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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

U.S. BANK NATIONAL
ASSOCIATION,

Plaintiff,

v.

GARY N. WAYMAN,

Defendant.

Case No. 13-CV-02203-BAS(BLM)

ORDER:

- (1) GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT (ECF NO. 17);**
- (2) DENYING MOTION FOR LEAVE TO FILE COUNTERCLAIMS (ECF NO. 21); AND**
- (3) DENYING MOTION TO STRIKE LATE FILED PAPERS (ECF NO. 40)**

Pending before the Court is a motion for summary judgment¹ filed by Plaintiff U.S. Bank National Association (“U.S. Bank”) against Defendant Gary N. Wayman, an individual, dba Postal Centre, and dba Cashman Postal Services (“Wayman”) (ECF No. 17), Wayman’s motion for leave to file late counter-claims against Plaintiff (ECF No. 21), and U.S. Bank’s objection and motion to strike late-filed papers submitted by Wayman in opposition to the motion for summary judgment (ECF No.

¹ Although titled a “motion for summary judgment”, the present motion only seeks partial summary judgment.

1 40).

2 The Court heard oral argument on these motions on September 28, 2015. For
3 the following reasons, the Court **GRANTS** U.S. Bank’s motion for summary
4 judgment, **DENIES** Wayman’s motion for leave to file late counter-claims against
5 U.S. Bank, and **DENIES** U.S. Bank’s motion to strike late-filed papers submitted by
6 Wayman in opposition to the motion for summary judgment.

7 **I. STATEMENT OF FACTS**

8 U.S. Bank is a national bank that offers deposit account and other banking
9 products. (ECF No. 17-2 (“Lewis Decl.”) at ¶ 3.) Wayman does business as Postal
10 Centre of Vista. (ECF No. 1 (“Compl.”) at ¶ 3; ECF No. 5 (“Answer”) at ¶ 1; Lewis
11 Decl. at Exhs. 14, 15 at No. 2.²) Postal Centre of Vista is a money service business
12 that sells money orders to the public. (ECF No. 1. at ¶ 6; ECF No. 5 at ¶ 1; Lewis
13 Decl. at Exhs. 14, 15 at No. 3.)

14 On or about April 6, 1999, Wayman opened Account #9278 at U.S. Bank in
15 the name of Gary Wayman dba Postal Centre of Vista. (Lewis Decl. at ¶ 4 & Exhs.
16 14, 15 at No. 4; Compl. at ¶ 7; Answer at ¶ 1.) Wayman signed a signature card for
17 this account. (Lewis Decl. at ¶ 4, Exh. 1 & Exhs. 14, 15 at Nos. 5, 6; Compl. at ¶ 25;
18 Answer at ¶ 1.)³ The signature card states that “[A]LL TRANSACTIONS SHALL
19 BE GOVERNED BY APPLICABLE LAWS AND THE BANK’S TERMS (COPY
20 ACKNOWLEDGED AS RECEIVED HEREIN) THAT PERTAIN TO THE TYPE
21 OF ACCOUNT AND STYLE OF OWNERSHIP INDICATED ON THIS CARD
22

23
24 ² See ECF No. 18.

25 ³ Wayman admits he signed a signature card when he opened Account
26 #9278, but states he cannot be sure if the card attached is in fact the one he signed.
27 (Lewis Decl. at Exhs. 14, 15 at No. 5.) The motion states that Wayman “reserves the
28 right to view the original card in the bank’s possession before agreeing that it
constitutes an ‘undisputed fact.’” (ECF No. 35 at p. 3.) However, Lewis’ statement
that this is Wayman’s signature card signed by Wayman is uncontroverted.

1 [SOLE PROPRIETORSHIP].” (Lewis Decl. at Exh. 1.)

2 At the time he opened the account, Wayman was given a copy of U.S. Bank’s
3 deposit agreement. (*Id.* at ¶ 7, Exh. 4.) The deposit agreement states that “[t]his
4 agreement contains rules that apply to your accounts and your banking relationship
5 with us.” (*Id.* at Exh. 4, at p. 3.) The agreement further explains that “[w]hen you
6 signed your account signature card . . . you agreed to follow our rules and regulations,
7 including any changes or additions we may make to them in the future.” (*Id.* at p. 4.)
8 Among the rules in the agreement is: “[a]ny time an item deposited to your account
9 is returned to us, we have the right without notice to charge your account.” (*Id.* at p.
10 7.)

