

| Revised Brief | Annotations |
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| <p>I. Introduction and summary of argument.</p> <p>Discovery is closed; trial begins in five weeks. Yet plaintiff Leo Julian now seeks leave to amend his complaint to try to transform a negligent misrepresentation action in a letter of credit case into an intentional fraud action—including new claims for punitive damages and emotional distress.¹ Julian’s motion should be denied for the following reasons.</p> <p>First, Julian’s motion for leave to amend should be denied as untimely. Julian’s memorandum of points and authorities (“MPA”) admits that <i>Julian knew all the facts alleged in his proposed amended complaint (the “Amended Complaint”) before he filed his original complaint in May 1994</i>: “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.)</p> <p><i>Even though Julian already knew the facts alleged in the Amended Complaint</i>, he failed to raise them in his original complaint. And Julian failed to seek leave to amend until seven months later—after discovery is closed and only five weeks before trial. Because Julian has offered no excuse for his delay, his untimely motion should be denied. <i>See Lloyd v. Williams</i>, 227 Cal. App. 2d 646, 648 (1964) (affirming trial court’s denial of plaintiff’s motion to amend her complaint for fraud because the plaintiff filed her motion</p> | <ul style="list-style-type: none"> • Typography experts recommend avoiding all-caps text for headings. Because headings should typically be full sentences, headings are too long for all-caps. Similarly, avoid initial caps. Initial caps are for titles; headings aren’t titles. <p>Use bold rather than underlines to highlight your headings. Underlined text is harder to read because it takes up more white space in the document. It also makes certain letters that go below the baseline of the line harder to read, like g, j, and y.</p> <ul style="list-style-type: none"> • Unlike in the original brief, I have defined the term “Amended Complaint” immediately so I can refer to it consistently and clearly throughout the analysis. • Use substantive transitions to demonstrate relationships between sentences or paragraphs. A substantive transition is a transition where the writer restates a portion of the previous sentence in the current sentence. See the italicized portions of these two paragraphs for an illustration. <p>This technique also allows you to restate favorable facts elegantly. Here, for example, I get to restate that Julian knew these facts when he filed his original complaint seven months earlier.</p> <ul style="list-style-type: none"> • Prefer shorter connectives to longer ones. For example, “and” or “also” transition to the next point more effectively than “moreover” or “in addition.” <p>Similarly, to show contrast, prefer “but” or “yet” to connectives like “however” or “nevertheless.”</p> <ul style="list-style-type: none"> • Tether arguments to authority, even in introductions. I typically use parentheticals to do this. If I’ve researched well and write effective parentheticals, the parentheticals will demonstrate the parallel logic between my arguments and my authority. |

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.

after the trial court's pretrial conference order and the plaintiff failed to explain her delay).

Second, Astrid Rollo's declaration that supports Julian's motion further shows that Julian's motion is untimely. Local Rule 9.19(e) of this Court requires that if party moves for leave to amend after the trial date is set, counsel's supporting declaration must specifically identify the following: 1) when the party acquired new information, including the specific dates when the party acquired this information; and 2) why the motion could not have been filed sooner. Ms. Rollo's declaration fails to state *when* Julian learned new facts and *what* new facts Julian learned. Because Ms. Rollo's declaration fails to explain why Julian's motion to amend was not made earlier, Julian's motion must be denied as untimely.

Third, granting Julian's untimely motion would severely prejudice VGNB's defense. Julian's new fraud claims differ significantly from his negligent misrepresentation claim. He bases his negligent misrepresentation claim solely on VGNB's alleged failure to identify documentary discrepancies relating to its letter of credit (the "Letter of Credit"); Julian bases his new proposed fraud claims on alleged intentional misrepresentations by VGNB about the underlying sales transaction between Julian and third parties.

Discovery is closed, yet Julian's new claims of fraud and emotional distress require crucial discovery that VGNB previously had no notice was necessary. VGNB limited its discovery because it was only potentially liable for Julian's original \$1.5 million damage claim. It now faces potentially greater damages claims that would justify more intensive discovery. Even if discovery were not foreclosed, VGNB could not complete its discovery in the five weeks before trial begins. Thus, VGNB would be severely prejudiced if Julian's

- I reframed the argument about Ms. Rollo's declaration. The original brief focused solely on her declaration failing to comply with the local rules, making it more likely that the court might think this argument relates to a technicality.

