

FISHER & PHILLIPS LLP
Michael R. Greco*
1125 17th Street, Suite 2400
Denver, Colorado 80202
Telephone: (303) 218-3650
Email: mgreco@fisherphillips.com

Wendy R. Hughes*
Paul J. Greco*
Two Logan Square, 12th Floor
Philadelphia, Pennsylvania 19103
Telephone: 610-230-6104
Email: whughes@fisherphillips.com
Email: pgreco@fisherphillips.com

Stephen C. Mitchell*
1320 Main Street, Suite 750
Columbia, SC 29201
Telephone: (949) 851-2424
Email: smitchell@fisherphillips.com

Attorneys for Plaintiff
FIRST-CITIZENS BANK & TRUST COMPANY

COOLEY LLP
John H. Hemann (165823)
Amy M. Smith (287813)
Eleanor W. Barczak (329180)
3 Embarcadero Center, 20th Floor
San Francisco, California 94111
Telephone: (415) 693-2000
Email: jhemann@cooley.com
Email: amsmith@cooley.com
Email: ebarczak@cooley.com

**Admitted Pro Hac Vice*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FIRST-CITIZENS BANK & TRUST
COMPANY, a Delaware Corporation,

Plaintiff,

v.

HSBC BANK USA, N.A., a Delaware
Corporation; HSBC UK BANK plc., an English
and Welsh Corporation; SILICON VALLEY
BANK UK LIMITED *n/k/a* HSBC
INNOVATION BANK LIMITED, an English
and Welsh Corporation; DAVID SABOW, an
individual,

Defendants

AND RELATED COUNTERCLAIM

Case No. 3:23-cv-02483-LB

**PLAINTIFF FIRST-CITIZENS BANK &
TRUST COMPANY'S NOTICE OF MOTION
AND MOTION TO STRIKE DEFENDANT
DAVID SABOW'S COUNTERCLAIM**

Date: October 8, 2026
Time: 9:30 AM
Dept: Courtroom B, 15th Floor
Judge: Honorable Laurel Beeler

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTE THAT, on October 8, 2026 at 9:30 a.m. in Courtroom B of the
3 above-captioned Court, Plaintiff First-Citizens Bank & Trust Company (“First Citizens”) will and
4 hereby does move this Court for entry of an order striking Defendant and Counterclaimant David
5 Sabow’s (“Sabow”) counterclaim, filed as part of his Answer to First Citizens’ Second Amended
6 Complaint (“SAC”) on July 10, 2026, pursuant to Federal Rule of Civil Procedure 12(f).

7 This Motion is made on the grounds that Sabow’s counterclaim is unauthorized and
8 untimely under this Court’s operative scheduling order and under the Federal Rules of Civil
9 Procedure. Because the SAC did not expand the theory or scope of the case against him with respect
10 to the breach of contract claim pleaded in First Citizens’ original Complaint and First Amended
11 Complaint, Sabow could not assert a new counterclaim as of right in his answer to the SAC.
12 Pursuant to Federal Rules of Civil Procedure 16(b)(4) and 15(a)(2), Sabow was required to both
13 (1) obtain modification of this Court’s pretrial schedule setting the deadline to seek leave to file an
14 amended pleading; and (2) obtain party consent or leave of court before filing his amended answer.
15 Sabow failed to do so, and his unauthorized and untimely counterclaim is properly stricken as an
16 immaterial and impertinent matter under Rule 12(f).

17 This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points
18 and Authorities below, and all other pleadings and papers on file, and upon such other oral and/or
19 documentary matters as may be presented to the Court at or before the hearing of this Motion.

20 Respectfully submitted,

21 Dated: August 31, 2026

COOLEY LLP

22
23 By: /s/ John H. Hemann
24 John H. Hemann
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1 **I. INTRODUCTION**

2 For more than three years, Defendant David Sabow litigated this case without ever asserting
3 a counterclaim against First Citizens. He moved to dismiss the original Complaint on the theory
4 that the very contractual provisions he now attacks were unenforceable and lost. He later answered
5 the First Amended Complaint and raised Section 16600 only as an affirmative defense. Now, after
6 once again failing to obtain dismissal of the same breach of contract claim, Sabow attempts in his
7 Answer to the SAC to inject a brand-new counterclaim under California Business & Professions
8 Code Section 16600.5, seeking damages, injunctive relief, declaratory relief, and attorneys' fees
9 for the first time in this litigation. His counterclaim is procedurally improper and should be stricken.

