UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITIBANK, N.A., Plaintiff, vs. STEVEN P. OTILLAR and LAURA J. OTILLAR, Defendants.	Case No. 12-cv-5092 (LLS)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff's motion for summary judgment in lieu of complaint on a promissory note (the "Note") must be denied because, as set forth in the detailed and extensive accompanying Declaration of Steven P. Otillar ("Otillar Decl."), the Defendants were fraudulently induced to sign the Note. Under settled New York law, fraudulent inducement is a defense to recovery on a negotiable instrument. Therefore, the motion for summary judgment should be denied and Defendants should be permitted to file an answer with affirmative defenses and counterclaims for aiding and abetting fraud and aiding and abetting breach of fiduciary duty.

BACKGROUND & PROCEDURAL HISTORY

Mr. Otillar is an attorney licensed to practice before the Bar of the State of Texas. (Otillar Decl. ¶ 5.) He has been practicing law since 1995, primarily in the fields of energy and finance. (*Id.*) In 2010, Mr. Otillar was a partner with the law firm of Baker & McKenzie LLP in Houston, Texas. (*Id.* ¶ 6.) In late 2010, he was approached by Dewey & LeBoeuf LLP ("DL") to join the now-bankrupt, New York-based law firm. (*Id.* ¶ 7.)

DL was formed in 2007 by the merger of two prominent law firms: Dewey Ballantine LLP ("DB") and LeBoeuf, Lamb, Greene & MacRae LLP ("LL"). (*Id.* ¶ 8.) DB was formed in 1909, and LL was formed in 1929. (*Id.*) As a result of the merger, DL became one of the largest law firms in the world, with a reputation for deep, firm-wide experience and expertise in a number of fields, including areas in which Mr. Otillar focused his practice – energy and finance. (*Id.*)

Initially, Mr. Otillar was approached by a recruiter. (*Id.* ¶ 8.) When DL was recruiting Mr. Otillar, they were also recruiting another partner from Baker & McKenzie

named Karl Hopkins. (*Id.*) On December 6, 2010, Mr. Otillar met at DL's New York City office with a number of DL partners, including Steven Davis, DL's Chairman. (*Id.*) On December 8, 2010, Mr. Otillar met with a group of DL partners in Houston, including Thomas Moore, John Klauberg, Bill Lamb and Jim Bowe. (*Id.*) Davis and the other DL partners with whom Mr. Otillar met in late 2011 before joining DL shall be referred to hereinafter as the "Recruiting Partners." (*Id.*)

In conversations and meetings with the Recruiting Partners, Mr. Otillar raised concerns about DL's possible financial difficulties resulting from the 2007 merger. (*Id.* ¶ 10.) The Recruiting Partners assured Mr. Otillar that DL had made changes and had taken steps to reduce expenses and to increase profitability, and they assured him that DL was in a growth mode. (*Id.*) None of the Recruiting Partners disclosed that they had not received their full compensation from the firm, or that there was any financial problem or difficulty at DL whatsoever. (*Id.* ¶ 11.) To the contrary, they all indicated that the firm was very prosperous and would be expanding the Houston office to 30 to 40 lawyers in the very near future. (*Id.*) Davis mentioned that any liabilities or expenses associated with the merger were going off of the books at the end of 2010. (*Id.* ¶ 12.) Mr. Otillar was told that he was joining DL at the absolute perfect time as the firm's profitability had grown and was continuing to grow substantially. (*Id.*)

In addition to the assurances he received from the Recruiting Partners before deciding whether to accept a position at DL, Mr. Otillar reviewed and relied on financial performance information available on line and what was provided by the recruiter, including information about DL in *The American Lawyer*'s 2010 Am Law 100 annual report. (*Id.* ¶ 13.) For more than 25 years, *The American Lawyer* has published annual reports ranking the 100 largest United States law firms, including DL, on a number of

metrics, including gross revenue, revenue per lawyer, attorney compensation, and profits per partner. (*Id.* ¶ 14.) The Am Law 100 is one of the principal sources of information relied on by attorneys considering lateral partnership positions. (*Id.*) Mr. Otillar used such information not only to judge the prestige and financial strength of DL, but also in an effort to compare DL with his then-current firm and other firms that had contacted him about becoming a lateral partner. (*Id.*) DL voluntarily provided its financial information to *The American Lawyer,* which was used for the 2010 Am Law 100. (*Id.* Ex. A)

The 2010 Am Law 100 reported the following for DL:

a. gross revenue: $914,000,000 (ranked 19) (*id.* ¶ 14; Ex. A at 137);

b. profits per partner: $1,605,000 (ranked 23) (*id.* ¶ 14; Ex. A at 153);

c. compensation per partner: $1,100,000 (ranked 36) (*id.* ¶ 14; Ex. A at 161); and

d. revenue per lawyer: $865,000 (ranked 38) (*id.* ¶ 14; Ex. A at 145).

During the course of Mr. Otillar's recruitment, the recruiter who initially contacted him and several Recruiting Partners referred to DL's Am Law 100 rankings and the firm's overall standing. (*Id.* ¶ 16.)

On January 2, 2011, Mr. Otillar signed DL's offer letter dated December 18, 2010, and agreed to join the firm. (*Id.* ¶ 17.) Mr. Otillar accepted a position at DL with a minimum annual compensation of $575,000 for 2011 and 2012. (*Id.*) DL required Mr. Otillar to make a one-time capital contribution to the operating capital of DL by December 31, 2011, in the amount of $207,000, which was 36% of his annual compensation. (*Id.* ¶ 18.) At Mr. Otillar's election, his capital contribution could have been paid either

through withholdings from his draw and capital account distributions, or he could have utilized a capital loan program negotiated by DL with one of its lenders. (*Id.*)

In discussions with DL during the recruiting process, Mr. Otillar was provided a copy of the DL partnership agreement (the "Partnership Agreement"). (*Id.* ¶ 19; Ex. D.) Pursuant to the Partnership Agreement, DL was obligated to return Mr. Otillar's capital contribution in three equal installments beginning on December 31 of the year of his departure and continuing on December 31 of the next two successive years. (*Id* ¶ 20*;* Ex. D at 27.)