11 On or about July 25, 2012, Wayman opened a second account, Account #6484,
12 at U.S. Bank in the name of Gary Wayman dba Postal Centre of Vista. (Lewis Decl.
13 at ¶ 5 & Exhs. 14, 15 at No. 11; Compl. at ¶ 7; Answer at ¶ 1.) Again, Wayman
14 signed a signature card with the same language noted above. (Lewis Decl. at ¶ 5,
15 Exh. 2; & Exhs. 14, 15 at No. 12.) Wayman also received a similar deposit agreement
16 to the one noted above. (*Id.* at ¶¶ 7, 8.)

17 In February 2012, the bank’s deposit agreement was revised and made
18 available to any customer, including Wayman, at any branch location and online.
19 (Lewis Decl. at ¶ 8.) This revised agreement was in effect during October 2012. (*Id.*)
20 The deposit agreement in effect during October 2012 includes the following
21 statements:

- 22 • **By providing a written or electronic signature on a signature**
23 **card or other agreement or contract, opening, or continuing**
24 **to hold an account with us, you agree to the most recent**
25 **version of this Agreement. . . . If any terms of your signature**
26 **card . . . are inconsistent with the terms of this Agreement,**
27 **the terms of this Agreement will control.** (*Id.* at Exh. 5, p. 3.)
- 28 • **DEPOSITS[.]** When you make a non-cash deposit to your
account, we give you credit for that deposit, but that credit is
provisional (temporary). If the deposit needs to be collected
from another financial institution, we must be paid before the

1 credit becomes final. After a credit is final it may still be
2 reversed. (*Id.* at Exh. 5, p. 6.)

- 3 • **RETURNED DEPOSITS AND CASHED ITEMS[.]** The
4 funds you deposit to your account are subject to normal
5 collection processes even after we make the funds available to
6 you for withdrawal (i.e., the check has “cleared”). If we do not
7 collect the funds, or we need to return the funds, your deposit
8 will be reversed and become your responsibility. (*Id.* at Exh. 5,
9 p. 7; *see also* p. 30.)
- 10 • **Your responsibilities for overdrafts:** If you have an overdraft,
11 you must deposit enough money into your account to pay the
12 overdraft and the fees we charge, and you must do so
13 immediately. If you share ownership of your account with
14 someone else, you are responsible to us for the overdraft, whether
15 or not you personally caused the overdraft or benefited from it.
16 (*Id.* at Exh. 5, p. 11.)

17 On October 5, 2012, an over-the-counter deposit was made to Account #9278
18 in the amount of \$160,139.49, consisting of \$11,000 cash and \$149,139.49 in money
19 orders. (*Id.* at ¶ 16, Exh. 9 & Exhs. 14, 15 at No. 18.) The money orders consisted
20 of 304 money orders issued by Continental Express Money Order Co., Inc.
21 (“Continental”), and payable through Continental’s bank, North American Banking
22 Company (“North American”). (*Id.*)

23 On October 9, 2012, another over-the-counter deposit was made to Account
24 #9278 in the amount of \$176,632.81, consisting of \$10,000 cash and \$166,632.81 in
25 money orders. (*Id.* at ¶ 17, Exh. 10 & Exhs. 14, 15 at No. 19.) The money orders
26 consisted of 338 money orders issued by Continental payable through North
27 American. (*Id.*)⁴

28 ⁴ Wayman proffers a declaration from Jorge Leon, a former employee of
the Postal Centre in Vista, stating that he “prepared the deposits on October 5, 2012
and October 9, 2012 and remember[s] clearly that 642 money orders were not
deposited on those two days.” (ECF No. 35-3 at ¶ 4.) Leon further states “[t]here is
no way that I deposited 338 money orders on October 9, 2012” and [t]here is no way
that I deposited 304 money orders on October 5, 2012.” (ECF No. 35-3 at ¶¶ 6, 7.)

1 Once these deposits were made, U.S. Bank extended \$315,772.30 in
2 provisional credit to Wayman while it waited for North American to make good on
3 the money orders. (*Id.* at ¶¶ 18-20.) On October 15, 2012, U.S. Bank received notice
4 from North American that 639 of the deposited money orders totaling \$314,737.14
5 were being returned unpaid due to a stop payment. (*Id.* at ¶ 21.) On October 17,
6 2012, two more money orders totaling \$1,000 were returned unpaid by North
7 American due to a stop payment. (*Id.*) In total, there were 641 returned money
8 orders, totaling \$315,737.14, and North American never paid U.S. Bank. (*Id.* at ¶ 22,
9 Exh. 11.)

