Original Brief	Annotations
I. INTRODUCTION AND SUMMARY OF ARGUMENT After the close of discovery and a mere five weeks before trial is set to begin, plaintiff Leo Julian ("Julian") now seeks leave to amend his complaint to try to transform a negligent misrepresentation action in a Letter of Credit case into an action based on intentional fraud and claims for punitive damages and emotional distress.[1] As detailed below, Julian's motion should be denied, and the trial should go forward on February 6, 1995 for the following reasons.	• This heading screams at the court because it underlines text that uses all caps. The revised brief uses better formatting for its headings. • I love our theme. We capture in one sentence that Julian's motion is untimely and prejudicial. • Avoid over-defining terms. "Julian" is the plaintiff's last name. No confusion will result from using "Julian" without defining it first.
First, Julian's motion for leave to amend should be denied because Julian's proposed amended complaint is subject to general demurrer for failure to state a cause of action. California law is clear that a motion for leave to amend should be denied when the proposed amended complaint is subject to demurrer. 5 Witkin, California Procedure § 1125 (3d ed. 1985). Julian's new claims for intentional misrepresentation and fraudulent concealment are subject to general demurrer because Julian has made judicial admissions in prior federal court actions, involving the very same Letter of Credit transaction, that he relied on the alleged misrepresentations of persons and entities other than VGNB, and that these misrepresentations induced him to authorize the release of the Letter of Credit funds.[2] (See Julian's federal complaints attached as Exhibits A and B to VGNB's Request for Judicial Notice.) Notably, Julian's second federal complaint containing these admissions was	• Legal analysis is hard, so make the court's job as easy as possible. Use the same terms to refer to the same thing. We fail to do that here. For example, in this paragraph we refer to Julian's proposed amended complaint without initial caps. In the next paragraph, we refer to the same document with initial caps: "Proposed Amended Complaint." • The sentence beginning with "Julian's new claims" contains 62 words. The content is good, but the content gets lost because the sentence contains too many words. Judges are like everyone else. They need resting places where they can absorb the information you offer. Periods and paragraphs give those resting places. Limit most sentences to about 20-25 words. Write even shorter sentences when possible. • The last sentence in this paragraph is also too long because it contains 48 words. Long sentences challenge your readers' memory and comprehension, so these sentences obscure their main points.

[1] On December 20, 1994, this Court granted VGNB's motion for summary adjudication of issues and dismissed Julian's causes of action for Breach of Contract and Negligent Disbursement.

[2] It is well settled that admissions in prior pleadings are admissible in subsequent judicial proceedings. Dolinar v. Pedone, 63 Cal. App. 2d 169, 176 (l944).

filed on May 4, 1994, only a day after Julian filed his complaint in this action. Thus, Julian's motion should be denied because he cannot state a claim against VGNB for fraud in that he cannot now plead, in direct contradiction to his federal complaints, that he relied on any alleged misrepresentation by VGNB when he authorized the release of the Letter of Credit funds.	Also, this paragraph was 22 lines long in the original format—almost a full page. It only has five sentences. Five sentences are reasonable for a paragraph if those sentences are short. But because two of the sentences are exceedingly long, the result is a long paragraph. The court needs more opportunities to rest and absorb your analysis.
Second, Julian's motion for leave to amend should be denied as untimely. Julian's own memorandum of points and authorities ("MPA") admits that Julian himself was aware of all of the facts alleged in his Proposed Amended Complaint prior to the filing of his original complaint in May, l994. Julian states: "[A]ll of the facts alleged in the proposed First Amended Complaint are found in a combination of the original complaint, the deposition testimony of Dr. Julian in this matter, and the responses to interrogatories posed by Bank to Dr. Julian. (MPA, p. 5, ln. 5-9.) Despite having full knowledge of all of the facts alleged in the First Amended Complaint, Julian failed to seek leave to amend until seven months after filing his original complaint, after the close of discovery and on the eve of trial. California law is clear that "[a] long unexcused delay may be the basis for denying permission to amend pleadings, especially where the proposed amendment interjects a new issue, which may require further investigation or discovery procedures." Rainer v. Community Memorial Hospital, l8 Cal. App. 3d 240, 258 (1971). Julian has offered no excuse for this delay. Thus, Julian's motion is untimely and should be denied.	• We used good thesis sentences throughout our introduction. Judges like clear signposts that identify where your argument is headed. • "First Amended Complaint" is our third way of referring to the same document. One way to avoid this mistake is to immediately define key terms in your pre-draft outline and use those terms in your initial draft, rather than seeking to edit problems like this later. • This paragraph has 13 lines and six sentences. In general, limit paragraphs to four or five sentences each. Six sentences should generally be your upper limit. In the revised brief I break this argument down into two shorter paragraphs. • Rules frame issues. If you state a rule for an issue in your introduction, state it immediately after your thesis. A rule gives the court the foundation to understand why the facts you're addressing are relevant. In general, don't save your rule until the end of your argument. Instead, end your argument with a parenthetical that demonstrates how your argument parallels the logic of your mandatory authority. See the revised brief for examples.
Third, the declaration of Astrid Rollo in support of Julian's motion is woefully insufficient. Local Rule 9. 19 (e) of this Court requires that "if a motion for leave to amend is filed after the trial date is set, the supporting declaration must set forth in specific detail the reasons why the amendment is	• We underlined too much in this paragraph and in general. Don't use underlines for emphasis. If you must use typographical means of emphasis, use bold or italics. But avoid these too. Prefer non-typographical means of emphasis. For example, write short sentences using active voice or place important information at the sentence's or paragraph's end.