I instead use this argument to augment my previous argument that the motion was untimely. My thesis and conclusion sentences both incorporate the contention that the motion isn't timely.

- The original brief used three sentences to state what I said in one sentence here. I made this edit for two reasons. First, I didn't need three sentences to make the argument. With careful editing, I condensed the argument into a short, 17-word sentence. When editing, seek to turn sentences into clauses or phrases. You'll make more pointed arguments that your readers will more likely retain.

Second, in this revision I wanted to add more authority in the introduction and more rules in my discussion. I couldn't just add these things because I would go over the page limit. I had to shorten some arguments to free up space.

- In our original brief, we merely asserted that Julian's new claims were different. Avoid arguments by assertion, even in (relatively) short introductions.

Here, I used a paragraph to concisely argue why Julian's Amended Complaint stated claims distinct from his original complaint. This used some space, but because prejudice is a compelling argument on its own and reinforces the timeliness argument, I wanted to give the argument its due. This factual foundation also makes it easier to establish my prejudice argument in the following paragraph.

- I use a semi-colon in the previous paragraph to demonstrate how Julian's new claims differ from his original claim. Semi-colons can be used to compare facts and ideas. This technique helps avoid long dependent clauses. It also varies the length and structure of your sentences. So you keep your readers' interest.
- Each of our arguments in our original brief were stated in a single paragraph. Our paragraphs were long and sapped our reader's attention.

In this revised introduction, I broke several of the arguments into two paragraphs. This

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| <p>motion were granted. <i>See Moss Estate Co. v. Adler</i>, 41 Cal. 2d 581, 586 (1953) (affirming the trial court’s denial of the defendant’s motion to amend her answer for fraud because her “original answer gave no inkling of the facts alleged in the proposed amended answer” and granting her motion would have required a continuance).</p> <p>Fourth, Julian’s motion for leave to amend should be denied because his motion is futile. A trial court may deny a motion for leave to amend when the proposed amended complaint is subject to demurrer. 5 Witkin, <i>California Procedure</i> § 1125 (3d ed. 1985); <i>see Hayutin v. Weintraub</i>, 207 Cal. App. 2d 497, 506-07 (1962) (affirming trial court’s denial of the plaintiff’s motion for leave to amend because the plaintiff’s new fraud allegations were potentially unable to survive a motion for demurrer).</p> <p>VGNB can demur to Julian’s Amended Complaint because it fails to state a cause of action. Julian’s Amended Complaint alleges that he relied on intentional misrepresentations by VGNB when he authorized the release of the Letter of Credit funds. But Julian admitted in two prior federal court actions regarding this same transaction that he relied on the alleged intentional misrepresentations of parties other than VGNB when he authorized the release of the Letter of Credit funds.² (<i>See Julian’s federal complaints attached as Exhibits A and B to VGNB’s Request for Judicial Notice.</i>) Because Julian has admitted that he relied on other parties’ intentional misrepresentations, he cannot successfully plead that he relied on alleged intentional misrepresentations by VGNB. Thus, Julian’s futile motion for leave to amend should be denied.</p> | <p>structure helps make the organization of the argument more transparent and gives the court more resting places.</p> <ul style="list-style-type: none"> • I again support my argument with a parenthetical of mandatory authority that demonstrates the parallel between my argument and precedent. • In the original brief, this demurrer argument was one paragraph and contained 23 lines in this format. In this revision, this argument contains 24 lines but is broken into two paragraphs. The paragraph break lets the court take a quick mental rest during the argument. <p>Note the natural break between the paragraphs. The first paragraph contains the thesis, rule, and supporting parenthetical. The second paragraph contains the argument.</p> <ul style="list-style-type: none"> • Note the sentence structure in this argument. I have one lengthy 37-word sentence, but all other sentences contain approximately 20 words or fewer. In contrast, the original brief had one sentence that contained 62 words. Another sentence contained 48 words. The revised argument is clearer, in part because concepts are broken down into more digestible chunks. <p>Note also that the more direct sentence structure helps me make my argument in 15 lines instead of 17. This reduction gives me some room to add a parenthetical that identifies the parallel between my authority and my argument.</p> <ul style="list-style-type: none"> • While I’ve rearranged the organization of my arguments and framed those arguments somewhat differently, the length of the introduction hasn’t significantly changed. In general, I favor introductions that highlight all the major arguments in my discussion section. Judges are busy. They get tired and lose focus just like the rest of us. I want to establish the basis for my |
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² Admissions in prior pleadings are admissible in subsequent judicial proceedings. *Dolinar v. Pedone*, 63 Cal. App. 2d 169, 176 (1944).