10 From October 9, 2012 to October 15, 2012, after the provisional credits for the
11 money orders had been applied to Account #9278, the majority of provisional credit
12 given to Wayman was spent. (*Id.* at ¶ 26.) A total of \$349,715.00 was transferred
13 online from Account #9278 to Account #6484. (*Id.* at ¶ 27.) The online transfers
14 could only have been made by a person using the unique ID and password created
15 for Account #9278 and Account #6484. (*Id.* at ¶¶ 10-12, 26-27.) A total of
16 \$179,701.60 was dispersed in electronic payments to third parties, including
17 Continental, Western Union, Budget Prepay, Paychex and The Hartford. (*Id.* at ¶
18 26.) In addition, there was a loan payment to Wayman’s consumer loan account
19 (\$949.12), check card purchases (\$435.03), and payment of a check to “Postmaster”
20 (\$22.48) during this period. (*Id.*) Surveillance footage also shows that Wayman took
21 out cash withdrawals from Account #9278 totaling \$26,000 between October 11-15,
22 2012. (*Id.* at ¶ 28, Exh. 12 & Exhs. 14, 15 at No. 30.) On October 15, 2012, before
23 any money orders were reversed, Account #9278 had a balance of \$5,020.82. (*Id.* at
24

25 To the extent U.S. Bank objects to this Declaration, the objections are overruled.
26 However, ultimately the fact that Mr. Leon states he did not deposit the money orders
27 is not dispositive. He states he prepared the deposits, but does not say he actually
28 made the deposits. Furthermore, what Mr. Leon did on those days does not explain
deposits someone else might have made to the account on those days. The fact that
the money orders were deposited to Wayman’s account is still uncontroverted.

¶ 31.)

On October 15, 2012, U.S. Bank reversed the deposit of the 639 money orders returned that day, and charged back the amount of the provisional credit it had given Wayman for those money orders in the amount of \$314,737.14. (*Id.* at ¶ 24.) On October 17, 2012, U.S. Bank reversed the deposit of the 2 money orders returned that day in the amount of \$1,000. (*Id.* at ¶ 25.) The reversals resulted in a balance to Account #9278 on October 17, 2012 of -\$312,817.39. (*Id.*)

On November 15, 2012, U.S. Bank exercised its set off rights and applied the positive balance in Account #6484 (\$160,652.46) to the negative balance that was reflected in Account #9278. (*Id.* at ¶ 29, Exh. 13.) From October to December, 2012, Account #9278 incurred overdraft charges, charges for returned checks, account analysis and other fees and charges in the amount of \$9,602.89. (*Id.* at ¶¶ 30-31, 33.) Thus, the total owed on Account #9278 when it was finally closed in December 2012 was \$159,666.75. (*Id.* at ¶¶ 30, 31.)⁵ U.S. Bank therefore sustained a loss of \$159,666.75 in connection with the returned deposit items and this amount has not been repaid to date. (*Id.* at ¶¶ 33-34.)

II. PROCEDURAL HISTORY

On March 3, 2014, United States Magistrate Judge Major issued a Case Management Conference Order Regulating Discovery and Other Pretrial Proceedings. (ECF No. 13.) She ordered that any motion to amend the pleadings be filed by June 2, 2014. (*Id.* at 1.) The discovery cut-off was October 13, 2014. (*Id.* at 3.) All pretrial motions were to be filed by November 14, 2014. (*Id.*) A Final Pretrial Conference was set for February 24, 2015. (*Id.* at 7.)

On August 15, 2014, U.S. Bank filed a motion for summary judgment. (ECF No. 17.) At the time, Wayman was appearing pro per, but on September 12, 2014,

⁵ Starting with a balance of \$5,020.82, less \$315,737.14 in returned money orders, plus \$160,652.46 set off from Account #6484, less \$9,602.89 in charges and fees. (Lewis Decl. at ¶31.)

1 he filed a motion to substitute in counsel, which was granted on September 25, 2014.
2 (ECF Nos. 20, 22.) Simultaneously with the motion to substitute in counsel, Wayman
3 filed a motion for leave to file counter-claims. (ECF No. 21.) U.S. Bank opposes.
4 (ECF No. 32.)