necessary and an explanation as to why the motion was not filed sooner. Pertinent dates regarding acquisition of the information must be stated." Ms. Rollo's declaration conspicuously omits stating when any new information supporting the amendment was acquired. The declaration also fails to state what new information was acquired. Specifically, the declaration fails to set forth even one fact that Julian learned during discovery that was unknown to him when he filed his original complaint. Because Ms. Rollo's declaration fails to explain why the amendment was not made earlier, Julian's motion must fail. Fourth, Julian's own cited authority does not support his motion for leave to amend. Julian relies on Honig v. Financial Corp. of Am., 6 Cal. App. 4th 960 (l992), to support his claim that even in "fast-track" cases, motions to amend should be liberally granted. However, the Honig court overturned the trial court's denial of plaintiff's motion to amend because the plaintiff in that matter alleged facts which occurred after plaintiff filed his original complaint. Id. at 966. To the contrary, Julian now seeks leave to amend his complaint to allege facts that were known to Julian in May of 1992. Honig in no way contradicts the principle that a trial court may properly deny a motion for leave to amend made on the eve of trial when no explanation has been offered for the party's failure to amend earlier in the case. Fifth, contrary to Julian's assertions, his new fraud claims are drastically different from his negligent misrepresentation claim. To permit Julian to completely change the nature of his case at this late date would severely prejudice VGNB and seriously undermine the judicial process in this case. Julian's new claims of fraud and emotional distress require discovery that VGNB previously had no notice was necessary. Additionally, as discussed above, VGNB will need to	• The highlighted sentence restates the argument in the previous sentence. While lawyers may think restated points add emphasis, restated points sap readers' energy. So readers will have less interest and ability to retain later arguments. If page or word limits are tight—they often are—restated points also waste space that could be used to develop authority or arguments. • This paragraph is also six sentences, but five of the six sentences are short. Despite my general advice to limit most paragraphs to four or five sentences, this paragraph is fine at six sentences. • This paragraph is good. We developed our argument in just five sentences.

challenge Julian's amended complaint on the pleadings. Because Julian was dilatory in making his motion, VGNB should not and cannot be foreclosed from challenging Julian's amended complaint and pursuing any discovery regarding Julian's claims. VGNB would thus be severely prejudiced if Julian's motion were granted. However, should this Court decide to grant Julian's motion, the trial date should be vacated or continued to allow VGNB to challenge Julian's amended complaint and pursue additional required discovery.

- I love words. I love the word "dilatory." But we could have found a simpler word. Help the court by using simple terms wherever possible. When I reworked this sentence in the revised brief, I avoided this word by revising the sentence's construction. Had I not changed the sentence's structure, I could have used a word like "late," "slow," or "lax."
- This introduction was 3 ½ pages in its original format. I generally favor detailed introductions. Judges are busy. They also have short attention spans. Develop concise versions of your arguments to grab their attention when they have the most energy and focus.