10 Sabow's counterclaim fails for three independent reasons. *First*, because the SAC did not
11 change the theory or scope of the non-competition allegations against him—allegations present
12 since the original Complaint in May 2023—Sabow had no right to assert a new counterclaim in his
13 answer to the SAC. Under the “moderate approach” adopted by the majority of district courts in
14 this Circuit, new counterclaims may be asserted as of right only to the extent they directly relate to
15 changes in the amended complaint. Sabow's counterclaim does not. *Second*, because the SAC did
16 not expand the case against him, Sabow's answer operates as an *amended* answer—one filed well
17 after this Court's December 18, 2025 deadline to amend pleadings. Sabow never sought
18 modification of the scheduling order under Rule 16(b)(4), nor did he obtain party consent or leave
19 of court under Rule 15(a)(2). *Third*, because his counterclaim is both unauthorized and untimely, it
20 is properly stricken as immaterial and impertinent under Rule 12(f).

21 Permitting Sabow to assert a counterclaim at this late stage—after three years of litigation,
22 three iterations of the complaint, and a lapsed amendment deadline—would reward delay and
23 prejudice First Citizens, which has litigated this case in reliance on the scope of the pleadings as
24 they stood. This Court should strike Sabow's counterclaim under Rule 12(f) and deny any
25 subsequent motion to reassert it.

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II. STATEMENT OF ISSUES TO BE DECIDED

1. Whether Sabow may assert a new counterclaim as of right in his answer to the SAC, where the SAC did not change the theory or scope of the breach of contract allegations against him.

2. Whether Sabow was required to obtain modification of the scheduling order under Rule 16(b)(4) and party consent or leave of court under Rule 15(a)(2) before filing an amended answer containing a new counterclaim.

3. Whether Sabow’s counterclaim should be stricken under Rule 12(f) as unauthorized and untimely.

III. BACKGROUND

A. First Citizens’ Original Complaint

First Citizens filed its original Complaint on May 22, 2023, alleging twelve causes of action. (*See* Dkt. No. 1.) The Complaint alleged that Sabow created a written plan titled Project Colony containing confidential SVB information—including data on annual gross profit per borrower, client classifications, loan portfolios, revenue, growth, and employee salaries—and identified key SVB employees whom Sabow later recruited to execute the scheme. (*Id.* ¶¶ 99-105). In relevant part, the Complaint alleged that Sabow breached the Confidential Information and Invention Assignment Agreement for Employees with Silicon Valley Bank (the “SVB Agreement”) by (1) using and disclosing confidential information for purposes other than SVB’s benefit, (2) soliciting SVB employees within six months after his termination, and (3) engaging in unfair competition by using SVB’s proprietary and confidential information to pitch and later execute “Project Colony” at HSBC. (*Id.* ¶¶ 94-100, 155-161; 164.)

On August 7, 2023, Sabow and his co-defendants moved to dismiss the Complaint, arguing that the SVB Agreement’s “non-competition” and “non-solicitation” provisions were unenforceable under California Business & Professions Code Section 16600 (“Section 16600”). (*See* Dkt. No. 48 at 16-17.) First Citizens opposed, explaining that it did not seek to restrain Sabow’s ability to work but rather to protect its confidential and trade secret information. (*See* Dkt. No. 60 at 20.) The Court agreed, holding that “the claims here turn on the use of confidential and trade

1 secret information to solicit others,” and allowed the breach of contract claim to proceed. (*See* Dkt.
2 No. 71 at 15-17.)