5 Upon the request of new counsel, the Court gave Wayman until November 3,
6 2014 to file an opposition to the motion for summary judgment. (ECF No. 31.)
7 Wayman filed his opposition on November 3, 2014, but added a declaration and an
8 exhibit to the motion for summary judgment on November 4, 2014. (ECF No. 35.)
9 U.S. Bank filed an objection to and motion to strike the late-filed exhibit and
10 declaration. (ECF No. 40.)

11 **III. LEGAL STANDARD**

12 **A. Motion for Summary Judgment**

13 Summary Judgment is appropriate under Rule 56(c) when the moving party
14 demonstrates the absence of a genuine issue of material fact and entitlement to
15 judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477
16 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law,
17 it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 77 U.S. 242,
18 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). A dispute about
19 a material fact is genuine if “the evidence is such that a reasonable jury could return
20 a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

21 A party seeking summary judgment always bears the initial burden of
22 establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.
23 The moving party can satisfy this burden in two ways: (1) by presenting evidence
24 that negates an essential element of the nonmoving party’s case; or (2) by
25 demonstrating that the nonmoving party failed to make a showing sufficient to
26 establish an element essential to that party’s case on which that party will bear the
27 burden of proof at trial. *Id.* at 322-23. “Disputes over irrelevant or unnecessary facts
28

1 will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pac. Elec.*
2 *Contractors Ass’n*, 809 F.2d 626 630 (9th Cir. 1987).

3 “The district court may limit its review to documents submitted for the purpose
4 of summary judgment and those parts of the record specifically referenced therein.”
5 *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001).
6 The court is not obligated “to scour the record in search of a genuine issue of triable
7 fact.” *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v.*
8 *Combined Ins. Co. of Am.*, 55 F.3d 247, 251 (7th Cir. 1995)). If the moving party
9 fails to discharge this initial burden, summary judgment must be denied and the court
10 need not consider the nonmoving party’s evidence. *Adickes v. S.H. Kress & Co.*, 398
11 U.S. 144, 159-60 (1970).

12 If the moving party meets this initial burden, the nonmoving party cannot
13 defeat summary judgment merely by demonstrating “that there is some metaphysical
14 doubt as to the material facts.” *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio*
15 *Corp.*, 475 U.S. 574, 586 (1986); *Triton Energy Corp. v. Square D Co.*, 68 F.3d
16 1216, 1221 (9th Cir. 1995) (“The mere existence of a scintilla of evidence in support
17 of the nonmoving party’s position is not sufficient.”) (citing *Anderson*, 477 U.S. at
18 242, 252). Rather, the nonmoving party must “go beyond the pleadings” and by “the
19 depositions, answers to interrogatories, and admissions on file,” designate “specific
20 facts showing that there is a genuine issue for trial.” *Celotex*, 477 U.S. at 324
21 (quoting Fed. R. Civ. P. 56(e)).

22 When making this determination, the court must view all inferences drawn
23 from the underlying facts in the light most favorable to the nonmoving party. *See*
24 *Matsushita*. 475 U.S. at 587. “Credibility determinations, the weighing of evidence,
25 and the drawing of legitimate inferences from the facts are jury functions, not those
26 of a judge, [when] he [or she] is ruling on a motion for summary judgment.”
27 *Anderson*, 477 U.S. at 255.

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1 **B. Motion for Leave to File Counterclaims**

2 After a scheduling order has been issued setting a deadline to amend the
3 pleadings, and a party moves to amend the pleadings after the deadline, the motion
4 amounts to one to amend the scheduling order and thus is properly brought under
5 Rule 16(b). *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 605, 608 (9th Cir.
6 1992). Rule 16(b)'s "good cause" standard primarily considers the diligence of the
7 party seeking amendment. *Id.* at 609. "Although the existence or degree of prejudice
8 to the party opposing the modification might supply additional reasons to deny a
9 motion, the focus of the inquiry is upon the moving party's reasoning for seeking
10 modification." *Id.* The party seeking to continue or extend the deadlines bears the
11 burden of proving good cause. *See Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080,
12 1087 (9th Cir. 2002); *Johnson*, 975 F.2d at 608-09.