Mr. Otillar started working at DL's Houston office on January 12, 2011. (*Id.* ¶ 21.) In or around May 2011, *The American Lawyer* published the 2011 Am Law 100, which he reviewed on or about the time it was published. (*Id.* ¶ 22.) Again, DL voluntarily provided its financial information to *The American Lawyer,* which was used for the 2011 Am Law 100. (*Id.* Ex. E)

The 2011 Am Law 100 reported the following for DL:

a. gross revenue: $910,000,000 (ranked 22) (*id.* ¶ 23; Ex. E at 121);

b. profits per partner: $1,770,000 (ranked 23) (*id.* ¶ 23; Ex. E at 139);

c. compensation per partner: $1,340,000 (ranked 29) (*id.* ¶ 23; Ex. E at 145); and

d. revenue per lawyer: $1,340,000 (ranked 38) (*id.* ¶ 23; Ex. E at 131).

The following chart compares the 2010 Am Law 100, which Mr. Otillar reviewed prior to joining DL, to the 2011 Am Law 100, which he reviewed several months after he joined DL. (*Id.* ¶ 24.)

	2010 Am Law 100 (2009 data)	**2011 Am Law 100** (2010 data)

Gross Revenue / Rank	$914,000,000 / 19	$910,000,000 / 22
Profits per Partner / Rank	$1,605,000 / 23	$1,770,000 / 23
Compensation per Partner / Rank	$1,100,000 / 36	$1,340,000 / 29
Revenue per Lawyer / Rank	$865,000 / 38	$870,000 / 38

THE CAPITAL LOAN PROGRAM

Each month with DL, Mr. Otillar received a compensation payment of $25,000, less deductions for certain state taxes, retirement programs and benefits. (*Id.* ¶ 25.) In addition, from time to time there were modest distributions of the remaining minimum compensation guaranteed under his offer letter. (*Id.*) During the first nine months, Mr. Otillar was with DL (before he entered into the capital loan program described below), the firm deducted 36% of the periodic distributions to fund the capital requirement, which deductions totaled $10,350 as of September 2011. (*Id.*)

While he was contemplating taking a loan to fulfill his capital contribution to DL, in an August 22, 2011 memo, DL's Chief Financial Officer, Joel L. Sanders, advised Mr. Otillar of a capital loan program (the "Program") being offered by Citibank and DL as an alternative method to fund his capital contribution (the "Sanders Memo"). (*Id.* ¶ 26, Ex. F.) The Sanders Memo began: "As part of their ongoing private banking initiative, Citibank has offered [DL] incentives that will enable us to offer a limited number of capital loans to our creditworthy partners at very attractive rates and terms." (*Id.* ¶ 27; Ex. F.)

The Sanders Memo, along with the attachments thereto, described the terms and features of the Program, including the following:

a. Completing the application attached to the Sanders Memo would make Mr. and Mrs. Otillar eligible to receive a no-fee, six-year term loan at no interest cost to them for the first three years and an interest rate cap of 2% for an additional three years thereafter.

b. The loan required interest only payments for up to six years with a "single bullet payment" due at maturity.

c. The interest for the first three years was to be paid by DL.

d. The Otillars were responsible for 2% of the interest for years four through six, and DL would pay the difference between the actual interest rate and 2%.

e. The interest payments made by DL were to be paid quarterly from an account "pre-funded" by DL at the time the loans were made.

(*Id.* ¶ 28; Ex. F.)

The Sanders Memo advised Mr. Otillar that he had been approved for the Program and it concluded with the following: "If at any time during the 6 year period you either leave the firm or elect to pre-pay the note, any extra interest charge resulting from that prepayment will also be funded for you, thereby eliminating any prepayment penalty for you." (*Id.* ¶ 29; Ex. F.)

A form cover letter dated August 18, 2011, from the managing director of Citibank's Citi Private Bank (Michael Stachura) was among the Sanders Memo attachments. (*Id.* ¶ 30; Ex. G.) The cover letter states that DL and Citibank had agreed to establish an account into which DL would deposit and Citibank would debit the interest on the Loan (the "Capital Loan Interest Account"). (*Id.*)

> As you will note from the attached term sheet, [DL] has instructed [Citibank] to establish a pre-funded impound account at the Private Bank which is to be debited quarterly to pay the interest due on your capital loan for the first three years and will pay your quarterly interest expense above the 2% per annum in years four through six.

A term sheet was attached to the Sanders Memo and referenced in the Citibank August 18, 2011 cover letter. (*Id.* ¶ 31; Ex. H.) Under the heading, "Documentation," the term sheet provided as follows:

> c) A Comfort Letter which Citibank provides to the partner, detailing the capital loan, acknowledged by the firm, directing that any distributions from the partner's capital account first go to Citibank to repay its loan in full if the borrower ceases to hold an equity interest in the firm.

(*Id.*)

The "capital account" referenced in the preceding paragraph presumably referred to Mr. Otillar's "account" with DL representing distributions per his equity interest in DL's profits. (*Id.* ¶ 32.)

THE LOAN

After receiving Citibank's and DL's offer concerning the Program, Mr. Otillar received several communications from Citibank, including emails and phone calls from Citibank's Senior Vice President, Rohit Malhotra, urging him to sign and submit the loan documents as soon as possible. (*Id.* ¶33; Ex. I.)

