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8 **SUPERIOR COURT OF CALIFORNIA**
COUNTY OF ALAMEDA
9 **UNLIMITED CIVIL JURISDICTION**

10 DIANE HENDRY,

11 Plaintiff,

12 vs.

13 CITY OF FREMONT, and DOES 1 through 15,

14 Defendants.

Case No. RG18915635

Assigned for All Purposes to:

Hon. Noël Wise

Reservation No. 198636479908

15 **MEMORANDUM OF POINTS AND**
16 **AUTHORITIES IN OPPOSITION TO**
17 **DEFENDANT CITY OF FREMONT'S**
18 **MOTION FOR SUMMARY JUDGMENT**
19 **OR, IN THE ALTERNATIVE, SUMMARY**
20 **ADJUDICATION**

Date: October 28, 2022

Time: 2:00 PM

Dept.: 514

Action filed: August 6, 2018

Trial date: November 4, 2022

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**I.
INTRODUCTION**

Fremont’s motion is a waste of the Courts and the parties’ time and resources. Not only does Fremont fail to meet its burden of presenting all material evidence on point - as but one example it does not even include Plaintiff’s *direct* evidence of retaliatory animus - Fremont repeatedly represents as undisputed material facts that it knows Plaintiff disputes. Defendant’s motion must be denied in its entirety.

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**II.
STATEMENT OF FACTS**

Ms. Hendry was hired by Union City Fire Department in January 1993 and began working for Fremont Fire (FF) when Union City was incorporated into FF in 1994. Although at that time she was only one among a handful of female firefighters working for FF, over the next two decades FF failed to hire a single other woman. By 2013 when FF finally did hire another woman, Ms. Hendry’s few female cohorts had all left the force, leaving just her and the new recruit in a Department of over 150 men. In the three years between 2013 and 2016, FF hired 50 firefighters – all men.

That Chief Hendry excelled is testament to that fact that she is extremely hardworking, intelligent, and personable, a standout among her male counterparts. In 2002 she was promoted to Captain and became responsible for a crew and a firehouse. Then in 2014 she was promoted to Division Chief of Administration, reporting directly to the Fire Chief, with wide ranging duties that included acting as a liaison with Fremont’s HR Department, Diversity and Inclusion, as well as hiring and recruitment.

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A. Chief Hendry’s Stellar Performance History

Chief Hendry’s work performance throughout her entire career has been distinguished by three key features: top level performance, extraordinary dedication to her job and high emotional intelligence. Her June 2017 Performance Evaluation (the latest formal evaluation she has received), is replete with unqualified praise:

You are perhaps one of the most dedicated people I have had the privilege of supervising. You constantly speak for those whose voice may not be as loud as others, especially during the recruitment and hiring process. Every day you come to work ready to work and your positive attitude is infectious . . . You consistently presented yourself, the Department and the City in a highly professional light . . . I can absolutely trust what you say and your

1 professional motives. Your wise and thoughtful counsel enables me to freely and easily
2 give you my unqualified trust. [ADF No. 1]¹

3 In his recent deposition, former Fire Chief, Geoff LaTendresse, described Chief Hendry as follows:
4 “She was all in. She took what I asked her to do to heart and she applied a hundred percent effort behind
5 the charge she was given,” and she possessed “excellent leadership skills.” [ADF No. 2] LaTendresse
6 actively encouraged Chief Hendry to complete her bachelor’s degree, a prerequisite to her becoming
7 Fire Chief: “This investment in yourself will set you up for career advancement and position you to have
8 even greater influence on the Fire Department. Well done!” [ADF No. 3] In keeping with her
9 commitment to advance, Chief Hendry earned her BA in Leadership and Organizational Studies from St.
10 Mary’s College in 2019. [ADF No. 4]

