismissed; and it is further

ORDERED that Morgan Stanley is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that IDT's motion to dismiss the complaint in Morgan Stanley & Co., Incorporated v IDT Corporation (Index No. 603194/04) is denied; and it is further

ORDERED that IDT is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that IDT's motion for disqualification is denied.

Dated: April 10, 2006

ENTER:

J.S.C.

FILED
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COUNTY CLERK'S OFFICE
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