On or about September 2, 2011, Mr. Otillar and his wife executed the Note promising to repay a loan made pursuant to the Program in the principal sum of $207,000 to Citibank (the "Loan"). (*Id.* ¶ 34; Ex. J.) The Note had a maturity date of September 12, 2017. (*Id.*) The Note provided that the proceeds of the Loan were to be used to fund Mr. Otillar's DL capital contributions. (*Id.*)

On or about September 2, 2011, Mr. Otillar executed a letter agreement addressed to Sanders (the "September 2 Letter Agreement"), which provided, among other things, that DL had "agreed to pay the total accrued interest on [the] Loan during years

one (1) through the end of year three (3) and has further agreed to pay the amount of interest on [the] Loan that exceeds an interest rate of 2% per year during the years four (4) through six (6)." (*Id.* ¶ 35; Ex. K.) Among other things, the September 2 Letter Agreement provides that DL would pay directly to Citibank rather than to Mr. Otillar the lesser of the amount due from his capital account to be disbursed or the unpaid balance of the Note plus accrued interest. (*Id.* ¶ 36; Ex. K.)

The September 2 Letter Agreement also directed that the loan be funded to a listed account, with proceeds to be withdrawn and paid to DL. (*Id.* ¶ 37; Ex. K.) The account listed in the September 2 Letter Agreement is Mr. Otillar's personal checking account number with JPMorgan Chase. (*Id.*) However, the Loan was not funded to his Chase account, and on information and belief, DL never countersigned the September 2 Letter Agreement. (*Id.*) Instead, the Loan was funded to a Citibank account set up under Mr. Otillar's and his wife's name, with the proceeds immediately drawn out on the same day. (*Id.*) By letter dated September 2, 2011, addressed to Malhotra, Mr. Otillar provided Citibank with an executed copy of the Note. (*Id.* ¶ 38.)

In early 2012, DL issued to Mr. Otillar a notice indicating that based on the profitability of the firm, his estimated tax obligation for the quarter required him to pay additional taxes of $35,000. (*Id.* ¶ 39.) From discussions with other DL partners, Mr. Otillar believed that distributions to that point were relatively typical, and that a substantial distribution would be made in January that would more than cover the tax obligations. (*Id.*) Despite assurances from various partners in the firm, including Davis, the firm did not make a tax distribution nor any other material distribution for Mr. Otillar's guaranteed income for the 2011 calendar year. (*Id.* ¶ 40.)

Based on this frustration, Mr. Otillar wanted to find out what the implications would be for his Loan if he were to leave DL or if DL had severe financial difficulties. Mr. Otillar called Malhotra to discuss what would happen if he left the firm or if DL had financial problems. (*Id.* ¶ 41.) Mr. Otillar was told Malhotra was no longer the firm's relationship manager and was referred to his successor, Maggie. (*Id.*) Mr. Otillar discussed his concern about the Loan and repayment with Maggie and she agreed to look into the situation. (*Id.*) Several days later she called back and represented to Mr. Otillar on the telephone that Citibank would look to DL for repayment of any amounts advanced by Citibank to fund his capital contribution if he was no longer with the firm. (*Id.*) She further represented to Mr. Otillar that the foregoing was documented in a letter agreement between DL and Citibank. (*Id.*)

DL'S DEMISE

After the 2007 merger, DL sought to expand by acquiring lateral partners with significant portable books of business and obtain marquee names in the industry. (*Id.* ¶ 42.) While clearly the marquee name when Mr. Otillar joined DL was Karl Hopkins, Mr. Otillar was a young partner with several good clients and expertise in an area that was in very high demand. (*Id.*) When he joined DL, Mr. Otillar's projected collections were between $1 million and $2 million. (*Id.*) During the approximately eleven months Mr. Otillar was at DL in 2011, collections on work that he generated for clients that he brought with him to DL were approximately $1.5 million. (*Id.*)

Unbeknownst to Mr. Otillar, before and after he joined DL, the firm had entered into compensation agreements that guaranteed hundreds of millions of dollars in payments and bonuses. (*Id.* ¶ 43.) Those guaranteed compensation agreements were made

in connection with the merger and as part of DL's effort to lure and retain lateral partners. (*Id.*)

In October 2011, DL management disclosed for the first time that DL had extended guaranteed compensation packages to approximately 100 partners representing one-third of the firm's partners, and Mr. Otillar learned for the first time that a significant percentage of partners had not received their full compensation from the firm for several years. (*Id.* ¶ 44.)

During an all-partner video conference on January 27, 2012, DL management disclosed that the firm's compensation obligations exceeded revenues by a quarter of a billion dollars. (*Id.* ¶ 45.) DL management also disclosed that more than 40% of the profit generated in 2011 had gone to pay partners for 2010 compensation, and that there was not enough money remaining to pay partners 2011 target compensation. (*Id.*) The presentation indicated that 2011 laterals would still be paid in full. However, Mr. Otillar never received any such distributions. (*Id.*) A mass exodus of the partners ensued in the following months. (*Id.* ¶ 46.)

Despite numerous promises from Davis, Steven DiCarmine (DL's Chief Operations Officer) and others in DL management that Mr. Otillar would receive 2011 minimum compensation, none was ever paid. (*Id.* ¶ 47.) Finally, after receiving an email from firm management that partners should seek to transition clients and active matters to successor firms, Mr. Otillar withdrew from the partnership on May 4, 2012. (*Id.*)

Mr. Otillar received no capital distributions from DL while he was a partner with the firm. (*Id.* ¶ 48.) To this day, Mr. Otillar has received just over 55% of his minimum guaranteed compensation set forth in his offer letter. (*Id.*) Moreover, DL has not repaid

Mr. Otillar's capital contribution that was funded by Citibank through the Program pursuant to the Partnership Agreement. (*Id.*)

On May 28, 2012 (the "Petition Date"), DL filed a petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (*In re Dewey & LeBoeuf LLP* (Case No. 12-12321-MG) (the "DL Bankruptcy"). (*Id.* ¶ 49.) Three days later, on May 31, 2012, Citibank commenced this action against Mr. Otillar and his wife to collect on the Note. (*Id.* ¶ 50.)