11 Chief Hendry served under Police Chief Kim Petersen at the Police Department (PD) from
12 December 2018 until Petersen’s retirement in October 2021. Although Petersen didn’t formally evaluate
13 Hendry’s performance because Hendry was on temporary assignment to PD and not a PD employee,
14 when asked her opinion of Chief Hendry’s work performance it was clear she shares LaTendresse’s high
15 regard for Hendry’s skills, work ethic, personal integrity, and attitude: “I thought she was highly
16 responsible. She was very mature. She’s smart. She’s got a high emotional intelligence, does a really
17 good job of building bridges and relationships with people...” [ADF No. 5]

18 Hendry worked under Fire Chief Curtis Jacobson’s supervision for one year, beginning in
19 December 2017 when Jacobson first started as Fire Chief to December 2018 when Hendry transferred to
20 PD. As described below, this was in the immediate aftermath of Chief Hendry’s involvement in
21 uncovering improper conduct on the part of several senior officers that resulted in the illegal termination
22 of a female recruit from FF’s Training Academy. In light of the evidence of her history of exemplary
23 performance, both before and after Jacobson’s supervision of her, Jacobson’s view of Chief Hendry’s
24 work performance—that she was unqualified for her position and has “nothing of value” to offer his
25 department – is hotly disputed.

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¹ All references to “ADF” are to Plaintiff’s Separate Statement of Additional Facts in Opposition to
Defendant’s Motion for Summary Judgment, served and filed herewith.

1 **B. Chief Hendry’s Involvement in the Investigation of Emily Scott’s Report of Discrimination**

2 In 2016 FF conducted a Training Academy that included a female recruit, Emily Scott. Scott was
3 ultimately released from the Academy for allegedly failing to pass required performance tests. When the
4 Fire Chief at that time, Geoff LaTendresse, met with Scott in February 2017 to terminate her from the
5 Academy, Scott raised a number of concerns about the way she had been treated during the Academy
6 and disputed the claim she had failed several tests. [ADF No. 6] Following that meeting LaTendresse
7 tasked Chief Hendry with investigating Scott’s concerns. Among the many things Chief Hendry did in
8 investigating Scott’s complaint was she spoke with several Academy attendees and on her own initiative
9 gathered and analyzed videotape of the tests Scott allegedly failed. She then presented her analysis of
10 the videotapes demonstrating that Scott had in fact passed the tests. [ADF No. 7] As a result of Chief
11 Hendry having gathered and analyzed the videotapes, Chief LaTendresse determined that it was
12 necessary to involve HR and conduct a full-scale investigation into the reasons ostensibly supporting
13 Scott’s dismissal. [ADF No. 8]

14 According to LaTendresse, Hendry’s early involvement was “critical” to his decision to expand the
15 investigation. [ADF No. 8] The improprieties which Chief Hendry brought to light resulted in two senior
16 officers (a Deputy Chief and a Captain) resigning rather than be interviewed for the investigation, and
17 the Interim Fire Chief, Amiel Thurston, was forced to formally reprimand Division Chief Rick Cory, his
18 best friend at FF. [ADF No. 9] Scott was reinstated to FF in November 2017. [ADF No. 10]

19 By virtue of her position as Division Chief of Administration, Hendry had for several years been
20 involved in internal investigations of firefighter misconduct and disciplinary matters. As LaTendresse
21 noted in her June 2017 Evaluation (which was completed while the Scott investigation was ongoing),
22 this is “perhaps one of the most difficult staff assignments” in that “you find yourself questioned about
23 personal and organizational motives by those who have a less than legitimate interest and less than all
24 the information on which to form an opinion.” Significantly, while noting the difficult assignment,
25 LaTendresse also commended her on “consistently and objectively focus [ing] on the behavior and not
26 the individual and in that sense keep[ing] the discussion respectful.” In particular he noted that “you
27 have always maintained your integrity and withheld the sharing of confidential information.” [ADF No.
28 11]

1 **C. Chief Hendry Was Subjected to Retaliation in the Aftermath of the Investigation**

