

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-09-0350 MMC

IN RE CITIBANK HELOC REDUCTION  
LITIGATION

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS; AFFORDING  
PLAINTIFFS LEAVE TO FILE THIRD  
AMENDED/CONSOLIDATED CLASS  
ACTION COMPLAINT**

Before the Court is defendant Citibank, N.A.'s ("Citibank") "Motion to Dismiss Plaintiffs' Second Amended/Consolidated Class Action Complaint," filed by Citibank on June 23, 2010 and amended June 24, 2010. On July 19, 2010, plaintiffs David Levin ("Levin"), Gary and Marie Cohen ("Cohens") and Mark Winkler ("Winkler") filed opposition, to which Citibank, on July 27, 2010, replied. Thereafter, on August 17, 2010, plaintiffs filed a "Correction" to their opposition. Having read and considered the above-referenced papers filed in support of and in opposition to the motion, the Court rules as follows.<sup>1</sup>

**BACKGROUND**

In the Second Amended/Consolidated Class Action Complaint ("SAC"), plaintiffs allege that each plaintiff entered into a home equity line of credit agreement ("HELOC") with Citibank, secured by a personal residence, and that Citibank, in violation of the terms

<sup>1</sup>By order filed August 3, 2010, the Court took the motion under submission.

1 of the HELOC and in violation of federal and state law, suspended further draws or reduced  
2 the applicable credit limit.

### 3 **LEGAL STANDARD**

4 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure can be based  
5 on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a  
6 cognizable legal theory. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
7 1990). Rule 8(a)(2), however, “requires only ‘a short and plain statement of the claim  
8 showing that the pleader is entitled to relief.’” See Bell Atlantic Corp. v. Twombly, 550 U.S.  
9 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, “a complaint attacked by  
10 a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations.” See id.  
11 Nonetheless, “a plaintiff’s obligation to provide the grounds of his entitlement to relief  
12 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
13 cause of action will not do.” See id. (internal quotation, citation, and alteration omitted).

14 In analyzing a motion to dismiss, a district court must accept as true all material  
15 allegations in the complaint, and construe them in the light most favorable to the  
16 nonmoving party. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).  
17 “To survive a motion to dismiss, a complaint must contain sufficient factual material,  
18 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,  
19 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations  
20 must be enough to raise a right to relief above the speculative level[.]” Twombly, 550 U.S.  
21 at 555. Courts “are not bound to accept as true a legal conclusion couched as a factual  
22 allegation.” See Iqbal, 129 S. Ct. at 1950 (internal quotation and citation omitted).

### 23 **DISCUSSION**

24 Citibank moves to dismiss the SAC to the extent the SAC is brought on behalf of the  
25 Cohens and Winkler.<sup>2</sup>

26 //

27 \_\_\_\_\_  
28 <sup>2</sup>Citibank does not seek dismissal of the SAC to the extent it is brought on behalf of  
Levin.

1 **A. Count I: Violation of TILA and Regulation Z**

2 In Count I, plaintiffs allege that Citibank violated the Truth in Lending Act (“TILA”)  
3 and an implementing regulation, Regulation Z, by “suspend[ing] the Cohens’ HELOC from  
4 any further draws” (see SAC ¶¶ 21, 48) and by “reduc[ing] [Winkler’s] HELOC from  
5 \$250,000 to \$10,000” (see SAC ¶¶ 31, 48).

6 Under TILA, a creditor may “[p]rohibit additional extensions of credit or reduce the  
7 credit limit applicable to an account under [an open end consumer credit] plan during any  
8 period in which the value of the consumer’s principal dwelling which secures any  
9 outstanding balance is significantly less than the original appraisal value of the dwelling.”  
10 See 15 U.S.C. § 1647(c)(2)(B). Similarly, under Regulation Z, a creditor may “[p]rohibit  
11 additional extensions of credit or reduce the credit limit applicable to an agreement during  
12 any period in which [ ] [t]he value of the dwelling that secures the plan declines significantly  
13 below the dwelling’s appraised value for purposes of the [home equity] plan.” See 12  
14 C.F.R. § 226.5b(f)(3)(vi). In a supplement to Regulation Z setting forth “official staff  
15 interpretations of Regulation Z,” the staff of the Federal Reserve Board states as follows:  
16 “What constitutes a significant decline for purposes of § 226.5b(f)(3)(vi)(A) will vary  
17 according to individual circumstances. In any event, if the value of the dwelling declines  
18 such that the initial difference between the credit limit and the available equity (based  
19 on the property’s appraised value for purposes of the plan) is reduced by fifty percent,  
20 this constitutes a significant decline in the value of the dwelling for purposes of  
21 § 226.5b(f)(3)(vi)(A).” See 12 C.F.R. Part 226, Supp. I, § 5b(f)(3)(vi) ¶ 6.