Finally, Julian’s own authority does not support his motion. Julian relies on *Honig v. Financial Corp. of Am.*, 6 Cal. App. 4th 960 (1992), to support his claim that motions to amend should be liberally granted even in “fast-track” cases. But the court in *Honig* overturned the trial court’s denial of the plaintiff’s motion to amend because the plaintiff had alleged facts that occurred *after* the plaintiff filed his original complaint. *Id.* at 966. In contrast, Julian seeks leave to amend his complaint to allege facts that Julian knew in May 1992—two years *before* he filed his original complaint. Julian’s ability to find a favorable quote in a distinguishable case does not change this fundamental principle: a trial court may deny a motion for leave to amend made just before trial when the plaintiff knew all the facts when he filed his original complaint, and his amended complaint changes his theory of the case.

Thus, VGNB respectfully requests that this Court deny Julian’s motion for leave to amend. But if this Court grants Julian’s motion, the trial date should be vacated or continued to allow VGNB to challenge Julian’s Amended Complaint and pursue necessary discovery.

II. Julian’s motion to amend should be denied because Julian’s motion to amend is untimely.

Courts may deny parties’ motions for leave to amend their pleadings when they are made after a long and unexcused delay, especially when the parties knew the facts underlying their proposed amendments when they filed their original pleadings. *Lloyd v. Williams*, 227 Cal. App. 2d 646, 648 (1964) (affirming the trial court’s denial of the plaintiff’s motion to amend her complaint for fraud because she filed her motion five weeks before trial and failed to explain her delay in filing the motion); *Moss Estate Co. v. Adler*, 41 Cal.

arguments immediately when the judge’s attention and energy are at their best.

- Use dashes to highlight important facts or ideas. Dashes can be used to highlight interruptive information in the middle of sentences or at the end of sentences.
- Use colons to highlight explanations and give readers resting places in longer sentences. The last sentence in this sentence would contain 55 words without the colon. Instead, the first independent clause contains just 17 words. The next clause is still long, but the reader has a break before she absorbs it.
- Our original brief had a little bit of snark. I add some snark at the end of this paragraph. While I generally try to avoid snark, it arguably works here. The final sentence advances my theme that Julian is grasping at straws. I previously contended that Julian has no excuse for his extensive delay. I amplify this here by noting that he not only can’t identify supporting facts, but he also can’t identify supporting law.

- Note the heading structure. It provides a conclusion and a reason for the conclusion. This structure provides a nice bullet-point outline of your analysis in your brief’s table of contents. They also let you begin your first paragraph with favorable rules because your heading contains your thesis.
- Use rules to frame your issues. Frame the issue broadly or narrowly depending on your position. Here, I’m trying to frame the rule narrowly. Courts grant most motions for leave to amend, and most jurisdictions have rules stating that motions to amend should be granted liberally. So I must narrow the issue to improve my chances of winning.

Here, I frame the rule negatively, stating that motions to amend should not be granted when the plaintiff knew the facts

2d 581, 586 (1953) (affirming the trial court’s denial of the defendant’s motion to amend her answer for fraud because she knew the facts underlying her proposed amended answer when she filed her original answer and did not explain her delay).

Julian’s motion is untimely because he knew all the facts underlying his Amended Complaint before he filed his original complaint in May 1994. Julian admits his prior knowledge in his brief: “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.) Yet he delayed amending his complaint for seven months. He’s offered no excuse for this prolonged delay.