In the wake of the DL bankruptcy, it was revealed that DL had provided false information to *The American Lawyer* for the Am Law 100. (*Id.* ¶ 51.) On April 3, 2012, *The American Lawyer* announced that it was "revising the 2010 and 2011 financial results reported for [DL] in [its] annual Am Law 100 ranking." (*Id.* ¶ 52; Ex. L.) The revision is based on a review prompted by a March 27 [,2012] Bloomberg story. In that article, [DL]'s management reported earnings of $250 million for 2011, far less than the amount reported by *The American Lawyer* for its Am Law 100 database three weeks earlier." (*Id.* ¶ 52; Ex. M.)

The April 3, 2012 article disclosed massive discrepancies in excess of $100 million between reality and what DL management reported to *The American Lawyer* in 2010 and 2011.

> On March 7, Dewey management told *The American Lawyer* that the firm collected $935 million last year, up from $909.9 million in 2010. According to the Bloomberg story, which was corroborated by a current and a former partner, however, the revenue figure for 2011 is actually $782 million, up 3 percent from the previous year. According to the new information, equity and nonequity partners shared a profit pool of $254 million. **Equity partners, viewed apart from the nonequity tier, shared a net of $197.5 mil-**

> **lion, not the $340.5 million first reported by *The American Lawyer***.
>
> According to the new information, **profits per partner last year were $1.04 million, not the $1.8 million** *The American Lawyer* initially reported. Additionally, our new reporting shows that **the firm's revenue per lawyer was $750,000 last year, not $900,000.**
>
> In 2010 the newly obtained information indicates **the gross revenue figure for Dewey was $759.5 million, not $910 million**. **Combined earnings distributable to equity and nonequity partners should have been $255.1 million, not the $401 million** Dewey reported, according to what appears to be a 2010 audited financial statement from the firm. **2010 average profits per equity partner should have been $980,000, not $1,605,000** as reported by the firm last year.

(*Id.* ¶ 52; Ex. L (emphasis added).)

DL attempted to explain the discrepancies as "methodological differences" between the firm's internal and financial accounting versus the numbers submitted to, and reported by, *The American Lawyer*. (*Id.* ¶ 54.)

> Dewey says that the former numbers were and are accurate and can be explained by methodological differences. Janis Meyer, Dewey's general counsel, wrote in an e-mail that "the methodology used for internal and financial accounting purposes is different from that used in submitting our numbers to you, which we assume is the case for every law firm that participates in your survey.

(*Id.* ¶ 54; Ex. L.)

In fact, the discrepancies appear to have been even larger than recently reported by *The American Lawyer*. (*Id.* ¶ 55.) According to DL's July 26, 2012 statement of financial affairs filed in the DL Bankruptcy, gross revenue for 2010 was approximately

$682 million, not $910 million as DL reported to *The American Lawyer* for the 2011 Am Law 100. (*Id.* ¶ 55; Ex. N.) DL's gross revenue for 2011 was approximately $655 million, not the $935 million in collections that DL reported to *The American Lawyer* for the 2012 Am Law 100. (*Id.*)

DL'S RELATIONSHIP WITH AND INDEBTEDNESS TO CITIBANK

Citibank has had a longstanding relationship with DL and its predecessor firms dating back to the early 1970s. (*Id.* ¶ 56.) On May 20, 2012, DL filed a Declaration of its Chief Restructuring Officer, Jonathan A. Mitchell (the "Mitchell Declaration"), in the DL Bankruptcy. (*Id.* ¶ 57; Ex. P.) According to the Mitchell Declaration, on April 16, 2010, DL entered into a credit facility in an amount up to $100 million (the "Secured Credit Agreement") with JP Morgan Chase Bank, N.A. ("JPM") as Administrative Agent, Citibank, as Documentation Agent, and Bank of America, N.A. ("BOA") as Syndication Agent (together the "Banks"), pursuant to which the Banks provided revolving loans and letters of credit to DL. (*Id.* ¶ 58; Ex. P, ¶ 29.)

Citibank issued letters of credit to members of DL's management team to insure "golden parachutes" in the event of DL's collapse. (*Id.* ¶ 59.) In December 2011, Otillar heard rumors that DiCarmine and Sanders had letters of credit backing their compensation. (*Id.*) Otillar was shocked by those rumors because the only reason someone would want a letter of credit is that he had reason to believe the firm would not survive. (*Id.*) As it turns out, Citibank – an experienced law firm lender – issued those letters of credit. (*Id.*) It is totally inconsistent with the concept of a law firm that its management's compensation would be secured by letters of credit. (*Id.*)

DL's obligations under the Secured Credit Agreement were secured by first-priority liens on and security interests in DL's assets, including accounts, contract rights, chattel paper, instruments, general obligations, and other obligations of any kind. (*Id.* ¶ 60; Ex. P, ¶ 33.) The foregoing liens and security interests were granted in favor of JPM, as Collateral Agent, on behalf of the Banks. (*Id.*) On April 16, 2010, DL apparently also entered into an agreement pursuant to which DL issued $150 million in secured notes (the "Note Purchase Agreement"). (*Id.* ¶ 61.)

The liens and security interests granted under the Note Purchase Agreement as well as the Secured Credit Agreement were purportedly granted in favor of JPM as Collateral Agent under an intercreditor agreement with the holders of the secured notes and the Banks, including Citibank (the "Intercreditor Agreement"). (*Id.* ¶ 62; Ex. P, ¶¶ 31, 33.)

The Secured Credit Agreement was set to mature on April 16, 2012, but was extended two weeks to April 30, 2012. (*Id.* ¶ 63; Ex. P, ¶ 35.) The Secured Credit Agreement was extended to May 14, 2012 (*id.*), and then extended again to May 18, 2012 (*id.* ¶ 63; Ex. P, ¶ 39). According to the Mitchell Declaration, in connection with the extensions of the Secured Credit Agreement, DL granted additional security to JPM as Collateral Agent on behalf of the Banks, including a lien on and security interest in all of DL's cash, deposit accounts, securities accounts, equipment, inventory, goods, intellectual property, commercial tort claims, and books and records. (*Id.* ¶ 63; Ex. P, ¶¶ 38, 42.)