2 Fremont gives extremely short shrift to the almost daily and pervasive hostility and ostracism to
3 which Chief Hendry was subjected in the immediate aftermath of the investigation, dismissing it as
4 “minor adverse employment actions.” But Fremont’s account omits much of the material evidence on
5 point, as evidenced by even a sampling of Chief Hendry’s deposition testimony. Specifically, during the
6 first of three days of deposition on July 23, 2019, defense counsel walked her through her detailed
7 responses to special interrogatories in which she was asked to describe, among other things, the
8 ostracism and hostility she experienced, the duties she was relieved of or excluded from, and how her
9 duties as the Department’s PIO Officer was undermined. In response she gave specific examples of
10 Thurston and Jacobson’s hostile behavior and how that manifested, the many meetings from which she
11 was excluded, the duties that were removed, the ways in which Jacobson removed or diminished her
12 duties, including that she was instructed she was no longer to do what had been the HR aspect of her job
13 (despite the fact that was part of her job description which is why she was tasked by LaTendresse to
14 investigate Scott’s complaint), and the ways in which Jacobson allowed the hostility towards her to
15 continue unchecked and his failure to support her. [ADF No. 12]

16 According to two other Division Chiefs at the time, Doug McKelvey and Mike Thomas, both of
17 whom attended meetings with officers and firefighters in the immediate aftermath of the Scott
18 investigation, Chief Hendry was being widely blamed by members of the department for the
19 consequences that befell the several senior officers who were essentially forced to resign or received
20 formal discipline. [ADF No. 13] Deputy Chief Thomas was frustrated that he was not able to share the
21 details of the investigation so as to mitigate the hostility directed at Chief Hendry. [ADF No. 14] When
22 asked by the outside investigator, Cepideh Roufougar, whether people were upset with and expressing
23 anger towards Chief Hendry related to the Scott investigation, McKelvey told her “They were
24 expressing anger. It was a tense time. . . they didn’t understand why any of it, from their perspective,
25 was justified, why Chris Shelley was treated the way he was treated, why Rick Cory was treated the way
26 he was treated, why other people were called in and investigated. . . I think [Chief Hendry] was the
27 target of a lot of that frustration. . . they felt that she talked too much and too openly with HR.” [ADF
28 No. 15] Despite these statements made by fellow Division Chiefs who were in the room when it

1 happened, Roufougar concluded that the hostility directed at Chief Hendry in the aftermath of the
2 investigation had nothing to do with Hendry's involvement in the investigation.

3 In response to Chief Hendry's claim that in retaliation for her role in the Scott investigation she was
4 being ostracized and duties removed, Fremont contends that Chief Hendry isolated herself and stopped
5 contributing because she was "jealous" that upon LaTendresse's retirement Thurston was made Acting
6 Chief instead of her. According to Thurston, "her whole behavior towards me, her whole behavior
7 towards the organization drastically changed" as a result of this jealousy. [ADF No. 16] However, both
8 LaTendresse and Assistant City Manager Brian Stott confirm Chief Hendry's account that it was she
9 who suggested Thurston for the position and in so doing fully and actively supported Thurston's
10 appointment to the Acting Chief position. [ADF No. 17]

11 That after his arrival Jacobson aligned himself with Thurston and those who resented Chief Hendry
12 for her role in the investigation is evidenced by the fact that after Jacobson read the outside
13 investigator's report he instructed Hendry she was no longer to do what had been the HR aspect of her
14 job, and he set about moving the entire complaint and disciplinary process in-house thereby removing
15 FF from HR oversight. [ADF No. 18] The decision about whether to discipline a FF employee for
16 policy violations was left entirely to Jacobson's discretion, and the responsibility for investigating
17 complaints was placed in the hands of various department heads within FF, none of whom has any
18 expertise in conducting workplace investigations. [ADF No. 19]

19 **D. Although as an Interim Measure Chief Hendry Transferred to PD to Escape Retaliation,**
20 **FF Nevertheless Continued to Retaliate**