3 **B. First Citizens’ First Amended Complaint**

4 First Citizens filed the FAC on February 7, 2024. (*See* Dkt. No. 76.) The FAC repeated the
5 same allegations regarding Sabow’s breach of the SVB Agreement’s non-solicitation and non-
6 compete provisions. (*See Id.* ¶¶ 270-276, 279.) Sabow and his co-defendants again moved to
7 dismiss on March 13, 2024, this time arguing that First Citizens had not plausibly alleged it acquired
8 the contracts from SVB Financial Group—but did not challenge the validity of the contracts
9 themselves. (*See* Dkt. No. 81 at 3.) The Court again declined to dismiss the breach of contract
10 claim. (*See* Dkt. No. 105 at 26-27.) Sabow answered the FAC on August 30, 2024 (the “2024
11 Answer”), raising Section 16600 only as an affirmative defense, asserting that First Citizens’ breach
12 of contract claim “fails because the provisions First Citizens seeks to enforce are void under
13 California Business and Professions Code Section 16600,” and asserting an unclean hands defense
14 on the same basis. (*See* Dkt. No. 116 at 45-46 (Ninth and Twentieth Affirmative Defenses).)

15 **C. The Operative Scheduling Order and First Citizens’ Second Amended** 16 **Complaint**

17 This Court entered a Revised Scheduling Order on April 17, 2025, setting December 18,
18 2025 as the final date to seek leave to add new parties or amend pleadings. (Dkt. No. 153.) On
19 December 18, 2025, First Citizens sought leave to amend the Complaint. (Dkt. No. 186.) On
20 January 2, 2026, the parties filed a joint stipulation in which Defendants consented to the SAC
21 pursuant to Rule 15(a)(2), mooted the motion for leave to amend. (Dkt. No. 189.) The Court
22 entered the stipulation as an Order the same day. (Dkt. No. 190.) The Court’s most recent revised
23 scheduling order at Dkt. No. 268 did not modify or extend the December 18, 2025 deadline to
24 amend the pleadings.

25 The SAC, filed on February 6, 2026, maintained the same breach of contract theories with
26 additional factual detail. Its allegations regarding Sabow’s breach of the SVB Agreement continued
27 to center on his creation and execution of Project Colony and the trade secret and confidential
28 information within it, with added specificity on the documents used to formalize the plan (*e.g.*,

SAC ¶ 53), the misappropriated data (*e.g., id.* ¶ 186), the scale of the pitch to HSBC leadership (*e.g., id.* ¶ 56), and his coordination and concealment efforts (*e.g., id.* ¶ 82). None of these additions changed the theory or scope of the breach of contract claim against Sabow. Sabow and his co-defendants filed a partial Motion to Dismiss on February 11, 2026. (Dkt. No. 199.) For the third time, the Court declined to dismiss the breach of the SVB Agreement claim, noting that a prior order had also declined to do so. (Dkt. No. 243 at 2, 17.) On June 10, 2026, the parties stipulated to extend Sabow’s deadline to answer the SAC to July 10, 2026 (Dkt. No. 244), which the Court granted the same day (Dkt. No. 245).

On July 10, 2026—for the first time in three years of litigation—Sabow filed his answer to the SAC (the “2026 Answer”) and asserted a counterclaim against First Citizens under Section 16600.5. (*See* Dkt. No. 249 at 48.) His 2026 Answer restated all the same affirmative defenses from the 2024 Answer. (*Compare* Dkt. No. 116, *with* Dkt. No. 249.) The sole addition was the counterclaim, which alleges that First Citizens “seeks to enforce a void California non-competition covenant against an individual it never even employed,” that the covenant is unlawful because it is triggered by “mere possession of information, untethered to any actual or threatened misappropriation,” and that California does not recognize the inevitable disclosure doctrine. (*Id.* at 48-49, 54.) Sabow seeks injunctive relief, declaratory relief, damages, and attorneys’ fees under Section 16600.5(e). (*Id.* at 55.)