As of the Petition Date (May 28, 2012), DL owed the Banks, including Citibank, more than $76 million comprised of $74,766,040.49 in principal and $1,688,658.85 face amount of outstanding letters of credit under the Secured Credit Agreement. (*Id.* ¶ 64; Ex. P, ¶ 45.) On July 28, 2012, DL filed a schedule of creditors holding secured

claims in the DL Bankruptcy. JPM is listed as "administrative and collateral agent for banks party to the [Secured Creditor Agreement]" with a claim in the amount of $76,454,699.34. (*Id.* ¶ 64; Ex. S at 4.) As of the Petition Date, DL also owed the holders of the secured notes $150 million. (*Id.* ¶ 65; Ex. P, ¶ 45.) DL's July 28, 2012 schedule of creditors holding secured claims lists JPM as "collateral agent for the senior secured notes" with a claim in the amount of $150 million. (*Id.* ¶ 65; Ex. S at 4.) Thus, the total amount owed in secured debt under instruments pursuant to which Citibank was a party (*i.e.*, the Secured Credit Agreement and the Intercreditor Agreement) was "approximately $255 million". (*Id.* ¶ 66; Ex. P, ¶ 45.)

On the Petition Date, DL filed a motion concerning, *inter alia*, the continued maintenance of existing bank accounts (the "Bank Account Motion"), including the Capital Loan Interest Account, which was supposed to have been established to fund the interest on the Loan pursuant to the Program. (*Id.* ¶ 66; Ex. T.) The Capital Interest Account is listed on Exhibit A to the Bank Account Motion. It indicates a balance of $805,209.60 at Citibank account number XXXX7368. (*Id.*) The Bank Account Motion indicated that most of DL's bank accounts were scheduled to be closed by DL. (*Id.* ¶ 66; Ex. T, ¶ 7, n.2.) The Bank Account Motion also indicated that DL "will continue to maintain records respecting all transfers between and among the Bank Accounts so that all transactions are accurately recorded and readily ascertainable." (*Id.* ¶ 66; Ex. T, ¶ 11.)

On July 12, 2012, the bankruptcy court entered a final order on the Bank Account Motion. (*Id.* ¶ 68; Ex. U.) Exhibit A to that order lists DL's bank accounts. (*Id.*) The Capital Loan Interest Account has a balance of zero. (*Id.*) Hence, the Capital Loan Interest Account appears to have been closed since it does not appear on the any of the re-

cently-filed schedules in the DL Bankruptcy, particularly Schedule B (Personal Property), part 2 (checking, savings, or other financial accounts). (*Id.*)

CITIBANK FRAUDULENTLY INDUCED DEFENDANTS INTO EXECUTING THE NOTE

The Program was a fraudulent scheme orchestrated by Citibank, DL and its management. (*Id.* ¶ 69.) The scheme was designed to directly benefit Citibank and DL and its management at Mr. and Mrs. Otillar's expense. (*Id.*) It is likely that the Loan proceeds were used by Citibank to pay down DL's indebtedness to Citibank. (*Id.*) By fraudulently inducing the Otillars to borrow money to pay Mr. Otillar's capital contributions, Citibank was able to offset uncollectible exposure under the Secured Credit Agreement with collectible indebtedness from Mr. and Mrs. Otillar and countless other unsuspecting lateral hires and their spouses who were fraudulently induced to participate in the Program. (*Id.*) DL benefited from the fraud because, with each partner capital account loan, DL's indebtedness to Citibank was reduced. (*Id.*) Those loans were made when Citibank knew that DL was financially unstable, that Citibank was undersecured, and that bringing in "creditworthy partners" like Mr. Otillar (and his wife) would provide additional credit support for Citibank's exposure to the firm. (*Id.*)

In September 2011, when they executed the Note and the related letter agreements, the Otillars were unaware of DL's perilous financial condition. (*Id.* ¶ 70.) Quite to the contrary, Mr. Otillar was assured that the firm was on solid financial ground and that the figures provided to him within the firm and as reported in places like the Am Law 100 were accurate. (*Id.*) As a relatively junior partner, Mr. Otillar did not have access to the same information as senior management or members of the executive committee. (*Id.*) In fact, as a partner in a very small satellite office, Mr. Otillar did not

even have the benefit of information that may have been disseminated in New York, even as rumor or innuendo. (*Id.*)

As its long-time lender, and as a result of being a party to the Secured Credit Agreement and the Intercreditor Agreement, Citibank had access to information about DL's true financial condition, which the Otillars did not have. (*Id.* ¶ 71.) Citibank knew that DL was not timely paying partner's compensation; it was providing letters of credit to backstop compensation to the partners who controlled the firm and it knew DL was likely to collapse. (*Id.*) The foregoing was evidenced by the fact that Citibank did not simply rely on its comfort letter with the firm to fund interest payments on the Loan, but rather set up the DL pre-funded Capital Interest Account. (*Id.*)

Citibank also knew that DL had to continually take profits from successive years to pay prior years' obligations like a Ponzi scheme. (*Id.* ¶ 72.) Thus, at a minimum, Citibank knew the firm was not going to be able to pay Mr. Otillar's guaranteed minimum compensation, and the Loan was far in excess of 36% of his actual compensation. (*Id.*)

In light of Citibank's knowledge, it must have known that DL had no intention of honoring its obligations under the Program or of repaying Mr. Otillar's capital contribution pursuant to the Partnership Agreement if he withdrew from the Partnership. (*Id.* ¶ 70.)