II. JULIAN'S MOTION SHOULD BE DENIED BECAUSE JULIAN'S PROPOSED AMENDED COMPLAINT IS SUBJECT TO GENERAL DEMURRER

"It is of course proper to deny leave when the proposed amendment or amended pleading is insufficient to state a cause of action or defense." 5 Witkin, California Procedure § 1125 (3d ed. 1985). For example, in Hayutin v. Weintraub, 207 Cal. App. 2d 497 (1962), the court upheld the trial court's denial of plaintiff's motion for leave to amend to add a cause of action for fraud holding that the trial court properly considered whether the proposed cause of action was properly pleaded. Id. at 506-07. Julian has admitted in prior federal pleadings (the first of which was originally filed almost two years before Julian filed his present action, and the second of which was filed on May 4, 1994 after dismissal of the original complaint for failure to prosecute) that he relied on the misrepresentations of persons and entities other than VGNB, and that these misrepresentations induced him to authorize the release of the funds pursuant to the Letter of Credit (See Julian's federal complaints, attached as Exhibits A and B to VGNB's Request for Judicial Notice). For example, in paragraph 86 of the original federal complaint attached as Exhibit A, Julian alleged: "In reliance on these

- I aggressively researched all the issues in this brief. I didn't find much authority on the demurrer issue. Witkin had a rule statement on this issue so we used it. But we supported the rule with mandatory authority so we weren't just relying on a secondary source, even a source as authoritative as Witkin.

  We had a second case, *Congleton*, that we cited at the end of our argument. In my revised brief, I moved *Congleton* to support the rule statement so I could reinforce my rule with more mandatory authority.
- The third sentence contains 76 words, not counting the citation parenthetical. That's far too long. Judges understand arguments better when they are presented in smaller, bite-sized chunks. Let the court rest between each step of your argument.

  And avoid putting information in parentheses in your analysis. Parentheses suggest you're giving tangential information. Legal memoranda provide *essential* information. If what you put in your parentheses is tangential, take it out. If it's essential, don't place it in parentheses.
- Note the two highlighted portions of this argument. They say the same thing. The second time the fact does meaningful work. It asserts that Julian was complaining about other parties' intentional misrepresentations while at that same time he was only suing VGNB for failure to identify documentary discrepancies.

representations by [the defendants in the original federal complaint], Plaintiff [Julian] was induced to, and in fact did, authorize the release of $1,579, 200 to Defendants Trimac International and BTB International." Julian repeated these very same admissions in his second federal complaint, filed on May 4, 1994, only one day after the filing of Julian's complaint in this action. (See ¶ 81 of second federal complaint, attached to VGNB's Request for Judicial Notice as Exhibit B.) Because Julian has admitted that he relied on the misrepresentations of others not including VGNB, Julian cannot state a cause of action for fraud. Thus, this Court may properly deny leave to amend on this ground alone. Significantly, this Court may properly deny leave to amend when, as in this case, the parties proposed amendment contradicts an admission made in prior pleadings. Congleton v. Nat'l Union Fire Ins. Co.,189 Cal. App. 3d 51, 62 (1987).

III. JULIAN'S MOTION TO AMEND IS UNTIMELY

California courts have consistently held that a long, unexcused delay in seeking to amend pleadings warrants the denial of a motion to amend. In Lloyd v. Williams, 227 Cal. App. 2d 646 (1964), plaintiff brought an action to recover money she had paid pursuant to a contract alleging two causes of action for money had and received and an accounting. Id. at 647-48. Four months after the court had issued its pretrial conference order and five weeks before trial, plaintiff moved to amend her complaint to add three new causes of action, including an allegation of fraud. Plaintiff filed a similar motion a week before trial. Both motions were denied. Id. at 648. On appeal, the court affirmed the Superior Court's denial of plaintiff's motion to amend, reasoning "no explanation was offered for plaintiff's delay. It was not offered to cure a technical defect, but instead added facts and substantially changed the theory of

That's a great juxtaposition. We could have solved two problems if we had eliminated the earlier reference: 1) we would have made the earlier sentence at least somewhat shorter; and 2) we would have eliminated redundant information.

- The rule that ends this paragraph works reasonably well here because it connects the law to the conclusion in this case. But this rule would be better placed in the opening paragraph. Rules frame issues. Rules also demonstrate why the facts you're addressing are relevant. So in general, state rules early in your analysis, not late.
- This paragraph is horribly, horribly long. Judges need resting spaces. This paragraph was over a page long in its original format. We could have at least broken this argument down into two paragraphs. One paragraph could have stated our rules and authority; the second could have stated our argument.