Similarly, Julian now alleges that he suffered “emotional distress” because of VGNB’s actions. VGNB’s alleged actions that caused his emotional distress occurred in May 1992. And Julian’s “distress” was particularly within Julian’s knowledge because Julian is a medical doctor. He certainly did not become aware of his “distress” through discovery directed at VGNB. Thus, Julian could have alleged this claim in his original complaint.

Discovery is closed. This case is set for trial five weeks from now. Julian has no excuse for his seven-month delay. So Julian’s untimely motion should be denied.

before filing her original motion failed to explain her lengthy delay. These facts parallel my argument and suggest that leave shouldn’t be granted.

- I used full case discussions in our original brief for this argument. But I used parentheticals here so I could use full case discussions in my prejudice section. I felt the prejudice section needed more help from case authority than this section because this argument is easier to establish.

Ideally, I would use cases other than *Lloyd* and *Moss Estate* for this section so I could bring more authority to bear in this brief and have holdings that were more explicitly limited to the untimeliness issue. But I didn’t find any other good cases with parallel facts that had holdings limited to untimeliness. I tried to massage this issue by just limiting the parentheticals to the untimeliness issue.

- As I stated in my annotations for the original brief, avoid admissions in your papers. Plaintiff’s counsel was trying to establish an argument that our client wasn’t prejudiced by Julian’s new claims. This contention certainly helped that argument, but it arguably cost too much because it gave us a great admission for our untimeliness argument.

- My argument in this section is much shorter than in our original brief. I did this in the following ways. First, I wrote a single thesis sentence for my argument instead of a paragraph.

Second, while I liked the original brief’s emphasis that Julian knew the facts two years before filing his original complaint, I had to shorten my arguments in places to provide space for other additions. So I eliminated that emphasis to focus on my core argument: Julian knew all the facts underlying his amended complaint at the time he filed his original complaint.

Third, I wrote a short paragraph that summarizes the basis for our contention. Two sentences are under ten words; the other two sentences are exactly ten words. These short, clear sentences draw attention to the obvious problems with Julian’s delay.

III. Astrid Rollo's declaration supporting Julian's motion fails to identify any new facts that Julian learned since filing his original complaint.

Astrid Rollo's declaration to support Julian's motion further shows that Julian's motion is untimely. If a party moves for leave to amend after the trial date is set, counsel's supporting declaration must specifically identify the following: 1) when the party acquired new information, including the specific dates when the party acquired this information; and 2) why the motion could not have been filed sooner. Local Rule 9.19(e), the Los Angeles County Superior Court.

Yet Ms. Rollo's declaration fails to state the simple facts this rule requires:

- What new facts Julian learned;
- When he learned them; and
- Why he failed to make his motion sooner.

Local Rule 9.19(e) requires a **stronger showing** for the need to amend when a party requests leave after the trial date is set. Julian has made **no showing**. So Julian's untimely motion to amend should be denied.

IV. Julian's untimely motion for leave to amend should be denied because permitting Julian's new claims and damages requests after discovery is closed and just before trial would prejudice VGNB.

A. Julian's new claims and prayer for relief change the nature of his complaint.

Julian's surviving claim for Negligent Misrepresentation is based solely on his allegation that VGNB funded the Letter of Credit after negligently misrepresenting to Julian the