22 Citibank argues that plaintiffs have failed to allege sufficient facts to support a claim  
23 that Citibank violated TILA and/or Regulation Z with respect to either the Cohens’ HELOC  
24 or Winkler’s HELOC. The Court disagrees.

25 First, with respect to the Cohens, the SAC alleges that at the time Citibank and the  
26 Cohens entered into a HELOC in May 2006, the Cohens’ residence had been appraised at  
27 \$1,650,000, the balance owed on their first mortgage was \$610,000, and the line of credit  
28 provided under the HELOC was \$500,000, later increased by Citibank to \$510,000 in

1 December 2006. (See ¶¶ SAC 20, 22.) The SAC also alleges that after Citibank, in  
2 August 2009, suspended the HELOC from further draws and advised the Cohens it had  
3 valued the property at \$1,018,000, the Cohens obtained from an “independent company”  
4 an appraisal stating the “current market value of the property as of September 21, 2009,  
5 was \$1,700,000.” (See SAC ¶¶ 21-22, 25.) The SAC further alleges that the available  
6 equity in the property had increased because “[b]y the time Citibank suspended their  
7 HELOC, the Cohens had paid down their first mortgage by nearly \$50,000.” (See SAC  
8 ¶ 28.) Finally, the SAC alleges that the valuation performed by Citibank in August 2009  
9 was “inaccurate” and “faulty.” (See SAC ¶ 50.) The Court finds the above-stated  
10 allegations are sufficient to allege that Citibank’s suspension of further draws was in  
11 violation of TILA and Regulation Z. Citibank’s argument, that neither TILA nor Regulation Z  
12 requires a creditor to accept an appraisal performed on behalf of a borrower, is unavailing.  
13 Although Citibank may not be required to accept any particular appraisal or to perform any  
14 particular method of valuation, where, as here, plaintiffs allege that the value of the Cohens’  
15 property had not substantially declined at the time of the suspension, plaintiffs have  
16 sufficiently pleaded a violation of TILA and Regulation Z.<sup>3</sup>

17 With respect to Winkler, the SAC alleges that at the time Citibank and Winkler  
18 entered into a HELOC in April 2007, his home was appraised at “over \$1,000,000,” the  
19 balance owed on his first mortgage was \$500,000, and the line of credit provided under the  
20 HELOC was \$250,000. (See SAC ¶ 30.) The SAC also alleges that, in April 2008, when  
21 Citibank reduced the line of credit to \$10,000, “there had not been a significant decline in  
22 value” in Winkler’s property because Winkler had previously paid off his first mortgage in  
23 its entirety (see SAC ¶¶ 5, 9,<sup>4</sup> 31), such that the equity in the home was “more than  
24 \$1,000,000” (see SAC ¶ 5.) The Court finds such allegations are sufficient to allege that

---

25  
26 <sup>3</sup>If Citibank is relying on the safe harbor provided by 15 U.S.C. § 1640(c), Citibank  
27 has made no argument in that regard, nor from the face of the SAC could the Court make a  
28 determination as to such defense.

<sup>4</sup>The SAC includes two paragraphs numbered “9”; the Court’s citation above is to the  
first of the two paragraphs numbered “9.”

1 Citibank's reduction was in violation of TILA and Regulation Z. Citibank's argument, that  
2 neither TILA nor Regulation Z requires a creditor to investigate whether a first mortgage  
3 has been paid off or paid down, is unavailing. Although Citibank may not be required to  
4 perform any particular step to determine if the value of a property has or has not  
5 substantially declined, where, as here, plaintiffs allege that the value of Winkler's property  
6 had not substantially decreased at the time Citibank reduced the line of credit, plaintiffs  
7 have sufficiently pleaded a violation of TILA and Regulation Z.