As a result of its superior knowledge about DL's financial condition coupled with the fact, as Citibank knew, that the Otillars did not have access to information about DL's true financial condition, Citibank had a duty to disclose what it knew. (*Id.* ¶ 74.) At no point did Citibank disclose its knowledge of DL's true financial condition to Mr. or Mrs. Otillar. (*Id.*) Instead, Citibank concealed that information as part of its scheme with DL and its management. (*Id.*) Discovery should prove that Citibank's failure to

disclose what it knew about DL's financial condition was deliberate and done with the intention to defraud Mr. and Mrs. Otillar into agreeing to the Loan. (*Id.*) The Otillars were justified in expecting Citibank to share what it knew about DL before executing the Note and the related letter agreements. (*Id.*) Had the Otillars known that DL was teetering on the verge of bankruptcy, or that at least the firm was not likely to pay Mr. Otillar's guaranteed compensation for 2011, they would not have executed the Note. (*Id.*)

When the Loan was made, Mr. Otillar had been allowing DL to withhold a portion of his distributions payable to fund his capital contribution requirements. (*Id.* ¶ 75.) The Otillars never would have participated in the Program and borrowed money from Citibank if they had known what Citibank knew about DL's finances. (*Id.*) Nor would they have participated in the Program if they had known that DL had no intention or ability to perform its obligations under the Program or to return Mr. Otillar's capital contribution under the Partnership Agreement. (*Id.*)

It was Mr. Otillar's understanding that regardless of the situation with DL, there would be a secure, pre-funded account outside of DL that would hold interest payments to cover obligations under the Loan for at least 3 years. (*Id.* ¶ 76.) In discussions with Citibank representatives after the bankruptcy filing, they told Mr. Otillar that the pre-funded interest account was "gone" and not available to pay any interest on the Loan. (*Id.*)

If the Otillars had declined to participate in the Program, they would not be indebted to Citibank for the amount of the Loan, including the unpaid interest that DL was supposed to have paid, and likely never will pay in light of the bankruptcy. (*Id.* ¶ 77.) The alternative to participating in the Program was to permit Mr. Otillar's capital distribution to be funded through deductions from profit distributions made from the

firm. (*Id.*) Since he never received the full guaranteed compensation, he would have suffered no loss whatsoever if DL had deducted sums from future distributions. (*Id.*) However, if the Otillars had chosen to have the capital account funded through capital distributions, Citibank would not have received an immediate reduction in DL's indebtedness and would not have obtained the claims asserted in this action against Mr. and Mrs. Otillar. (*Id.*)

Mr. Otillar did not even leave DL until firm management had issued an email indicating, that to protect client's interests in pending work that active matters should be transferred to other firms or practices. (*Id.* ¶ 78.) Thus, the Note became due and payable in advance of its full term. Then, once, DL filed bankruptcy, Mr. Otillar and his wife became personally liable for the Note. (*Id.*)

CITIBANK AIDED AND ABETTED DL'S FRAUD AND
Breach of Fiduciary Duty

Beginning no later than 2010, when DL recruited Mr. Otillar (and others) to join the firm, DL and its management defrauded and conspired to defraud its existing partners and potential lateral hires by misrepresenting the firm's financial performance, condition and stability in private conversations and in public, through outlets like *The American Lawyer*. (*Id.* ¶ 79.) DL and its management provided false financial information in response to Am Law 100 surveys before and after Mr. Otillar joined DL with the intention to deceive him and others into believing that the firm was stable and one of the top financial performers among the largest firms in the world. (*Id.* ¶ 80.) The Recruiting Partners vouched for the accuracy of reports, such as the Am Law 100, and they knew that Mr. Otillar and other potential lateral hires that they were recruiting would justifiably rely on their misrepresentations. (*Id.*)

DL and its management engaged in a scheme to defraud the Otillars and others. (*Id.* ¶ 81.) The scheme was intended to lure unsuspecting lateral hires to join the failing firm as equity partners, who would then be responsible for making significant capital contributions to DL when its revenue was insufficient to pay its obligations, particularly the hundreds of millions of dollars in guaranteed compensation and bonuses to existing partners, some of whom were directly involved in the fraud. (*Id.*) Clearly, Citibank was facing a significant loss, which it reduced by virtue of the Program and specifically by virtue of the Loan. (*Id.*)

DL and its management had a fiduciary duty to Mr. Otillar to disclose DL's true financial condition and to deal with him honestly and in good faith. (*Id.* ¶ 82.) Instead, DL and its management team conspired with Citibank to devise the Program as a means to entice new hires to make capital contributions as soon as possible after joining the firm. (*Id.*) Citibank and DL and its management knew or should have known that DL would never be able to pay the interest on the Loan and that DL would never be able to repay the capital contributions that they fraudulently induced Otillar and other new partners to borrow from Citibank. (*Id.*)

Citibank had actual knowledge of DL's and its management's fraud and breach of fiduciary duty. (*Id.* ¶ 83.) Through the Program, Citibank actively participated in the fraud and breach of fiduciary duty, which active participation directly harmed the Otillars. (*Id.* ¶ 84.)

On May 31, 2012, Citibank commenced this action against the Otillars by filing a summons, notice of motion for summary judgment in lieu of complaint and supporting affidavits in the Supreme Court of the State of New York, County of New York. (*Id.* ¶ 2.) On June 29, 2012, the Defendants filed a timely notice of removal pursuant to 28 U.S.C.

§ 1446 in this court. (*Id.* ¶ 3.) On July 2, 2012, this matter was assigned to the Honorable Louis L. Stanton. (*Id.* ¶ 4.)

ARGUMENT

I. SUMMARY JUDGMENT MUST BE DENIED BECAUSE THE OTILLARS HAVE COUNTERCLAIMS AGAINST CITIBANK FOR FRAUDULENT INDUCEMENT

Summary judgment must be denied unless the moving party demonstrates "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Citibank cannot meet that burden because the Otillars can establish that Citibank fraudulently induced them to execute the Note. Unless Citibank is prepared to admit the Otillars' allegations, genuine issues of material fact are disputed. Accordingly, Citibank's motion for summary judgment must be denied.