- Prefer active voice in headings. Your sentences will typically become shorter. Seek short, punchy verbs.
- Also, compare this heading to the original heading for this argument. By avoiding all-caps, I use three lines for my heading, not four. And the heading is much more readable than the underlined, all-capped text in the original. I've got a good argument: I don't need to yell at my readers.
- Typography experts discourage underlining because underlining takes up too much "white space" in your document. Instead, use italics for emphasis in your text because italics are easier to read.
- The original brief stated the rule in a lengthy block quote. Avoid block quotes. Judges gloss over them. Instead, provide rules in short sentences. Here, I reduced this lengthy quote into a single tabulated sentence. With tabulation, you can give your readers information in short, understandable chunks. This sentence has a 22-word introductory clause. The two tabulated points contain 16 and nine words, respectively. So much shorter than an 81-word block quote! Plus, the judge will now read the rule!
- Use bullet points to give your reader something new to look at. Bullets provide more white space, so readers can process them easily. They also highlight key points.
- Note the explicit contrast I have highlighted in yellow. By using parallel construction and short sentences, I highlight Julian's failure to meet the standard.
- This argument is now much shorter than the argument in the original brief. So the judge has more energy to comprehend later arguments, and the judge will more easily retain this argument.
- I removed the initial caps from my sub-headings, using normal sentence capitalization instead. The bold text highlights the heading.
- I had an organizational choice here. I like framing issues with rules. I considered placing the rule I have in section IV.B. at the beginning of section IV.

But I decided against that because I then would have needed to combine sections IV.A. and IV.B. into a single section. That

nature and extent of documentary discrepancies. (See Julian’s original Complaint, ¶¶ 12, 13, 14, 15, and 25.) For example, in paragraph 15, Julian highlighted that he relied on VGNB’s failure to identify the alleged discrepancies: “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.” Julian’s narrow focus on documentary discrepancies to support his negligent misrepresentation claim is amplified by his allegations in paragraph 25 of his original 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. . . .

In contrast, Julian’s new claims allege that VGNB fraudulently coerced Julian to continue with the underlying transaction and concealed its liability under the Letter of Credit to Julian. For example, in paragraph 43, Julian’s Amended Complaint alleges fraud regarding the underlying transaction:

On several occasions between approximately April 30 and May 5, 1992 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 . . .

would have led to a very lengthy subsection. It also would have led to having two case discussions and the argument that is currently in section IV.A. come before my prejudice argument.

My prejudice argument is the key argument in this section. I didn’t want it trailing so much other information before I made it.

Instead, I let my argument speak for itself in section IV.A. and concretely framed my prejudice argument with a rule in Section IV.B.

- I discourage block quotes from cases, but I encourage quotes from the record—even block quotes.
- When offering a longer quote, use a substantive introduction that summarizes what the quotation provides or how it supports your argument.

For example, the introduction to this block quote emphasizes that Julian’s original complaint focused on documentary discrepancies to establish his negligent misrepresentation claim.

Similarly, the introduction to the block quote below highlights Julian’s fraud allegations.

This technique helps ensure that your longer quotation gets read. It also helps ensure that your quotation’s meaning is understood because you’ve provided a thesis for the quotation.

Don’t force your readers to try to understand the importance of the quote on their own,

Julian’s new fraud claims plainly differ from his negligent misrepresentation claim because Julian’s new claims are not based on alleged documentary discrepancies. Julian’s original complaint focused on VGNB’s duties to *him* under the Letter of Credit. In contrast, Julian’s new fraud claims focus on VGNB’s alleged intentional misrepresentations regarding the underlying sales transaction between Julian and *third parties*. As an issuer of the Letter of Credit, VGNB had no duties to examine the facts regarding the underlying sales transaction. Thus, Julian’s new claims dramatically change the nature of his original complaint.

B. Julian’s untimely Amended Complaint would prejudice VGNB’s defense because it was filed after the close of discovery and on the eve of trial.

A motion to amend pleadings prejudices the opposing party when the motion is untimely and contains a new allegation of fraud, especially when the motion is made shortly before trial. *Lloyd*, 227 Cal. App. 2d at 648.

For example, in *Lloyd*, the plaintiff sued to recover money she had paid under 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—the plaintiff moved to amend her complaint to add three new causes of action, including an allegation of fraud. The plaintiff filed a similar motion a week before trial. Both motions were denied. *Id.* at 648. On appeal, the court affirmed the trial court’s denial of the plaintiff’s motion to amend because it was untimely and prejudiced the defendant: “[n]o 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 plaintiff’s case.” *Id.*

Similarly, in *Moss Estate Co.*, the court held that the

- As I noted above, motions to amend are liberally granted, so I again need to frame a narrow rule to help support my contention that prejudice would result from granting the motion in this situation.