13 In addressing the diligence requirement, one district court in this Circuit
14 noted:

15 [T]o demonstrate diligence under Rule 16's "good cause" standard, the
16 movant may be required to show the following: (1) that [it] was diligent
17 in assisting the Court in creating a workable Rule 16 order.; (2) that
18 [its] noncompliance with a Rule 16 deadline occurred or will occur,
19 notwithstanding [its] diligent efforts to comply, because of the
20 development of matters which could not have been reasonably foreseen
21 or anticipated at the time of the Rule 16 scheduling conference...; and
22 (3) that [it] was diligent in seeking amendment of the Rule 16 order,
23 once it became apparent that [it] could not comply with the order....

24 *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999) (internal citations
25 omitted). If the district court finds a lack of diligence, "the inquiry should end."
26 *Johnson*, 975 F.2d at 609. If, however, the movant clears the Rule 16 bar, the Court
27 proceeds to considering the motion under the usual standard of Rule 15. *Campion v.*
28 *Old Republic Home Protection Co., Inc.*, 861 F. Supp. 2d 1139, 1150 (S.D. Cal.
2012).

1 “Rule 15(a) is very liberal and leave to amend ‘shall be freely given when
2 justice so requires.’” *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946,
3 951 (9th Cir. 2006) (quoting Fed. R. Civ. P. 15(a)); *see also Kaplan v. Rose*, 49 F.3d
4 1363, 1370 (9th Cir. 1994) (noting the “strong policy in favor of allowing
5 amendment”). However, “a district court need not grant leave to amend where the
6 amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces
7 an undue delay in litigation; or (4) is futile.” *AmerisourceBergen Corp.*, 465 F.3d at
8 951. These factors are not of equal weight as prejudice to the opposing party has
9 long been held to be the most crucial factor in determining whether to grant leave to
10 amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003);
11 *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990); *Howey v. United*
12 *States*, 481 F.2d 1187, 1190 (9th Cir. 1973).

13 A delay of two years, while not enough alone to support denial of a motion to
14 amend, is nevertheless relevant. *Morongo Band of Mission Indians v. Rose*, 893 F.2d
15 1074, 1079 (9th Cir. 1991). Furthermore, the fact that the proposed new claims
16 greatly alter the nature of the litigation and require a defendant to undertake, at the
17 last minute, an entirely new course of defense, again, while not the sole factor, is also
18 something the court should consider. *Id.*

19 A court should more carefully scrutinize a party’s attempt to raise new theories
20 of recovery by amendment when the opposing party has filed a motion for summary
21 judgment. *Parish v. Frazier*, 195 F.3d 761, 764 (5th Cir. 1999). This raises concerns
22 about seriatim presentation of facts and issues. *Id.* “A plaintiff who proposes to
23 amend his complaint after the defendant has moved for summary judgment may be
24 maneuvering desperately to stave off the immediate dismissal of the case.” *Cowen*
25 *v. Bank United of Tex., FSB*, 70 F.3d 937, 944 (7th Cir. 1995).

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1 **IV. DISCUSSION**

2 **A. Motion for Summary Judgment**

3 U.S. Bank moves for summary judgment on the second cause of action for
4 breach of contract and the third cause of action for refund under section 4214 of the
5 California Commercial Code.⁶ On the breach of contract claim, U.S. Bank argues it
6 is “entitled to judgment as a matter of law because the undisputed facts establish there
7 are no triable issues of material fact as to Wayman’s breach of the [Deposit]
8 Agreement by refusing to repay U.S. Bank for the uncollected portions of the
9 provisional credits it provided in connection with the returned deposit items and any
10 resulting overdraft.” (ECF No. 17-1 at p. 10, line 27 to p. 11, line 4.) On the section
11 4214 claim, U.S. Bank argues it is entitled to judgment as a matter of law because
12 “Wayman expressly admits U.S. Bank is entitled to a refund for any collected portion
13 of the provisional credit,” and the undisputed facts establish that U.S. Bank had the
14 “statutory right to reverse the deposit, charge back the provisional credit it gave
15 Wayman for the money orders, and obtain a refund for any uncollected portion of the
16 provisional credit.” (*Id.* at p. 16, lines 1-12.) In response, Wayman asserts the
17 affirmative defense of unclean hands. (ECF No. 35.)