8 Citibank also argues the claim alleged on behalf of Winkler is subject to dismissal for  
9 the asserted reason it is barred by the one-year statute of limitations applicable to TILA  
10 claims for damages.<sup>5</sup> See 15 U.S.C. § 1640(e). Citibank correctly notes that Winkler filed  
11 his initial complaint on September 11, 2009 (see Winkler v Citigroup Inc., Civil Case No. 10-  
12 0572, Document No. 1),<sup>6</sup> more than a year after Citibank reduced Winkler's available credit,  
13 which, as noted, was in April 2008 (see SAC ¶ 31). Plaintiffs argue, however, that Winkler  
14 is entitled to equitable tolling because Winkler is a member of the putative class identified in  
15 Levin's initial complaint against Citibank, which complaint was filed on January 26, 2009, a  
16 date within the one-year limitations period applicable to Winkler's TILA claim. See In re  
17 Hanford Nuclear Reservation Litig., 534 F.3d 986, 1008 (9th Cir. 2008) (holding  
18 "commencement of a class action suspends the applicable statute of limitations as to all  
19 asserted members of the class"). The relevant putative class identified in Levin's initial  
20 complaint is persons "who have objective evidence . . . showing that the value of the home  
21 securing the HELOC had not declined significantly since the origination of [the] HELOC."  
22 (See Complaint, filed January 26, 2009, at 7:12-15, 12:13.) Contrary to Citibank's  
23 argument, the Court cannot determine from the face of the SAC that Levin is not a member  
24 of such putative class, i.e., that Levin lacks objective evidence to show the value of his

---

26 <sup>5</sup>Plaintiffs only seek damages as a remedy for violations of the claims alleged in  
27 Count I.

28 <sup>6</sup>Winkler filed his initial complaint in the Southern District of California. By order filed  
therein on January 28, 2010, the action was transferred to this district.

1 home had not declined significantly.

2 Accordingly, Citibank has failed to show the claims alleged in Count I on behalf of  
3 the Cohens and Winkler are subject to dismissal.<sup>7</sup>

4 **B. Count II: Declaratory Judgment/Injunctive Relief**

5 In Count II, plaintiffs seek, on behalf of the Cohens, a declaration that “Citibank  
6 violated TILA and Regulation Z” and an injunction requiring “full reinstatement” of the  
7 Cohen’s credit limit. (See SAC ¶ 62.)

8 Citibank argues that, to the extent Count II seeks declaratory relief, Count II is  
9 unnecessary because plaintiffs, in Count I, seek damages for the same conduct. The  
10 Court agrees. “A claim for declaratory relief is unnecessary where an adequate remedy  
11 exists under some other cause of action.” Mangindin v. Washington Mutual Bank, 637 F.  
12 Supp. 2d 700, 707 (N.D. Cal. 2009). Here, in Count I, plaintiffs seek an award of damages  
13 under TILA for alleged TILA and Regulation Z violations, including, as discussed above,  
14 Citibank’s having allegedly violated TILA and Regulation Z when it suspended the Cohens’  
15 HELOC from any further draws.

16 Citibank also argues the request for injunctive relief within Count II is improper, for  
17 the asserted reason that, under TILA, injunctive relief is not an available remedy. The  
18 Court finds it unnecessary to consider the merits of such argument because plaintiffs, in  
19 their opposition, state they are “withdraw[ing] their prayer for injunctive relief in Count II.”  
20 (See Pls.’ Opp., filed July 19, 2010, at 16:9-26.)<sup>8</sup>

---

21  
22 <sup>7</sup>In their opposition, plaintiffs argue that if Citibank suspended or reduced HELOCs  
23 without having a “sound factual basis,” apparently even if the subject dwelling had in fact  
24 substantially declined in value, such conduct would support an “independent claim” under  
25 TILA. (See Pls.’ Opp. at 9:16-18.) As Citibank correctly points out, however, TILA includes  
no requirement that a creditor have a “sound factual basis” in the abstract; the issue is, as  
discussed above, whether the value did substantially decline. Accordingly, to the extent  
plaintiffs may be requesting leave to amend to allege such an “independent” claim, such  
leave is denied.

26 <sup>8</sup>In their opposition, plaintiffs request leave to amend “to pray for injunctive relief in  
27 other counts where such relief is warranted, including their UCL claims.” (See *id.* at 16:26-  
28 27.) As discussed below, the Court will afford plaintiffs leave to amend to cure deficiencies  
in the SAC; plaintiffs may include therein a prayer for injunctive relief as to claims for which  
such relief appropriately is sought.