Structure your rule to parallel the best facts in your argument. This technique helps support your argument before you ever make it. Note that my rule relies on three great facts that support my argument.

- The motion is untimely—a conclusion established in Section II;
- The amendment contained an allegation of fraud where one didn’t previously exist; and
- The motion occurred shortly before trial.

I would have loved to have written a rule relating to the trial date being set, but *Lloyd* doesn’t explicitly support that rule.

- Use dashes to highlight key facts. Here, I use dashes to highlight that the motion in *Lloyd* was made five weeks before trial—just like Julian’s motion.
- Note the parallel facts between *Lloyd* and Julian’s situation.
 - The original complaint was essentially for breach of contract, while the amendment was for fraud.
 - The motion for leave to amend was made five weeks before trial.

defendant was properly denied leave to amend her answer because her motion to amend was untimely and included new assertions of fraud. 41 Cal. 2d at 586. In *Moss Estate*, the defendant’s original answer in a quiet title action did not allege fraud. But twelve days before the date set for trial, the defendant sought leave to amend her answer to include fraud as a defense.

The court affirmed the trial court’s denial of her motion because her untimely motion blindsided the plaintiff. The court reasoned that the defendant alleged a new defense after the trial date was set. While she knew the facts when she filed her original answer, she did not justify her delay. Because her “original answer gave no inkling of the facts” she alleged in her proposed amended answer, the trial court “would have been required” to grant a continuance if it had allowed the motion. *Id.*

Similarly, Julian’s untimely motion was made shortly before trial, alleging new fraud claims where none previously existed. Julian’s untimely motion prejudices VGNB’s defense because VGNB is foreclosed from conducting further discovery. If Julian were allowed to allege fraud at this late date, VGNB would be required to mount a strikingly distinct defense to these new claims, a defense that VGNB had no notice was necessary. Relying on the allegations in Julian’s original complaint, VGNB focused its discovery on narrow issues like the following: 1) whether discrepancies existed in the documents; 2) whether Julian knew about those discrepancies, and 3) whether Julian suffered any damage from these alleged discrepancies.

To defend against Julian’s new claims, VGNB would at minimum need to reopen Julian’s deposition to determine the facts upon which Julian bases his new fraud claims. VGNB would likely also need to depose other witnesses who

Note the parallel logic between this case and Julian’s situation.

- No explanation was offered for the delay.
- The amendment not offered to cure a technical defect.
- The amendment alleged new facts and changed the theory of the case.
- One way to transition between cases is to use what I call a “transition holding.” It’s a particular example of the substantive transition technique I previously discussed.

A transition holding works by stating the holding broadly and incorporating parallel language from your rule into the holding. Besides helping you write an effective transition, you further reinforce your rule. I highlighted the transition holding in blue.
- Prefer short, punchy verbs to bland verbs. Here, “blindsided” is an evocative two-syllable word. It frames the court’s reasoning effectively.
- I eliminated the block quote, but I excised two short quotes that relate directly and favorably to my facts. The court’s reasoning is offered in 67 words—not 107 words.
- Note again the parallel facts and logic.
 - The moving parties knew all the facts alleged in their amended pleadings when they filed their original pleadings.
 - The amended pleadings alleged fraud.
 - The amended pleadings contained new facts that the opposing party previously did not know.
 - The trial date was set.
- I link my argument to authority in a simple thesis that tethers my argument to the logic of the cases.
- Note the paragraphing. Besides giving your readers resting places, paragraphs also make the organization of your argument transparent.
 - Paragraphs 1 & 2 relate to prejudice from Julian’s new fraud claims.
 - Paragraph 3 relates to prejudice from Julian’s emotional distress claim.

allegedly perceived the new facts Julian alleges. Some of these potential witnesses live abroad, which would require VGNB to suffer additional expense and delays.