18 1. Breach of Contract

19 To recover on a breach of contract claim, U.S. Bank must prove the following:
20 (1) the existence of a contract between Plaintiff and U.S. Bank; (2) U.S. Bank’s
21 performance of the contract or excuse for non-performance; (3) Wayman’s breach of
22 the contract; and 4) damages caused by Plaintiff’s breach. *See Bushell v. JPMorgan*
23 *Chase Bank, N.A.*, 220 Cal. App. 4th 915, 921 (2013) (citing *Reichert v. General Ins.*
24 *Co.*, 68 Cal. 2d 822, 830 (1968)). “The relationship of bank and depositor is founded
25 on contract, which is ordinarily memorialized by a signature card that the depositor
26 signs upon opening the account.” *Chazen v. Centennial Bank*, 61 Cal. App. 4th 532,
27

28 ⁶ U.S. Bank does not seek summary judgment on its first cause of action
for fraud. (*See* ECF No. 17-1 at p. 7, n. 5.)

1 537 (1998) (internal citation omitted). By signing a signature card, a depositor may
2 agree to be bound by the rules and regulations of the bank. *See Larrus v. First Nat.*
3 *Bank of San Mateo Cnty.*, 122 Cal. App. 2d 884, 889-90 (1954).

4 In this case, U.S. Bank submits uncontroverted evidence that Wayman signed
5 a bank signature card when he opened Account #9278 and thereby entered a contract
6 with U.S. Bank. (Lewis Decl. at ¶ 4, Exh. 1; Compl. at ¶ 25; Answer at ¶ 1.) All
7 transactions on the account were therefore subject to applicable laws and the bank's
8 terms, including the deposit agreement. (*See id.*) U.S. Bank submits uncontroverted
9 evidence that \$315,737.14 in money orders were deposited into Account #9278, on
10 which U.S. Bank extended provisional credit. (*See id.* at ¶¶ 16, 17, 18, Exhs. 9, 10.)
11 U.S. Bank also submits uncontroverted evidence that the money orders were later
12 returned unpaid due to a stop payment instruction. (*See id.* at ¶¶ 21-25, Exh. 11.)
13 Pursuant to the deposit agreement, U.S. Bank was authorized to reverse the deposits
14 and charge back the provisional credit. (*See id.* at Exhs. 1, 5.) Wayman was then
15 required to repay the unpaid amount back to U.S. Bank. (*See id.*) Because Wayman
16 has failed to repay the unpaid amount back in its entirety, U.S. Bank has been
17 damaged in the amount of \$159,666.75. (*See id.* at ¶¶ 33-34.)

18 Based on the foregoing, U.S. Bank is entitled to judgment as a matter of law
19 on its breach of contract claim and U.S. Bank's motion for summary judgment on its
20 second cause of action is **GRANTED**

21 2. California Commercial Code Section 4214

22 As explained in *Symonds v. Mercury Savings and Loan Assoc.*, 225 Cal. App.
23 3d 1458 (1990):

24 When a customer deposits a check [or a money order] drawn on another
25 bank, the customer receives a provisional credit for the amount of the
26 check [or money order]. The collecting bank, acting as the customer's
27 agent, then forwards the check [or money order] to the payor bank or a
28 presenting bank which gives the collecting bank a provisional credit. If
the check [or money order] is forwarded to a presenting bank, the
presenting bank in turn presents the check [or money order] to the payor

1 bank from which the check [or money order] is to be drawn and receives
2 a provisional credit. If the payor bank does not promptly dishonor the
3 check [or money order], the provisional settlements through this chain
of banks become final.

4 *Id.* at 1464 (internal citations omitted); *see also* Cal. Com. Code §§ 4215(a) & (b),
5 3104(f) (defining “check” to include a money order). Until final settlement for an
6 item is made, any settlement given for the item is provisional. *Holcomb v. Wells*
7 *Fargo Bank, N.A.*, 155 Cal. App. 4th 490, 497 (2007) (citing Cal. Com. Code § 4201);
8 *see also* Cal. Com. Code § 4104(a)(11) (defining “Settle”), § 4104(a)(9) (defining
9 “Item”). “An item is finally paid by a payor bank when the bank has first done any
10 of the following: (1) Paid the item in cash[;] (2) Settled for the item without having
11 a right to revoke the settlement under statute, clearing house rule, or agreement[; or]
12 (3) Made a provisional settlement for the item and failed to revoke the settlement in
13 the time and manner permitted by statute, clearing house rule, or agreement.” Cal.
14 Com. Code § 4215(a). Section 4214 of the California Commercial Code allows a
15 bank to charge back an item which has been given as a provisional settlement but is
16 then dishonored before final settlement. *See* Cal. Com. Code § 4214(a).