Furthermore, this case is not a simple issue of a bank looking to get repaid on a promissory note. The information coming out of the DL bankruptcy is unprecedented in the law firm industry, and Citibank was in the middle of much of it. It would be inappropriate to grant summary judgment at this early stage in the proceedings before the Otillars have had an opportunity to take discovery on their counterclaims. *See Counsel Financial Services, LLC v. The Dobson Firm, LLC*, 2010 WL 3504789, at *7 (W.D.N.Y. 2010) (denying motion for summary judgment in lieu of complaint in suit on promissory notes; "[t]his litigation is in its infancy and Defendants are entitled to discovery. Defendants raise material questions of fact but have not had the opportunity to commence discovery").

"Under New York law, fraudulent inducement is a valid defense to an action by the holder of a negotiable instrument to enforce the instrument." *Thornock v. Kinderhill Corp.*, 749 F. Supp. 513, 518 (S.D.N.Y. 1990).[1] Summary judgment must be denied where a defendant raises a *prima facie* claim of fraudulent inducement of contract, including a negotiable instrument. *See Estate of Sheradsky v. W. One Bank, Oregon*, 817 F. Supp. 423, 425 (S.D.N.Y. 1993) (denying summary judgment to financing entity that "deliberately shut[] its eyes to clues concerning the fraud may be unable to enforce promissory notes signed as a result of the fraud"); *Citizens Fidelity Bank & Trust Co. v. Church*, 1992 WL 276579 (S.D.N.Y. Sept. 30, 1992) (denying bank's motion for summary judgment in lieu of complaint in suit on promissory notes where defendants alleged fraud and misrepresentation in connection with issuance of notes and raised issue of whether under the circumstances bank was a holder in due course); *Fidelity Bank, Nat. Ass'n v. Avrutick*, 740 F. Supp. 222 (S.D.N.Y. 1990) (summary judgment denied where defendants raised genuine issue of material fact as to whether they were fraudulently induced to execute promissory notes because "such questions go to the heart of the issue whether the defendants [the borrowers] are obligated to make payment to Citizens [the lender]"); *Millerton Agway Co-op., Inc. v. Briarcliff Farms, Inc.*, 17 N.Y.2d 57, 215 N.E.2d 341 (1966) (reversing grant of summary judgment on promissory note where debtor raised defense of fraudulent inducement); *N & M Plumbing & Heating Corp. v. Cenacle Properties of L.I., Inc.*, 171 A.D.2d 653, 567 N.Y.S.2d 133 (2d Dep't 1991) (affirming denial of summary judgment where defendants' fraudulent inducement claim raised triable issue of fact); *Pan Atl. Group, Inc. v. Isacsen*, 114 A.D.2d 1022, 495 N.Y.S.2d 458 (2d Dep't 1985) (denying summary judgment where defendant raised is-

[1] The Note is to be construed pursuant to New York law. (Otillar Decl. Ex. J, ¶ 17.)

sue of fact as to whether he was fraudulently induced into executing promissory note); *Beninati v. Hanley*, 95 A.D.2d 816, 817, 464 N.Y.S.2d 377 (2d Dep't 1983) (affirming denial of summary judgment on two promissory notes where borrower alleged lender engaged in fraud and deceit); *Ssangyong (U.S.A.) Inc. v. Sung Ae Yoo*, 88 A.D.2d 572, 573, 451 N.Y.S.2d 90, 91 (1st Dep't 1982) (holding that borrower's claim of fraud in the inducement was sufficient to defeat summary judgment on promissory note).

To sustain a cause of action for fraudulent inducement, a party must allege that defendant made a material false "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Shea v. Hambros PLC*, 244 A.D.2d 39, 46, 673 N.Y.S.2d 369, 373 (1st Dep't 1998). Fraud "'predicated on acts of concealment where the defendant had a duty to disclose material information'" is known as fraudulent concealment. *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 291-92 (2d Cir. 2006) (quoting *Kaufman v. Cohen,* 307 A.D.2d 113, 119-20, 760 N.Y.S.2d 157, 165 (1st Dep't 2003)); *see also* 37 Am.Jur.2d *Fraud and Deceit* § 200 (2005) (fraudulent concealment claim arises from "negative misrepresentations, such as the failure of a party to a transaction to fully disclose facts of a material nature" where that party has a duty to speak).

"In business negotiations, an affirmative duty to disclose material information may arise . . . where (1) one party has superior knowledge of certain information; (2) that information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge." *Banque Arabe et Internationale D'Investissement v. Maryland Nat. Bank*, 57 F.3d 146, 155 (2d Cir. 1995); *see also Lerner,* 459 F.3d at 292 (same); *accord Nasaba Corp. v. Harfred Realty*

Corp., 287 N.Y. 290, 295, 39 N.E.2d 243 (1942) ("Concealment with intent to defraud of facts which one is duty-bound in honesty to disclose is of the same legal effect and significance as affirmative misrepresentations of fact."); *Young v. Keith*, 112 A.D.2d 625, 626-27, 492 N.Y.S.2d 489, 490 (3d Dep't 1985) ("[N]ondisclosure may constitute a false representation where a party has a duty to communicate the undisclosed information to the other contracting party . . . [s]uch a duty can arise when one party to a contract has superior knowledge which is not available to both parties.").

Citibank's duty to disclose arises from the "superior knowledge" it possessed concerning DL's perilous financial condition when it pressured the Otillars to execute the Note. "Superior knowledge" has two aspects: that the person who fails to disclose (a) knows the facts material to the transaction, and (b) knows that the claimant is ignorant of such material facts. *See Brass v. American Film Technologies, Inc.,* 987 F.2d 142, 152 (2d Cir. 1993) ("[A] fraudulent concealment claim based on superior knowledge must allege that the defendant knew that the plaintiff was acting under a mistaken belief with respect to a material fact."); *accord Miele v. Am. Tobacco Co.,* 2 A.D.3d 799, 803, 770 N.Y.S.2d 386, 391 (2d Dep't 2003) ("New York recognizes a cause of action to recover damages for fraud based on concealment, where the party to be charged has superior knowledge or means of knowledge, such that the transaction without disclosure is rendered inherently unfair."); *Abrams v. Gen. Motors Corp.,* 120 Misc.2d 371, 374, 466 N.Y.S.2d 124, 127 (N.Y. Sup. Ct. 1983) ("If one party has superior knowledge or has means of knowledge not available to both parties, then he is under a legal obligation to speak and the silence would constitute fraud.").