IV. LEGAL STANDARD

A party may assert counterclaims as of right in a timely filed answer or in an amended answer within 21 days of service of the original answer. *See* Fed. R. Civ. P. 12, 13, 15(a)(1). Outside those windows, counterclaims may be asserted only in an amended answer filed with party consent or leave of court, and only by the deadline set in the pretrial scheduling order. *See* Fed. R. Civ. P. 15(a)(2), 16(b)(3)(A) (“scheduling order must limit the time to...amend the pleadings”).

A. New Counterclaims are Permitted as of Right Only When Directly Related to Changes in an Amended Complaint.

Neither the Federal Rules nor the Ninth Circuit “directly address whether a defendant may, as a matter of right, assert new counterclaims in response to an amended complaint[.]” *Neuropathy*

1 *Sols., Inc. v. Massachusetts Bay Ins. Co.*, 2022 WL 6589002, at *5 (C.D. Cal. Sept. 7, 2022), *appeal*
 2 *dismissed*, 2023 WL 6868959 (9th Cir. May 24, 2023); *cf. KST Data, Inc. v. DXC Tech. Co.*, 980
 3 F.3d 709, 715 (9th Cir. 2020) (“A defendant is not required to file a new answer to an amended
 4 complaint when the allegations in the amended complaint do not ‘change the theory or scope of the
 5 case.’”). To fill this gap, the majority of district courts in the Ninth Circuit have adopted the
 6 “moderate approach,” which permits new counterclaims as of right “only to the extent they directly
 7 relate to changes in the amended complaint.” *Neuropathy*, 2022 WL 6589002, at *5; *see also*
 8 *Synopsys, Inc. v. Magma Design Automation, Inc.*, 2005 WL 8153035, at *3 (N.D. Cal. Oct. 19,
 9 2005) (same). Thus, a new counterclaim may be asserted as of right only “when the amended
 10 complaint changes the theory or scope of the case,” and “the breadth of the changes in the amended
 11 response must reflect the breadth of the changes in the amended complaint.” *Id.*; *see also Adobe*
 12 *Sys. Inc. v. Coffee Cup Partners, Inc.*, 2012 WL 3877783, at *5 (N.D. Cal. Sept. 6, 2012) (same).

13 **B. If a Counterclaim is not Permitted as of Right, an Amended Pleading Must be**
 14 **Filed by the Deadline to Amend with Either Party Consent or Leave of Court.**

15 “The obvious corollary is that if an amended complaint does not change the theory or scope
 16 of the case, a [defendant] must seek leave of court pursuant to Rule 15(a) before it can amend its
 17 answer to assert a counterclaim.” *Coppola v. Smith*, 2015 WL 2127965, at *2 (E.D. Cal. May 6,
 18 2015) (citation omitted). In other words, an answer filed in response to an amended complaint that
 19 does not change the theory or scope of the case operates as an amended answer, not an original one.
 20 *See, e.g., Nixon v. Buck*, 2025 WL 2995072, at *2 n.3 (C.D. Cal. Sept. 3, 2025) (noting that the
 21 answer to a fourth amended complaint was “properly considered an amended answer” where the
 22 amendment did not change the theory or scope of the case). Such an amended answer may be filed
 23 only after obtaining party consent or leave of court by the deadline set in the scheduling order. *See*
 24 Fed. R. Civ. P. 16(b)(3)(A).

25 When the scheduling order deadline has lapsed, the party “seeking to amend pleading after
 26 date specified in scheduling order must first show ‘good cause’ for amendment under Rule 16(b),
 27 then, if ‘good cause’ be shown, the party must demonstrate that amendment was proper under Rule
 28 15.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992) (citation omitted).

1 “Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking the
 2 amendment.” *Id.* at 609; *In re W. States Wholesale Nat’l Gas Antitrust Litig.*, 715 F.3d 716, 737
 3 (9th Cir. 2013) (same). Even where the good-cause threshold is met, under Rule 15, “late
 4 amendments to assert new theories are not reviewed favorably when the facts and the theory have
 5 been known to the party seeking amendment since the inception of the cause of action.” *Acri v.*
 6 *Int’l Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986). As such,
 7 leave to amend should not be granted if the “amendment would cause prejudice to the opposing
 8 party, is sought in bad faith, is futile, or creates undue delay.” *Madeja v. Olympic Packers, LLC*,
 9 310 F.3d 628, 636 (9th Cir. 2002).