1 Accordingly, Count II is subject to dismissal.

2 **C. Count III: Breach of Contract**

3 In Count III, plaintiffs allege that Citibank failed to comply with the provisions of the  
4 Cohens' HELOC by suspending the Cohens' HELOC from any further draws and not  
5 thereafter reinstating the credit limit, and failed to comply with the provisions of the  
6 Winkler's HELOC by reducing the credit limit applicable to Winkler's HELOC and not  
7 thereafter reinstating Winkler's access to the full credit limit.

8 The HELOCs,<sup>9</sup> using language similar to that set forth in Regulation Z, provide that  
9 "Citibank may prohibit additional extensions of credit or reduce [the] Credit Limit" under  
10 specified circumstances, one such circumstance occurring when "[t]he value of the  
11 Property declines significantly below the Property's appraised value for purposes of the  
12 Account." (See Def's Req. for Judicial Notice Ex. A at 5.)<sup>10</sup> Further, the HELOCs provide  
13 that if the "circumstances change" and the borrower wishes to "reopen [the] Account or  
14 increase [the] Credit Limit to the original Credit Limit, [the borrower] must make such a  
15 request to Citibank in writing and pay any bona fide and reasonable appraisal and credit  
16 report fees actually incurred by Citibank to investigate whether the [ ] circumstances  
17 continue to exist." (See id. Ex. A at 6.)

18 Citibank argues that Count III, to the extent it is based on the suspension of the  
19 Cohen's HELOC from further draws and reduction of the credit limit applicable to Winkler's  
20 HELOC, is subject to dismissal. As with Count I, Citibank asserts that the HELOCs do not  
21 require Citibank to accept a borrower's appraisal or investigate the amount of equity  
22 available. Again, the Court is not persuaded. Although the HELOCs do not require  
23 Citibank to accept any particular appraisal or to perform any particular method of valuation,

---

24  
25 <sup>9</sup>The Court grants each party's request for judicial notice of the contents of the  
HELOCs.

26 <sup>10</sup>The HELOCs do not define the phrase "declines significantly," but provide one  
27 "example": "[I]f the value of the Property declines such that the initial difference between  
28 the Credit Limit and the available equity (based on the Property's appraised value) is  
reduced by fifty percent, such an event would constitute a significant decline in the value of  
the Property." (See id.)

1 where, as here, plaintiffs allege that the value of the subject properties had not substantially  
2 declined at the time of the suspension/reduction, plaintiffs have sufficiently pleaded a claim  
3 for breach of contract.

4 Accordingly, Citibank has failed to show Count III, to the extent it is based on the  
5 suspension of the Cohen's HELOC from further draws and reduction of the credit limit  
6 applicable to Winkler's HELOC, is subject to dismissal.

7 Citibank next argues that to the extent Count III is based on Citibank's asserted  
8 failure to reinstate Winkler's access to the full credit limit, such cause of action is subject to  
9 dismissal for the reason that plaintiffs do not allege Winkler ever requested reinstatement.  
10 The Court agrees. As discussed above, the terms of the HELOCs provide that after a  
11 reduction of the credit limit, any request for an increase must be in writing. The SAC  
12 includes no allegation that Winkler ever made a request for an increase, and, indeed,  
13 alleges that "[a]fter his HELOC reduction, Winkler "close[d] the HELOC and obtain[ed] a  
14 replacement at a significantly higher interest rate." (See SAC ¶ 33; see also id. (alleging  
15 Winkler was "forced to close his HELOC").)

16 Accordingly, Count III, to the extent it is based on Citibank's not reinstating Winkler's  
17 access to the full credit limit, is subject to dismissal.

#### 18 **D. Count IV: Breach of Implied Covenant of Good Faith and Fair Dealing**

19 As noted, the HELOCs provide that if a borrower seeks to "reopen [the] Account or  
20 increase [the] Credit Limit to the original Credit Limit, [the borrower] must make such a  
21 request to Citibank in writing and pay any bona fide and reasonable appraisal and credit  
22 report fees actually incurred by Citibank to investigate whether the [ ] circumstances  
23 continue to exist." (See Def.'s Req. for Judicial Notice Ex. A at 6.) In Count IV, brought on  
24 behalf of the Cohens, plaintiffs allege that Citibank breached the implied covenant of good  
25 faith and fair dealing in the HELOC by requiring the Cohens to pay "excessive fees" for an  
26 appraisal. (See SAC ¶ 74.)