Julian has also raised a claim for emotional distress. VGNB had no reason to, and did not, question Julian about his mental state and any resulting physical manifestations of his alleged “emotional distress.” Besides forcing VGNB to reopen Julian’s deposition, Julian’s new emotional distress claim would require VGNB to do the following: 1) seek a medical evaluation of Julian to verify the delayed onset of his newly discovered distress, and 2) retain an additional expert to assess Julian’s mental state. Forcing VGNB to invest more time and money in such large-scale discovery—much of which could have been done earlier and more efficiently had VGNB been aware of the allegations—would severely prejudice VGNB.

Julian’s late addition of a punitive damages claim further prejudices VGNB’s prior discovery plan. If VGNB had been aware of Julian’s extensive damages claims earlier, it would have invested more resources in discovery. VGNB is presently exposed to a \$1.5 million principal damage claim. If Julian were permitted to amend his complaint, VGNB would suddenly confront a potential expansive and discretionary punitive damage award.

VGNB’s expanded potential liability would have merited more expansive discovery. For example, two witnesses with knowledge of Julian’s participation in the sales transaction live overseas: Justin Marcian, Julian’s father-in-law; and Brun von Sutter, the agent who purportedly shipped the goods. Because of Julian’s untimely motion, VGNB cannot depose these individuals even though VGNB’s increased potential liability would very likely require VGNB to seek documents and testimony from these individuals.

- Paragraphs 4 & 5 relate to prejudice from VGNB’s increased damages exposure.

A bonus to paragraphing is that—assuming you respect your thesis sentences—your arguments will focus on one analytical issue at a time. This technique adds clarity to multi-issue arguments.

- Use dashes to emphasize favorable facts and arguments.

- This sentence uses a substantive transition with a bit of parallel construction: expansive damage claims require expansive discovery.

While Julian has asked to amend his complaint, he has not asked this Court to reopen discovery or extend the trial date. Julian’s untimely motion prejudices VGNB even if discovery were reopened, but Julian’s proposal is even more prejudicial because VGNB would have no opportunity to prepare a defense.

V. Julian’s motion should be denied because Julian’s Amended Complaint is subject to general demurrer.

A court may deny a motion to amend a pleading if the amended pleading cannot state a cause of action or a defense. *Hayutin v. Weintraub*, 207 Cal. App. 2d 497, 506-07 (1962). Thus, a court may properly deny leave to amend when the plaintiff’s proposed amendment contradicts an admission made in his prior pleadings. *See Congleton v. Nat’l Union Fire Ins. Co.*, 189 Cal. App. 3d 51, 62 (1987) (affirming the trial court’s denial of the plaintiffs’ motion to amend their complaint to allege they relied on the defendant insurer’s grant of an insurance policy because their proposed allegations conflicted with admissions they made in an earlier brief that stated they had not relied on this grant).

Julian has admitted in two prior federal pleadings that he relied on the intentional misrepresentations of parties other than VGNB when he authorized the release of the funds under 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 his first federal complaint—filed almost two years before Julian’s original complaint against VGNB—Julian alleged: “*In reliance on these representations* by [the defendants in the first 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.” (See Exhibit A.) Julian

- As I stated in my comments on the original brief, avoid relying on secondary authority in your rules. If a dearth of authority forces you to rely on secondary authority for your rule, support that rule as much as possible with citations to mandatory, primary authority.

Here, I used *Congleton* to state a rule that frames the issue and applies directly to my facts.

- I chose to use a parenthetical to support my rule. The facts and reasoning of *Congleton* didn’t obviously parallel my facts. So I framed a parenthetical to massage those issues and state the court’s holding favorably.

repeated these admissions in his second federal complaint, filed on May 4, 1994—just one day after Julian filed his original complaint against VGNB. (See ¶ 81 of Julian’s second federal complaint as Exhibit B.)

Because Julian has admitted that he relied on the intentional misrepresentations of parties other than VGNB, Julian cannot state a cause of action for fraud against VGNB. Thus, this Court may properly deny Julian’s leave to amend on this ground alone. *See Hayutin v. Weintraub*, 207 Cal. App. 2d 497, 506-07 (1962) (affirming the trial court’s denial of the plaintiff’s motion for leave to amend because the plaintiff’s new allegations of fraud were potentially unable to survive a motion for demurrer).