In my revised brief, I used three paragraphs for this argument.

- Good headings should do the following: 1) identify the conclusion you want the court to reach; and 2) state a reason that supports your conclusion—usually determinative facts. Headings serve as thesis sentences for arguments. If done well, they provide a bullet-point outline of your analysis in your table of contents.
- Our opening sentence is good. We state a rule that frames the issue immediately.
- Many attorneys prefer to use parentheticals rather than complete discussions of authority. Parentheticals are great, but full case discussions often highlight parallels between authority and your client's facts more effectively.

First, appellate courts offer full descriptions of precedent in their opinions; trial courts rely on those opinions.

Second, lawyers reason by analogy. Analogies can identify factual parallels and demonstrate parallel logic. By emphasizing the court's reasoning in a full case discussion, you can support your argument better than even a well-crafted parenthetical can.

For example, note the detailed facts we relied on in *Lloyd* that directly parallel Julian's facts. Both cases involved the

plaintiff's case." Id.

Similarly, in Moss Estate. Co. v. Adler, 41 Cal. 2d 581 (1953), the court held that defendant was properly denied leave to amend her answer to include fraud as a defense to plaintiff's quiet title action twelve days before the date set for trial. The court reasoned that:

> The trial court was thus presented with a situation wherein defendant sought to file an amended answer alleging a new defense based on different facts on the eve of the trial more than a year after the original answer was filed, and more than two months after she had notice of the date set for trial. Defendant was aware of the facts at the time the original answer was filed, but she gave no excuse for her delay. The original answer gave no inkling of the facts alleged in the proposed amended answer, and a continuance would have been required had leave to file had been granted.

Id. at 586 (emphasis added).

By his own admission, Julian knew of the facts underlying his proposed First Amended Complaint prior to filing his complaint on May 3, 1994. Julian has offered no excuse for his delay in alleging these new facts. Thus, Julian's motion to amend is untimely and should be denied.

Julian's new fraud claims are based entirely on representations allegedly made by VGNB to Julian in 1992. Thus, Julian knew the facts underlying his proposed fraud claims in 1992, two years before he filed his original complaint on May 3, 1994. Importantly, Julian admits in his MPA that "all of the facts alleged in the proposed First Amended Complaint are found in a combination of the original complaint, the deposition testimony of Dr. Julian in this matter, and the responses to interrogatories posed by Bank to Dr. Julian." (MPA, p. 5, ln 5-9.) Thus, Julian knew all of the facts on which he bases his proposed new fraud claims before he filed his original complaint.

following: 1) a motion to amend made five weeks before trial; 2) the motion to amend changed what was basically a breach of contract action into a fraud action; 3) the motion alleged new facts; and 4) the plaintiff offered no explanation for the delay.

By discussing this case fully, we were able to rely on the parallel logic of the case in our argument.

- *Moss Estate* is another case where we could rely on parallel logic even though the facts seem facially different. We have the following facts in common: 1) the trial date was set; 2) both motions were made to add fraud; 3) both parties were aware of the facts before they filed their original pleading; and 4) no explanation was provided for the delay.
- Banish block quotations from cases. Some judges state they don't read block quotes. And block quotes undermine advocacy because they impose more work on readers. Your job is to crystallize and clarify. Block quotes do not crystallize and clarify. They instead transfer the analytical work that you should be doing to your readers. So rewrite block quotes in your own words.
- When a court says something in a particularly effective and pithy way, excise that short quote if that quote relates directly to your client's facts.

  Here, for example, this block quote suffers from several problems:

  - The quote contains 107 words.
  - The first sentence contains 56 words.
  - This first sentence also identifies two distinguishable facts: 1) the longer time between the original complaint and the motion to amend, and 2) the shorter time before trial.
  - This sentence also uses an antiquated Middle English word—"wherein"—and two unnecessary "to be" verbs.