27 In support of this claim, plaintiffs allege that after Citibank informed the Cohens that  
28 their residence had substantially declined in value and the Cohens "dispute[d]" Citibank's



1 valuation, Citibank “responded that in order for Citibank to even consider reinstatement, the  
2 Cohens must order and pay for an on-site appraisal of their home by an appraisal company  
3 of Citibank’s own choosing,” specifically, Lender Services, Inc. (“LSI”). (See SAC ¶¶ 22,  
4 23, 74.) According to plaintiffs, the Cohens contacted LSI, which told them it would charge  
5 them an appraisal fee of \$750, even though the “standard rate for appraisals was \$175 to  
6 \$350” (see SAC ¶ 23), and even though an “independent” appraiser only charged the  
7 Cohens \$175 (see SAC ¶ 29). Further, plaintiffs allege, Citibank’s “arrangement with LSI  
8 was designed to discourage HELOC borrowers from seeking reinstatement of their  
9 suspended or reduced HELOCs.” (See SAC ¶ 75.)

10 Citibank argues the above allegations are insufficient to state a claim for breach of  
11 the implied covenant of good faith and fair dealing. The Court disagrees.

12 First, contrary to Citibank’s argument, plaintiffs’ claim is not an attempt to impose on  
13 Citibank a substantive contractual obligation inconsistent with the terms of the Cohens’  
14 HELOC. See Wolf v. Walt Disney Pictures and Television, 162 Cal. App. 4th 1107, 1120  
15 (2008) (holding “if the defendant did what it was expressly given the right to do, there can  
16 be no breach [of the implied covenant]”). Nothing in the Cohen’s HELOC allows Citibank to  
17 require a borrower to pay an appraisal fee well in excess of the standard rate.

18 Second, contrary to Citibank’s argument, plaintiffs’ claim is not an attempt to impose  
19 on Citibank a new substantive contractual obligation. See Guz v. Bechtel Nat’l, Inc., 24  
20 Cal. 4th 317, 349-50 (2000) (holding implied covenant of good faith and fair dealing “cannot  
21 impose substantive duties or limits on the contracting parties beyond those incorporated in  
22 the specific terms of their agreement”). Plaintiffs’ claim is not based on the theory that  
23 Citibank should not have required the Cohens to pay for an appraisal, but, rather, that  
24 Citibank should not have refused to entertain the Cohens’ request for reinstatement unless  
25 and until the Cohens paid an excessive appraisal fee to LSI.

26 Third, and finally, the Court finds unpersuasive Citibank’s argument that the Cohens  
27 have failed to allege a cognizable injury, specifically, that their ability to enjoy a contractual  
28 right was frustrated. As noted, plaintiffs have alleged that the Cohens were required to pay

1 LSI an appraisal fee well in excess of the market rate before Citibank would reconsider its  
2 valuation determinations (see SAC ¶¶ 22, 29, 76); such allegation is sufficient at the  
3 pleading stage to allege a frustration of the Cohens' contractual right to have Citibank  
4 reconsider its determination, subject to certain conditions such as reimbursement for any  
5 "reasonable appraisal" fee incurred by Citibank.

6 Accordingly, Citibank has failed to show Count IV is subject to dismissal.

7 **E. Count V: Violation of California's UCL, Cal. Bus. & Prof. Code § 17200**

8 In Count V, plaintiffs allege that Citibank's asserted violations of TILA and  
9 Regulation Z, with respect to the Cohens and Winkler, constituted "unlawful, deceptive, and  
10 unfair acts and practices" for purposes of § 17200 of the California Business & Professions  
11 Code. Citibank argues Count V is subject to dismissal because plaintiffs have failed to  
12 state a TILA or Regulation Z claim on behalf of the Cohens and Winkler.

13 "[A] lender's violation of TILA can be an unfair business practice or act under  
14 [§ 17200]." Pacific Shore Funding v. Lozo, 138 Cal. App. 4th 1342, 1347 (2006). For the  
15 reasons stated above, the Court finds plaintiffs have adequately alleged that Citibank  
16 violated TILA and Regulation Z with respect to the Cohens and Winkler.

17 Accordingly, Citibank has failed to show Count V is subject to dismissal..

18 **F. Count VI: Violation of California's UCL, Cal. Bus. & Prof. Code § 17200**

19 Citibank argues that Count VI should be dismissed to the extent it is brought on  
20 behalf of the Cohens and Winkler. Count VI, however, is only alleged on behalf of Levin.  
21 (See SAC at 21:20-21.)