21 In mid-2018, when Fremont Chief of Police, Kim Petersen, learned from Chief Hendry that she was
22 being isolated, subjected to hostility and prevented from doing her job, Petersen contacted Stott, the
23 Assistant City Manager, and the City Attorney, Harvey Levine. Chief Petersen explained Chief
24 Hendry's concerns and proposed that Hendry transfer temporarily to PD as "a safe haven" while
25 Fremont responded to Hendry's complaints. [ADF No. 20] Chief Petersen also spoke directly to
26 Jacobson and explained that a transfer to PD would serve as a "temporary safe refuge for Diane Hendry
27 until these issues could be worked out." [ADF No. 21] As Human Resources Director, Allen DeMers,
28 confirmed, Fremont's harassment policy contains an "Interim Relief" provision which provides that an

1 employee alleging retaliation can be temporarily reassigned to “defuse volatile situations.” [ADF No.
2 22] Thus, in November 2018 the parties entered into a stipulation whereby Chief Hendry was
3 temporarily assigned to PD. The stipulation provided that Chief Hendry was entitled to “at any time,
4 request a transfer back” to FF, a request that could only be denied for “legitimate business reasons
5 unrelated to Plaintiff’s underlying claims that are asserted in her legal action.” [ADF No. 23]

6 Immediately following the transfer, Jacobson and Thurston cut off all Chief Hendry’s access to
7 anything relating to FF, including her email and access card allowing her to enter the Fire
8 Administration building. Moreover, Thurston demanded that if Chief Hendry was intending to enter the
9 Fire Administration building (as she routinely was required to do in her new role with PD), she or the
10 PD would have to first notify him. Chief Petersen was very upset when she learned of what she
11 described as these “shocking” and “ridiculous” restrictions. As she explained, “That was the one time
12 where I, you know, inserted myself into the dispute because it’s not acceptable.” Petersen met with
13 DeMers and Thurston and told them not only do FD employees have access to the building, so do
14 members of her PD. Petersen also told them that Chief Hendry was “being treated differently” than other
15 employees, and “she needed to be treated like a regular employee.” [ADF No. 24]

16 **E. Following an October 2019 Mediation, the Parties Agreed to a Stay on Discovery and to**
17 **Stay Chief Hendry’s Pending Request to Return to FF**

18 In an email to Jacobson dated September 24, 2019, Chief Hendry indicated it was her intent to
19 return to FF and was prepared to do so immediately. In particular, she expressed concern that given the
20 hostility expressed by him and Thurston the organizational structure of the department would be
21 manipulated to prevent her return (e.g., by eliminating her position) thus she was prepared to
22 immediately return rather than risk that loss. In response, Jacobson said that the issue would be
23 discussed at the upcoming mediation. [ADF No. 25] Shortly after this email exchange, the parties
24 participated in a mediation with Justice Lambden. As Fremont described in its CMC Statements filed in
25 connection with subsequent CMCs in 2019 and 2020, in a Memorandum of Understanding (MOU)
26 reached during the mediation it was agreed that there would be a stay on all discovery while the
27 consultants (Justice Lambden and former Fremont City Manager Fred Diaz) assessed the need for
28 training and further remediation to be provided to FF. It was also agreed that Chief Hendry’s request to

1 return to FF would be placed on hold and FF would maintain the status quo within FF upper
2 management while the consultants' work was ongoing. [ADF No. 26] The stay ended in late March
3 2020 after the consultants had completed their assessment process and submitted their recommendations
4 to the parties.