VI. Julian’s cited authority does not support his motion.

Neither of the two cases Julian cites in his opening brief support his request for relief. Julian cites *California Casualty Gen. Ins. Co. v. Superior Court*, 173 Cal. App. 3d 274, 278 (1985), for the unremarkable proposition 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.” (Emphasis added.) Julian fails to establish this rule applies because Julian’s motion is untimely and granting his motion would prejudice VGNB.

Julian also relies on *Honig v. Financial Corp. of Am.*, 6 Cal. App. 4th 960 (1992), but the facts in *Honig* differ strikingly from the facts here. In *Honig*, the plaintiff filed a complaint against his employer alleging, among other things, fraud and breach of contract. *Id.* at 963. The plaintiff was fired after he had filed his complaint; he then moved to amend his complaint to include causes of action for wrongful termination and defamation. *Id.* at 964. The court held that the trial court erred by denying plaintiff’s motion, reasoning

- Parentheticals generally work best in two places when you use them to support your arguments: 1) to support a rule statement; and 2) at the end of an argument. If you use a parenthetical to end your argument, frame the parenthetical to parallel the facts and reasoning in your argument.

- I added just a small amount of literary flair to emphasize that the general rule regarding motions for leave to amend does not apply. The phrase “unremarkable proposition” conveys that opposing counsel can’t find concrete authority to support their argument.

that: “[the 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.

Unlike the plaintiff in *Honig*, Julian has no new story to tell. Julian knew the facts he alleges in his Amended Complaint two years before he filed his original complaint. So unlike the plaintiff in *Honig*, Julian has no excuse for not alleging his new claims in his original complaint.

VII. If this court does grant Julian’s motion, the trial date should be vacated or continued to enable VGNB to challenge Julian’s complaint and conduct discovery on Julian’s new claims.

Julian’s belated motion for leave to amend should be denied. However, if this Court should grant Julian’s motion, VGNB respectfully urges this Court to reopen discovery and vacate or continue the trial date. Without citation to the record or authority, Julian’s brief and Ms. Rollo’s declaration assert 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 opportunity to explore the factual basis for Julian’s new allegations. But discovery is closed. 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.

And Julian’s proposed amended complaint is subject to general demurrer. Julian should not be permitted to strip VGNB of its right to challenge his amended pleading by delaying his motion. VGNB would not have time to challenge Julian’s amended complaint before the trial date.

- The revision makes a stronger distinction. First, I begin a new paragraph, which highlights the transition to my argument. Second, the distinction comes immediately, rather than in the second sentence of the argument, allowing it to serve as a thesis for the argument. Third, by using the phrase “new story,” I directly tie into the basis for the court’s holding in *Honig*.

- This is one weakness in my new organizational scheme. Our fallback position in the original brief was in Section VI.C. It was a bit more hidden as the third subsection. Here, my organizational scheme forced me to add this as its own major section. I had principled reasons for my decision, and I think the benefits outweigh the costs, but this is a cost.

The important thing is that I considered the costs and the benefits of my strategic choices. Reasonable lawyers may differ on how they balance the costs and benefits of their decisions. The key is to meaningfully identify and resolve these issues.

- Note the short arguments. I already made my points. I don’t need to belabor them. I merely need to refer to them to establish my contention that if the court granted the motion, providing the time and opportunity to conduct additional discovery was appropriate.

- Note also the organization. My first paragraph has a thesis and my argument that we need more time to conduct discovery. My second paragraph focuses solely on needing time to challenge Julian’s amended complaint.

VIII. Conclusion

Julian knew all the facts alleged in his Amended Complaint two years before he filed his original complaint. Discovery is closed. Trial is near. Julian is out of time.

Julian's motion to amend is untimely, would prejudice VGNB if granted, and is futile. So Julian's belated motion should be quickly denied.

- Take advantage of every opportunity for advocacy. While many attorneys just throw in a boilerplate sentence in the conclusion, make your conclusion work for you.

Here I use two short paragraphs to carry my opening theme through the entire brief. That's especially helpful here because I just gave the court an opportunity to split the baby in the previous section.

I explicitly contrast Julian's dilatory actions to the immediate action I'm asking the court to take.