17 Here, the uncontroverted evidence shows that U.S. Bank provided provisional
18 credit to Wayman’s Account #9278 totaling \$315,772.30 based on the deposit of 642
19 money orders, and the money orders on which the credit was extended were later
20 returned unpaid due to a stop payment by the payor bank, North American. (*See*
21 *Lewis Decl.* at ¶¶ 18-22, Exh. 11.) Therefore, no final settlement was made and U.S.
22 Bank is entitled to a refund for the amount of credit given. *See Symonds*, 225 Cal.
23 App. 3d at 1464-65 (“When the payor bank timely dishonors a check, section 4212
24 grants a bank the right to charge back the amount provisionally credited”). U.S.
25 Bank also presents uncontroverted evidence that it promptly reversed and charged
26 back the provisional credit it provided to Wayman once the money orders were
27 returned, and promptly notified Wayman of this fact. (*See Lewis Decl.* at ¶¶ 21-25
28 & Exh. 11.)

1 Based on the foregoing, U.S. Bank is entitled to judgment as a matter of law
2 on its refund claim and U.S. Bank’s motion for summary judgment on its third cause
3 of action is **GRANTED**.

4 3. Affirmative Defense

5 Wayman claims that U.S. Bank is not entitled to recovery because U.S. Bank
6 suffers from “unclean hands”, in that the bank failed to exercise ordinary care in
7 detecting that the money orders were deposited fraudulently. (ECF No. 35 at pp. 3-
8 5.) Wayman argues that the fraudulent money orders were deposited by his General
9 Manager, without his knowledge, and it was Wayman’s action that eventually led to
10 the fraud detection. (*Id.*; *see also* ECF No. 35-2 (“Wayman Decl.”) at ¶¶ 9-15, 18.)
11 Wayman argues U.S. Bank is at fault for accepting the fraudulent money orders and
12 for failing to notify him that his General Manager was making out of the ordinary
13 deposits. (*Id.*)

14 The doctrine of unclean hands, which Wayman asserts as an affirmative
15 defense, “demands that a plaintiff act fairly in the matter for which he seeks a
16 remedy.” *Kendall-Jackson Winery, Ltd. v. Super. Ct.*, 76 Cal. App. 4th 970, 978
17 (1999). A plaintiff “must come into court with clean hands, and keep them clean, or
18 he will be denied relief, regardless of the merits of his claim.” *Id.* In handling a
19 check or money order, a collecting bank “must use ordinary care in presenting the
20 check for collection or for sending it for presentment.” *Symonds*, 225 Cal. App. 3d
21 at 1464 (citing Cal. Com. Code § 4202(1)(a)). “A collecting bank exercises ordinary
22 care . . . by taking proper action before its midnight deadline following receipt of an
23 item, notice, or settlement.” Cal. Com. Code § 4202(b). However, banks are not
24 responsible for monitoring their client’s accounts for wrongdoing. *Chazen*, 61 Cal.
25 App. 4th at 537-41. The “contractual relationship does not involve any implied duty
26 ‘to supervise account activity’ or ‘to inquire into the purpose for which the funds are
27 being used.’” *Id.* at 537 (internal citations omitted). Furthermore, “[t]he right to
28 charge back is not affected by . . . [f]ailure by any bank to exercise ordinary care with

1 respect to the item,” *Wells Fargo Bank, N.A. v. FSI Financial Solutions, Inc.*, 196
2 Cal. App. 4th 1559, 1570 (2011) (quoting Cal. Com. Code § 4214(d)(2)), or by the
3 lack of an endorsement or signature on a deposited item, *see Lema v. Bank of Am.*,
4 375 Md. 625, 639-641 (Md. App. 2003); *Oswald Mach. & Equip., Inc. v. Yip*, 10 Cal.
5 App. 4th 1238, 1247 (1992); Cal. Com. Code § 4214.

6 The Court finds Wayman has failed to raise a triable issue of material fact as
7 to his defense of unclean hands. Wayman does not establish that U.S. Bank failed to
8 exercise ordinary care, that it was responsible for monitoring Wayman’s account, or
9 that it otherwise acted with fraud and in bad faith.