  The revised brief eliminates this block quote and states the court's reasoning more favorably and concisely.
- I researched and read all the cases in California involving motions to amend to find authority that was directly on point. We had this great authority, but we failed to use it in our argument because we never

Furthermore, Julian also claims for the first time that he has suffered "emotional distress" as a result of the Bank's actions. Again, VGNB's actions which allegedly caused his emotional distress occurred in May of 1992. Moreover, Julian's "distress" was particularly within Julian's own knowledge. Julian is a medical doctor. Julian certainly did not become aware of his "distress" through discovery directed at VGNB. Thus, Julian could have and should have alleged this claim in his original complaint.

IV. THE DECLARATION OF ASTRID ROLLO IN SUPPORT OF JULIAN'S MOTION FAILS TO EXPLAIN WHY JULIAN COULD NOT HAVE AMENDED HIS COMPLAINT EARLIER.

Julian offers only one declaration in support of his motion, the inadequate declaration of Astrid Rollo. The declaration of Ms. Rollo utterly fails to explain the reasons for Julian's untimely motion. Local Rule 9.19(e) of the Los Angeles County Superior Court provides: "Motions to amend must be made promptly upon discovery of the need therefor. Usually a stronger showing is necessary when such motions are filed near the trial date. If a motion for leave to amend is filed after the trial date is set, the supporting declaration must set forth in specific detail the reasons why the amendment is necessary and an explanation as to why the motion was not filed sooner. Pertinent dates regarding acquisition of the information must be stated." (emphasis added.)

Because Ms. Rollo's declaration does not set forth any of the pertinent dates, it is wholly insufficient under all aspects of the Local Rules. Conspicuously absent from Ms. Rollo's declaration are the dates that Julian learned information that was supposedly unavailable to him, and the content of this "newly acquired" information. Nowhere does Ms. Rollo state that Julian obtained any information regarding VGNB's

linked our authority to our argument. At minimum, we needed what I call a "thesis analogy" that identifies the parallel logic between our authority and our own situation. See the example in the revised brief.

- Use party admissions wherever possible. Similarly, avoid making admissions that damage your position. Here, opposing counsel attempted to argue that VGNB wasn't prejudiced by the amended complaint, but its argument for this issue gave us a great admission that Julian's motion was untimely.
- We placed quotations around "distress" throughout this paragraph. This technique has the subtle, or not-so-subtle, effect of undermining the credibility of Julian's claim. We slightly mock the claim while using concrete facts to establish that Julian didn't learn about his emotional distress during discovery.
- Beware of burdening your analysis with excessive "glue" words. "Working" words add meaning to your sentences. "Glue" words hold sentences together.

  Glue words are words like the following: prepositions, compound prepositional phrases, articles, and connectives.

  Glue words should comprise no more than 40% of your sentences, preferably less.

  In Section IV, the heading and the first two sentences have unnecessary glue words. For example, using the possessive "Rollo's declaration" would have eliminated all the "of's" in the heading and first two sentences. See my revised brief for alternative constructions of the heading and these sentences.

- This is another exceedingly long paragraph. It contains eight sentences and took up 26 lines in the original format, almost a full page.

  Your reader needs resting places to stop and absorb your argument. Paragraphs provide those resting points.

allegedly fraudulent behavior of which Julian was supposedly unaware when he initiated this action. Ms. Rollo states only that "the most recent information concerning Defendant VGN Bank's fraudulent behavior was made known in the deposition of Michael Bringa, an individual who was deposed this week, on November 14 and 15, 1994. Mr. Bringa's testimony and the testimony of Mr. Malcolm Franks (deposed on November 9, 1994) gives insight into the behavior of Defendant VGN Bank." (Declaration, 5, p. 2-3.) This statement completely fails to articulate what information Julian supposedly learned from Mr. Bringa and Mr. Franks that Julian did not already independently possess. Ms. Rollo's statement that the deposition of Mr. Bringa provided the "most recent information" is telling. At best, Ms. Rollo's statement merely asserts that Mr. Bringa's deposition testimony may have partially supported Julian's own memory of the facts at issue in this matter.	• I would start a new paragraph at "Ms. Rollo states only." This break would allow the court to linger a bit longer and absorb the previous sentences, which demonstrate that Ms. Rollo's declaration didn't identify any new facts that Julian learned after he filed his original complaint.
The reasons why plaintiff did not include dates are clear: if plaintiff detailed his knowledge with dates, that detail would dramatically illustrate the basis for denial of the motion: 1. Plaintiff knew all facts alleged in the Amended Complaint when he filed his complaint in May, 1994, when he answered interrogatories in August, 1994 and when he was deposed in October, 1994; 2. Plaintiff knew all of the facts when the case was set for trial on October 3, 1994; and 3. There are no dates plaintiff can offer that warrant granting of this motion.	• We used two colons in the same sentence. While that may be technically OK, it looks odd and may cause the reader to ask whether one can properly use two colons in a sentence. We don't want the court focusing on that issue. Instead, we want the court focusing on our argument. I would add a period after "clear." This period would give me two short, direct sentences that lead into a great factual summary. • Bullet points are a great way to convey information. They give the court a break from reading textual paragraphs. And they also offer more "white space" in your document than standard paragraphs. They also make the organization of your points transparent. I like the content of our bullet points, but we formatted them poorly. All text should be indented to the right of the bullet; the text in bullets should not wrap back to the left margin. The automated bullet point lists on your computer will do this for you. Don't manually create bulleted lists.