10 C. Striking Unauthorized and Untimely Counterclaims Pursuant to Rule 12(f)

11 Under Rule 12(f), a court “may strike from a pleading an insufficient defense or any
 12 redundant, immaterial, impertinent, or scandalous” matter on a party’s motion. Fed. R. Civ. P. 12(f).
 13 The purpose of a Rule 12(f) motion is to “avoid the expenditure of time and money that must arise
 14 from litigating spurious issues by dispensing with those issues prior to trial[.]” *Sidney-Vinstein v.*
 15 *A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Courts in this district have stricken
 16 counterclaims under Rule 12(f) where a defendant failed to satisfy the procedural requirements for
 17 asserting them. *See, e.g., Impossible Foods Inc. v. Impossible LLC*, 2024 WL 5173315, at *3 (N.D.
 18 Cal. Dec. 18, 2024).

19 V. ARGUMENT

20 Sabow’s counterclaim fails at every procedural step. First, because the SAC did not change
 21 the theory or scope of the case against him, Sabow could not assert a new counterclaim as of right.
 22 Second, because the SAC’s breach of contract allegations are unchanged from the original
 23 Complaint, Sabow’s 2026 Answer operates as an *amended* answer filed well past this Court’s
 24 December 18, 2025 deadline to amend pleadings—without the required modification of the
 25 scheduling order or leave of court. *Third*, because the counterclaim is both unauthorized and
 26 untimely, it is properly stricken under Rule 12(f), and any subsequent motion to reassert it should
 27 be denied.

28

A. Sabow’s Counterclaim Could Not Be Asserted as of Right

Sabow’s counterclaim cannot be asserted as of right because the SAC did not expand the theory or scope of the case against him, and his counterclaim does not directly relate to any change in the amended complaint.

Each iteration of the Complaint has alleged the same three breach of contract theories under the SVB Agreement: misuse of confidential information, improper solicitation of SVB employees, and unfair competition through the use of SVB’s proprietary information to pitch and execute Project Colony at HSBC. (Dkt. No. 1 ¶¶ 155-161; Dkt. No. 76 ¶¶ 270-276.) The FAC restated these allegations without substantive change. Sabow could have asserted his counterclaim as of right in his 2024 Answer to the FAC but failed to do so.

The SAC likewise maintains the same theories of breach with additional factual detail—describing Sabow’s use and disclosure of confidential information (SAC ¶¶ 185-193), his solicitation of Bridge Bank and First Citizens’ employees (SAC ¶ 175), and his unfair competition (*id.* ¶¶ 177, 179). Additional factual granularity does not change the theory or scope of the case. *See UDAP Indus., Inc. v. Bushwacker Backpack & Supply Co.*, 2017 WL 1653260, at *3 (D. Mont. May 2, 2017) (“simply add[ing] factual allegations in support of its already pled claims” does not “change the scope or theory of the case”); *First Nat’l Bank of Ariz. v. Kislak Nat’l Bank*, 2007 WL 9724236, at *2 (D. Ariz. Feb. 15, 2007) (defendant could not assert new counterclaim as of right where amended complaint merely clarified plaintiff’s existing claims).

The stipulated deadline to answer the SAC permitted Sabow to respond to *new* allegations but did not grant him a “do-over as of right” to assert a counterclaim relating only to allegations present since 2023. *Impossible Foods*, 2024 WL 5173315, at *3. Stipulations to extend briefing deadlines, like the one entered here for Sabow to answer the SAC, do not provide the authority to assert his counterclaim in his improper 2026 Answer. *See KST Data*, 980 F.3d at 715 (rejecting the argument that a district court order inviting or setting a deadline for a party to file an answer imposed a substantive obligation beyond its plain terms, where “the district court’s order only invited [the party] to file an answer” and “did not require it”); *cf. Gen. Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1514 (9th Cir. 1995) (even an order expressly granting leave to

1 amend an answer “did not authorize” the party to add or subtract counterclaims beyond the scope
 2 of that leave). Because Sabow’s counterclaim does not directly relate to any change in the theory
 3 or scope of the case, he had no right to assert it in his answer to the SAC.