22 Accordingly, Citibank has failed to show Count VI is subject to dismissal.

23 **G. Count VII: Violation of California's UCL, Cal. Bus. & Prof. Code § 17200**

24 In Count VII, plaintiffs allege that Citibank "knew of LSI's practice of charging  
25 excessive appraisal fees and either ignored the practice or encouraged it" (see SAC  
26 ¶ 97), and that it was "unfair," within the meaning of § 17200, for Citibank to require the  
27 Cohens to pay to LSI an "excessive and unreasonable appraisal fee" before Citibank would  
28 reconsider its valuation of the Cohen's residence. (See SAC ¶¶ 95-97.) As relief for such

1 alleged unfair practice, plaintiffs seek “restitution of any money or property gained by  
2 Citibank and its agent LSI from the Cohens.” (See SAC ¶ 101.)

3 Citibank argues that plaintiffs have failed to allege sufficient facts to support a claim  
4 for restitution against Citibank. In particular, Citibank asserts, plaintiffs cannot state a claim  
5 for restitution against Citibank because plaintiffs allege the Cohens paid the appraisal fee  
6 directly to LSI, and not to Citibank.

7 Contrary to Citibank’s argument, plaintiffs’ allegation that the Cohens paid the fee  
8 directly to LSI does not necessarily foreclose them from stating a claim for restitution. A  
9 restitution claim can be stated, for example, where the plaintiff, at the defendant’s  
10 instruction, pays a fee to a third party, provided the defendant “receive[s] a benefit from  
11 [the] payments” made to the third party. See, e.g., Troyk v. Farmers Group, Inc., 171 Cal.  
12 App. 4th 1339-40 (2009) (holding, where defendant insurer required plaintiff policyholders  
13 to pay service charges to third party, “[insurer] may be liable to [policyholders] for restitution  
14 under the UCL” because “substantial portion of the service charges paid by [policyholders]  
15 to [third party was] indirectly received by [insurer] through payments made by [third party]  
16 to [insurer] for services rendered”). Other examples of viable restitution claims based on a  
17 payment to a third party include claims wherein the third party is alleged to have acted as  
18 the “agent” of the defendant, see id. at 1340-41, or where the third party allegedly was part  
19 of a “single enterprise” with the named defendant, see id. at 1341-42.

20 Here, however, the SAC fails to include any facts to support a finding that Citibank  
21 itself obtained a benefit from the Cohens’ payment of the appraisal fee to LSI, that LSI was  
22 acting as the agent of Citibank when it charged the appraisal fee, that LSI and Citibank are  
23 a single enterprise, or that any other circumstance exists such that Citibank can be held  
24 liable for restitution based on the Cohens’ payment to LSI. Although the SAC includes a  
25 conclusory allegation that LSI was “acting as Citibank’s agent and/or co-conspirator” (see  
26 SAC ¶ 95), such conclusory allegation is insufficient to state a claim for restitution against  
27 Citibank. See Iqbal, 129 S. Ct. at 1950 (holding, on motion to dismiss, district court is “not  
28 bound to accept as true a legal conclusion couched as a factual allegation”); Karim-Panahi

1 v. Los Angeles Police Dep't, 839 F.2d 621, 626 (9th Cir. 1988) (holding, where plaintiff  
2 seeks to proceed under theory of conspiracy, "mere allegation of conspiracy without factual  
3 specificity is insufficient").

4 Accordingly, Count VII is subject to dismissal.

5 **CONCLUSION**

6 For the reasons stated above,

7 1. Citibank's motion to dismiss is hereby GRANTED in part and DENIED in part, as  
8 follows:

9 a. Counts II and VII are DISMISSED.

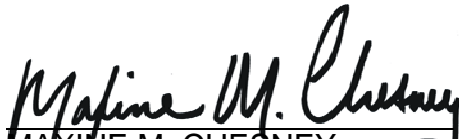
10 b. To the extent Count III includes a claim based on Citibank's not reinstating  
11 Winkler's access to the full credit limit, Count III is DISMISSED.

12 c. In all other respects, the motion is DENIED.

13 2. In the event plaintiffs seek to amend any or all of the dismissed counts to cure  
14 the deficiencies identified above, plaintiffs are directed to file a Third Amended/  
15 Consolidated Class Action Complaint no later than September 20, 2010. If plaintiffs elect  
16 not to further amend, the instant action will proceed on the remaining claims in the SAC.

17 **IT IS SO ORDERED.**

18  
19 Dated: August 30, 2010

20   
21 MAXINE M. CHESNEY  
22 United States District Judge  
23  
24  
25  
26  
27  
28