V. JULIAN'S CITED AUTHORITY DOES NOT SUPPORT HIS MOTION

Julian relies on two cases to support his motion, yet neither case supports Julian's argument. In California Casualty Gen. Ins. Co. v. Superior Court, 173 Cal. App. 3d 274 (1985), the court stated that "if the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend." Id. at 278. (Emphasis added.) The assumption underlying the rule in California Casualty does not exist in this matter. For the reasons discussed herein, Julian's motion is both untimely and prejudicial to VGNB.

Julian also relies on Honig v. Financial Corp. of Am., 6 Cal. App. 4th 960 (l992). The situation in Honig is much different than the present matter. In Honig, plaintiff filed a complaint alleging, inter alia, fraud, breach of contract, and intentional infliction of emotional distress. Plaintiff was fired after he had filed his complaint. Plaintiff then moved to amend his complaint to include causes of action for wrongful termination and defamation. Id. at 963. The court held that the trial court abused its discretion by denying plaintiff's motion to amend reasoning "[plaintiff's] proposed amendments finished telling the story begun in the original complaint. The added assertions described the continuation of the events asserted in the initial pleading." Id. at 966. The facts alleged by Julian occurred in l992, two years before the initial complaint was filed. Unlike the plaintiff in Honig, there is no reason why Julian could not have alleged his fraud claims in his original complaint.

- When researching, seek cases that give you the rules and arguments you want, but only *use* cases that don't hurt you in other respects. Julian's counsel was using this case for a very general proposition: motions to amend should be liberally granted even in "fast track" cases. I imagine there were other cases that stated this same rule.

  By using a case that was distinguishable on its facts, Julian's counsel gave me an opportunity to further emphasize that Julian's motion was untimely and that the court should not apply the general rule that supports liberally granting motions to amend.

VI. JULIAN'S NEW CLAIMS AND PRAYER FOR RELIEF COMPLETELY CHANGE THE NATURE OF THE COMPLAINT AND PREJUDICE VGNB

A. Contrary to Julian's Assertions, Julian's New Claims and Prayer for Relief Completely Change the Nature of the Complaint

Julian's surviving claim for Negligent Misrepresentation is based solely on the allegation that VGNB funded the Letter of Credit after allegedly negligently misrepresenting to Julian the nature and extent of documentary discrepancies. (See Julian's original Complaint, ¶¶ 12, 13, 14, 15 and 25.) For example, in paragraph 15 of Julian's Complaint, Julian alleges that: "Had Dr. Julian been informed by Bank about the non-conforming documentation, he would not have waived the discrepancies and would have insisted that no payment was due from Bank based on said documents." That Julian based his Negligent Misrepresentation claim on documentary discrepancies is further made clear by his allegations in paragraph 25 of his Complaint. "On or about May 5, 1992, Bank represented to Dr. Julian that Bank had: (1) received documents in conjunction with a request for payment on Letter of Credit No. 30478; (2) examined said documents; and (3) found them to be in conformity with Letter of Credit No. 30478 but for three specified exceptions. None of these specified exceptions mentioned any other patent and non-conforming discrepancies in the documentation. . . ."

- I like our detailed factual arguments in this section. But we wasted opportunities to frame the issues with our rules. We were fighting an uphill battle in our opposition because motions for leave to amend are liberally granted. While we ultimately won, we should have framed a narrow rule that emphasized that leaves for motions to amend *in situations like VGNB's* should not be granted.