DL's dire financial condition was obviously material to the transaction at issue between the Otillars and Citibank. Had the Otillars known that DL was teetering on the

verge of bankruptcy, or that at least the firm was not likely to pay his guaranteed compensation for 2011, they would not have executed the Note. (Otillar Decl. ¶ 70.) Citibank knew that the Otillars were unaware of DL's dire financial condition. (*Id.* ¶ 74.)

In *Brass v. American* Film, the Second Circuit affirmed a finding of fraudulent concealment where restrictions on the marketability of certain warrants were known to an officer of the selling corporation but not revealed to the buyer. *See* 987 F.2d at 151. The evidence that the seller knew of the buyer's ignorance of this material fact was nothing more than a claim that the officer "also surely knew that if [the buyer] were informed of these restrictions, [the buyer] would never consider a purchase of the securities." *Id.* at 152. Here, due to its long-standing relationship with DL, Citibank clearly possessed knowledge about DL's financial condition that was unknown and unavailable to Otillar, a junior partner that had only recently joined the firm. (Otillar Decl. ¶¶ 70-73.) As in *Brass*, Citibank "surely knew" that if the Otillars had been informed about DL's dire and rapidly deteriorating financial condition and failure to pay income to such a substantial portion of partners, they would not have participated in the Program and exposed themselves to personal liability for providing capital to an insolvent, or at least highly mismanaged law firm. (*Id.* ¶¶ 71-75.)

DL's deteriorating financial condition was not readily available to the Otillars. (*Id.* ¶¶ 70, 74.) The "readily available" element relieves a party of its duty of disclosure only if the other party has an equal opportunity to obtain information; otherwise, the party who did not have the knowledge "is not required to conduct investigations to unearth facts and defects that are present, but not manifest." *Brass*, 987 F.2d at 151. Knowledge of DL's deteriorating condition was not equally available to Citibank and the Otillars. (Otillar Decl. ¶ 74.) The only information that was readily available to the Otil-

lars and other DL lateral hires was the bogus financial information that DL provided to various media outlets such as *The American Lawyer,* as well as the false and misleading statements made to Mr. Otillar by the Recruiting Partners. (*Id.* ¶ 80.) Citibank, on the other hand, surely had access to all of DL's audited and unaudited financial records that would have been regularly reviewed by Citibank as a participant in the $100 million credit facility under the Secured Credit Agreement. (*Id.* ¶ 71.)

The Otillars justifiably relied on Citibank's failure to disclose DL's true financial condition. As a result, they suffered financial injury. If the Otillars had not participated in the Program, they would not be indebted to Citibank for the amount of the Loan, including the unpaid interest that DL was supposed to have paid, and likely never will pay in light of the bankruptcy. (*Id.* ¶ 77.) The alternative to participating in the Program was to permit Mr. Otillar's capital distribution to be funded through deductions from profit distributions made from the firm. (*Id.*) Since Mr. Otillar never received the full guaranteed compensation, the Otillars would have suffered no additional loss whatsoever if DL had deducted sums from future distributions. (*Id.*) However, if the Otillars had chosen to have Mr. Otillars capital account funded through capital distributions, Citibank would not have received an immediate reduction in DL's indebtedness and would not have obtained a claim against the Otillars. (*Id.*) Mr. Otillar did not even leave DL until firm management had issued an email indicating, that to protect client's interests in pending work that active matters should be transferred to other firms or practices. (*Id.* ¶ 78.) Thus, the Note became due and payable in advance of its full term. Then, once DL filed for bankruptcy, the Otillars became personally liable for the Note. (*Id.*)

II. THE DEFENDANTS MUST BE PERMITTED TO FILE A COUNTERCLAIM AGAINST CITIBANK

The Otillars must be given an opportunity to file a counterclaim against Citibank before the Court determines whether the Otillars are liable on the Note or the amount of such liability. Upon removal, the Federal Rules of Civil Procedure govern the procedural aspect of this case. *See Valley Nat. Bank v. Oxygen Unlimited, LLC*, 2010 WL 5422508, at *2 (S.D.N.Y. Dec. 23, 2010) (holding that once action removed to federal court "the Federal Rules of Civil Procedure govern any further proceedings."). Rule 13 of the Federal Rules of Civil Procedure "governs counterclaims in the federal courts, and Fed.R.Civ.P. 13(b) states that a defendant in a civil action may raise 'any claim against an opposing party' as a counterclaim." *Counsel Fin. Services, LLC v. Melkersen Law, P.C.*, 602 F. Supp. 2d 448, 452 (W.D.N.Y. 2009); *see also See Com/Tech Comm. Tech., Inc. v. Wireless Data Sys., Inc.,* 163 F.3d 149, 150–51 (2d Cir.1998) (endorsing adjudication of summary judgment motion upon removal from state court provided that defendant is allowed to raise defenses and counterclaims); *accord Sage Realty v. Insurance Co. of N. Am.,* 34 F.3d 124, 129 (2d Cir.1994) (holding that waiver of counterclaims, potentially valid in state court, was inoperative in federal court when its application would have prevented the assertion of a counterclaim that, under Fed. R. Civ. P. 13(a), was "compulsory"). Accordingly, the Otillars must be permitted to file a counterclaim with affirmative defenses, based upon the facts set forth in Mr. Otillar's declaration, which clearly present issues of material fact justifying the denial of summary judgment in Citibank's favor.

CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court deny Citibank's motion for summary judgment.

August 17, 2012

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