10 **B. Motion for Leave to File Counter-Claims**

11 After the filing of U.S. Bank’s motion for summary judgment, Wayman moved
12 to add five counter-claims. (ECF No. 21.) In his proposed counter-complaint,
13 Wayman first alleges that U.S. Bank breached its contract when it (1) failed to send
14 monthly account statements, (2) sent photocopies of checks but not of the money
15 orders, and (3) accepted as deposits unendorsed money orders. (*See* ECF No. 21-2
16 at p. 5.) Second, Wayman claims both intentional and negligent interference with
17 contractual advantage alleging U.S. Bank interfered with his relationship with
18 Continental. (*See id.* at pp. 6-7.) Third, Wayman alleges U.S. Bank aided and abetted
19 fraud because it was aware of his General Manager’s schemes and aided and abetted
20 them. (*See id.* at p. 8.) Finally, Wayman alleges a counter-claim against U.S. Bank
21 for negligence. (*See id.* at p. 9.)

22 Although Wayman files his motion relying on Federal Rule of Civil Procedure
23 15, as laid out above, motions to amend pleadings after the scheduling cut-off must
24 show “good cause” under Federal Rule of Civil Procedure 16. *See Johnson*, 975 F.2d
25 at 608. After consideration of the relevant factors, the Court denies Wayman’s
26 motion for leave to file a counter-complaint for the following reasons. First, Wayman
27
28

1 has failed to move to amend the scheduling order.⁷ Even construing this motion as
2 one to amend the scheduling order, the Court highlights that Wayman filed this
3 motion well after the scheduled deadline to amend the pleadings and one month
4 before the discovery cut-off date. Wayman claims he failed to file the counter-
5 complaint sooner because he was acting pro per and believed he could amend to add
6 the counter-claims at any time. However, the scheduling order specifically informed
7 Wayman, even if he was acting pro per, that any motion to amend the pleadings must
8 be filed by June 2, 2014. (*See* ECF No. 13.) Thus, the Court finds a lack of diligence
9 in seeking to amend the scheduling order.

10 While the inquiry should end there, *see Johnson*, 975 F.2d at 609, the Court
11 will continue and analyze Wayman's motion under Rule 15. Despite Rule 15's
12 liberal standards, a district court need not grant leave to amend where the amendment
13 would cause prejudice to the opposing party and undue delay, or is futile. *See*
14 *AmerisourceBergen Corp.*, 465 F.3d at 951. The Court finds all three present here.
15 At this stage, permitting Wayman leave to file late counterclaims would require
16 reopening discovery, as well as an additional motion for summary judgment which
17 would cause undue prejudice to U.S. Bank. The fact that Wayman waited to file a
18 counter-complaint until after U.S. Bank filed its motion for summary judgment is
19 significant. *See Parish*, 195 F.3d at 764; *Cowan*, 70 F.3d at 944. Wayman attempts
20 to greatly alter the nature of the litigation by changing it from a simple breach of
21 contract action to one adding additional claims and parties, including negligent and
22 intentional interference with a contractual advantage involving a third party.
23 Moreover, several of Wayman's proposed counterclaims appear to be another
24 attempt to argue his failed affirmative defenses. For the reasons stated above,
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26
27 ⁷ A court may deny as untimely a motion for leave to amend after a
28 scheduling order deadline has passed, simply because the party seeking an extension
of time did not request a modification of the scheduling order as well. *See Johnson*,
975 F.2d at 608.


1 Wayman's allegations do not alter the fact that U.S. Bank is entitled to a return of the
2 money. Accordingly, Wayman's motion for leave to file late counterclaims against
3 U.S. Bank is **DENIED**.

4 **V. CONCLUSION**

5 For the foregoing reasons, U.S. Bank's motion for summary judgment (ECF
6 No. 17) on its second and third causes of action in the amount of \$159,666.75 against
7 Wayman is **GRANTED**. In addition, Wayman's motion for leave to file late counter-
8 claims against U.S. Bank (ECF No. 21) is **DENIED**, and U.S. Bank's motion to strike
9 late-filed papers (ECF No. 40) is **DENIED**.

10 **IT IS SO ORDERED.**

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12 **DATED: September 30, 2015**


Hon. Cynthia Bashant
United States District Judge

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