Contrary to Julian's assertions, Julian's new fraud claims are completely different from his Negligent Misrepresentation claim because Julian's new claims are not based on alleged documentary discrepancies. Instead, Julian's new claims are based on allegations that VGNB fraudulently coerced Julian to continue with the underlying transaction and fraudulently concealed its liability under the

- The first two sentences establish a lengthy thesis. But the argument that comes after the quote from the amended complaint is conclusory. This structure should be reversed. Keep your thesis statements concise. Develop your argument after you've provided the factual foundation for it.

Letter of Credit to Julian. For example, in his Proposed Amended Complaint, Julian alleges in paragraph 43 that:

> On several occasions between approximately April 30 and May 5, l992 in response to Dr. Julian's voiced concerns as to whether the cigarettes were actually shipped on board the "Export Freedom", as indicated in a bill of lading Bank showed Dr. Julian, Bank represented to Dr. Julian that Dr. Julian's cigarettes were actually being shipped "under the table" and that Dr. Julian should continue with the transaction because Bank would pay on the letter of credit no matter what. Bank represented to Dr. Julian that it is nearly impossible for a person to forge a bill of lading . . .

Thus, given the drastically changed nature of Julian's allegations, this Court should reject Julian's baseless contention that Julian's new fraud claims are mere extensions of his existing Negligent Misrepresentation claim.

B. Julian's Proposed Amended Complaint Would Prejudice VGNB's Defense

Julian now asserts, without a single citation to the record, that his two new causes of action for fraud, his new claim for emotional distress, and his new prayer for punitive damages do not prejudice VGNB's defense even though discovery is now foreclosed. Julian's claim defies all reason. Can plaintiff argue with a straight face that adding claims for intentional fraud, emotional distress and punitive damages - - where no such claims existed before - - does not change the nature of the case?

If Julian were allowed to allege fraud and emotional distress at this late date, VGNB would be required to mount a defense to those claims which differs markedly from its planned defense to Julian's original claims. Based on Julian's original complaint allegations, VGNB has focused its discovery on whether discrepancies existed in the documents, whether Julian had knowledge of those discrepancies, and

- We again failed to frame our argument with a rule. If we first state a principle that defines prejudice, our arguments will be even more compelling because we can tie our facts back to the rule.

- Some experienced practitioners and legal writing experts like rhetorical questions. But briefs should generally answer questions—not ask them. Our next paragraphs answer this rhetorical question. And by spending a paragraph on this question, we lost opportunities for advocacy elsewhere. I would rather have a rule and some case authority here instead of a question.

  Rhetorical questions should make the argument on their own. Our question doesn't, so we should just make the argument.

whether any such alleged discrepancies caused Julian any damage. To defend against Julian's new claims, it would be necessary for VGNB to conduct further discovery, which at a minimum, would include reopening Julian's deposition to determine the facts upon which Julian bases these new claims. VGNB may also seek to depose other witnesses, some of whom are located abroad. Additionally, Julian's emotional distress claim would necessitate a medical evaluation of Julian and the retention of an additional expert to opine on his claims. To be forced to reopen discovery on such a large scale would clearly prejudice VGNB.

Moreover, Julian's late addition of a punitive damages claim severely prejudices VGNB's prior discovery plan. VGNB is presently exposed to $1.5 million principal damage claim. If Julian were permitted to at amend his complaint, VGNB would face a $1.5 million compensatory damage claim plus the potential of an expansive, discretionary punitive damage award. If VGNB had been aware of Julian's claims earlier, VGNB's expanded potential liability may have merited more expansive discovery. For example, two witnesses with knowledge of Julian's participation in the Letter of Credit transaction live overseas: Justin Marcian (Julian's father-in-law) and Brun von Sutter (the agent who purportedly shipped the goods). Due to the untimely nature of Julian's motion, VGNB is now foreclosed from deposing these individuals, even though VGNB's increased potential liability may merit discovery regarding these individuals.

Finally, Julian has raised a claim for emotional distress. VGNB had no reason to, and did not, question Julian regarding his mental state and any resulting physical manifestations of his alleged "emotional distress." Further, VGNB has not had an opportunity to subject Julian to a medical exam to verify his supposed distress. Without an

- Note the highlights in these final three paragraphs. Our emotional distress argument is separated in two different locations. First, it's at the tail end of this argument. Second, we make a full-paragraph argument that ends this sub-section. The court shouldn't have to find the same conceptual argument in two separate places.