4 **B. Sabow Failed to Satisfy the Requirements to File an Amended Answer**

5 Because the SAC did not change the theory or scope of the case, Sabow’s 2026 Answer
 6 operates as an *amended* answer. *Nixon*, 2025 WL 2995072, at *2. Analyzed as such, it was filed
 7 well after this Court’s December 18, 2025 deadline to amend pleadings. To file an amended answer
 8 after that deadline, Sabow was required to both seek modification of the scheduling order under
 9 Rule 16(b)(4) and to obtain party consent or leave of court under Rule 15(a)(2). He did neither.

10 Even if Sabow had sought to modify the scheduling order, he could not satisfy the good-
 11 cause standard. Under Rule 16(b), the inquiry “primarily considers the diligence of the party
 12 seeking the amendment. . . . If that party was not diligent, the inquiry should end.” *Johnson*, 975
 13 F.2d at 609. Sabow cannot demonstrate diligence in seeking to assert a counterclaim concerning
 14 the same agreement, the same causes of action, and the same operative facts that have been part of
 15 this litigation since its inception three years ago. His lack of diligence is fatal to any attempt to
 16 modify the scheduling order. Finally, even if good cause could be shown, Sabow could not
 17 overcome the prejudice caused to First Citizens for his counterclaim to proceed at this late stage in
 18 litigation to obtain leave to amend under Rule 15. This Court has ruled three times that the breach
 19 of contract claim as pled is viable at least beyond the motion to dismiss stage and fact discovery is
 20 nearly complete on all live issues in the case. Moreover, First Citizens would need to pursue
 21 discovery to defend against Sabow’s counterclaim and the expansive damages he seeks which could
 22 require expert testimony. *See, e.g., Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir.
 23 2000) (holding the prejudice to a counterparty caused by “granting the request to amend [that]
 24 would likely have required reopening discovery so that [counterparty] could develop its evidence
 25 to prepare its defenses” to the new theory is “an additional reason for denying” leave to amend).
 26 This case is—at long last—moving toward resolution. This counterclaim is simply an attorney
 27 brainstorm too late in the litigation and would substantially prejudice First Citizens if allowed to
 28 proceed.

C. Sabow's Unauthorized Counterclaim Should be Stricken Pursuant to Rule 12(f)

Because Sabow's counterclaim is both unauthorized and untimely, it is properly stricken as immaterial and impertinent under Rule 12(f).

Impossible Foods is directly on point. There, the court struck a counterclaim that a defendant raised for the first time in its answer to a second amended complaint, holding that the Federal Rules do not permit a party to use a later amended pleading to assert matters unrelated to the changes actually made in that amendment. 2024 WL 5173315, at *2-3. The court rejected the argument that a new "opportunity to assert" grants a "do-over as of right" where the underlying facts and theories are unchanged. *Id.* at *3. The same reasoning applies here: Sabow's counterclaim does not relate to any change in the SAC, and he cannot use the 2026 Answer as a vehicle to inject claims he failed to assert at any earlier stage of this three-year litigation. This Court should strike the counterclaim and deny any subsequent motion to reassert it.

VI. CONCLUSION

For the foregoing reasons, this Court should grant First Citizens' motion, strike Sabow's counterclaim pursuant to Rule 12(f), and deny any subsequent motion seeking leave to reassert it.

Dated: August 31, 2026

COOLEY LLP

By: /s/ John H. Hemann
John H. Hemann

COOLEY LLP
Amy M. Smith
Eleanor W. Barczak

FISHER & PHILLIPS LLP
Michael R. Greco*
Wendy R. Hughes*
Paul J. Greco*
Stephen C. Mitchell*

*Admitted *Pro Hac Vice*

Attorneys for Plaintiff
FIRST-CITIZENS BANK & TRUST
COMPANY