  Whenever I discuss argument structure, I always make two points:

  - "Give your reader one analytical task at a time."
  - "Say it once. Say it well. And never say it again."

  Here, we're forcing the court to consider the same analytical argument in two different places.

  In my revised brief, I state the emotional distress argument after the fraud argument and before the punitive damages argument. This structure keeps my argument focused and coherent. The court only has one analytical task at a time. First, the court only has to understand my argument about the new claims and why they would prejudice VGNB. Second, the court only has to understand why our new damages exposure would prejudice our prior discovery plan.

opportunity to mount a defense to Julian's emotional distress claim, VGNB would be severely prejudiced.

C. If this Court Does Grant Julian's Motion, The Trial Date Should Be Vacated Or Continued to Enable VGNB To Challenge The Pleadings And Conduct Discovery on Julian's New Claims

VGNB believes that Julian's belated motion for leave to amend should be denied. However, out of an abundance of caution, if this Court should grant Julian's motion, VGNB respectfully urges that this Court vacate or continue the trial date. Without citation to the record or any reasoning, Julian states in his brief and Ms. Rollo states in her declaration that a continuance is unnecessary. Such assertions, coming after Julian's two new claims of fraud, Julian's new claim for emotional distress, and Julian's new claim for punitive damages, strain credulity. VGNB needs, and deserves, the time and opportunity to challenge Julian's amended complaint on the pleadings and to explore Julian's new allegations. As discussed above, Julian's proposed amended complaint is subject to general demurrer. By delaying his motion, Julian should not be permitted to strip VGNB of its right to challenge the amended pleading. With regard to discovery, VGNB would need, at minimum, to retake Julian's deposition to determine Julian's reliance on the alleged intentional misrepresentations by VGNB, whether Julian's damages were caused by Julian's alleged reliance, and explore Julian's claim of emotional distress. Additionally, VGNB would need discovery regarding Julian's physical condition. Further, VGNB would need the opportunity to depose witnesses with knowledge of Julian's state of mind prior to May 5, 1992: Justin Marcian and Brun von Sutter. Even if discovery were not already foreclosed, this discovery could not take place in time to allow VGNB to prepare for the February 6, 1995 trial date.

- Organizational choices can impact the ease in which you make your fallback arguments. We argued for fourteen pages that the court should deny Julian's motion. We had a variety of obvious and confidential reasons why we really didn't want to face the fraud claims. So we didn't want to give the court a way to split the baby and give each party something, which courts are often inclined to do.

  But on our last page we explicitly gave the court an out and identified a way to split the baby: reopen discovery and vacate or continue the trial date.

  Our organization helped us here. Our fallback position came in the third sub-subsection. This arguably lessened the impact of our concession. The fallback position flowed naturally in our "prejudice" section.

  I reorganized the sections in my revised brief. One drawback to my revised organization is that my fallback position sticks out a bit more than it does in here.

- Note the highlighted portions of this sub-section. Here again we are giving the court two analytical tasks at a time. We reference the potential for a demurrer in this first paragraph and in our next paragraph. In between we discuss how VGNB would be prejudiced. Instead, we should have articulated the demurrer argument in its entirety once so the court could absorb our argument in full without being distracted by other issues.

  Also, this paragraph is another long paragraph. One way to make this paragraph shorter is to focus each paragraph on a distinct argument: 1) VGNB needs more time for discovery; and 2) VGNB needs more time to challenge Julian's amended complaint on demurrer.

  Another way to break up this long paragraph is to start a new paragraph at the sentence beginning with, "As discussed above." The first paragraph would be a general thesis paragraph, although one can reasonably question whether we should devote so much time to restating Julian's argument. The second paragraph could discuss the need for additional discovery, while the third paragraph could discuss the

As a practical matter, given the February 6, 1995 trial date, VGNB would not have time to challenge Julian's amended complaint before trial. Accordingly, the trial date should be vacated or continued if the Court grants the motion to amend. VII. CONCLUSION For the foregoing reasons, VGNB respectfully urges that this Court deny Julian's motion for leave to amend.	need for time to challenge Julian's amended complaint on the pleadings.