5 **F. Jacobson Has Repeatedly Denied Chief Hendry's Requests to Return to FF Without Any**
6 **Legitimate Business Reason for Doing So**

7 **1. Jacobson refused to allow Plaintiff to return in April 2020 to serve as interim ESM**

8 On April 14, 2020, when Chief Hendry learned that Fremont's Emergency Services Manager, Alex
9 Schubek, had resigned, she emailed the City Manager offering to step into the position (which reports to
10 Chief Jacobson). [ADF No. 27] She had been serving as the PD's Emergency Manager since her transfer
11 a year and a half earlier. According to Petersen, Chief Hendry had, among other things, done an
12 excellent job of training her department in the use of the Incident Command System, had been appointed
13 to a select committee that was instrumental in leading Fremont's response to the pandemic, and had
14 developed an Emergency Plan for PD. She had also worked closely with the former ESM Schubek.
15 [ADF No. 28]

16 Chief Petersen, believing Chief Hendry had the knowledge, expertise, and capacity to perform the
17 ESM duties, suggested to City Manager Mark Danaj and Assistant City Manager Brian Stott that Chief
18 Hendry step into the role, but Danaj and Stott "just shut it down." [ADF No. 29] When Chief Hendry
19 continued to inquire about the position, Stott told her that Fremont would appoint her ESM but only on
20 the condition that she make a commitment to stay in the position for two years. [ADF No. 30] When
21 Chief Hendry explained that she could not make a two-year commitment because she wanted to apply
22 for Deputy Chief Thurston's position in that he was soon to retire, she offered to serve in an interim role
23 until Fremont could hire a permanent ESM to replace Schubek. [ADF No. 31] Fremont refused to
24 consider that possibility and insisted that she could only take the position if she committed to two years
25 – which would have precluded her from competing for the Deputy Chief position later that year. [ADF
26 No. 32]

27 Significantly, HR Deputy Director, Kelly Wright, confirmed that Fremont could have appointed
28 Chief Hendry in an interim capacity pending a permanent hire. [ADF No. 33] She also testified that

1 Fremont does not impose a two-year commitment as a condition of employment for any position in the
2 City. [ADF No. 34] Finally, in the midst of a pandemic, during one of the worst wildfire seasons in the
3 State’s history, and with Fremont experiencing a budget crisis, Fremont chose to deny Chief Hendry’s
4 request to serve as an interim ESM – which she could have done at no additional cost to FF since Chief
5 Hendry is still on their payroll – and instead left the City without an ESM for nearly eight months until
6 November 2020 when Schubek’s replacement was finally hired. [ADF No. 35]

7 **2. Rather than allow Chief Hendry to return to FF to fill in for the absent DC at no**
8 **additional cost, Jacobson instead chose to elevate BCs and Captains and in so doing**
9 **incurred significant additional costs.**

10 On May 27, 2020, when Chief Hendry learned that Deputy Fire Chief Thurston would be taking
11 a twelve-week sabbatical which would leave FF in need of someone to perform his duties, she
12 immediately contacted Jacobson and requested to return to FF and serve in his absence. [ADF No. 36]
13 Though Chief Hendry could have performed Thurston’s duties during the three-month sabbatical at no
14 additional cost to Fremont in that she was already on FF’s payroll, Jacobson rejected her request and
15 instead elevated two Battalion Chiefs (BC) to take turns serving in Thurston’s absence. [ADF No. 37]
16 Because the Battalion Chiefs were being elevated to Acting Division Chief, Fremont was required to pay
17 them an additional 5% above their BC pay. And, because Captains had to be elevated to Acting BCs to
18 serve in the absence of the BCs filling Thurston’s role, they too received an increase in their pay.
19 Further, because firefighters or engineers had to be elevated to Acting Captain positions, Fremont
20 incurred the additional expense of their increased pay as well. Jacobson’s decision to elevate all these
21 officers and incur the additional expense rather than allow Chief Hendry to return at no additional cost
22 was done at a time when FF was already short staffed, in the throes of the pandemic, heading into
23 wildfire season, and in the midst of a budgetary crisis. [ADF No. 38] Assistant City Manager Brian
24 Stott, who was charged with investigating Chief Hendry’s complaint that Jacobson’s refusal to allow her
25 to return was ongoing retaliation, testified that assuming Chief Hendry was willing to perform
26 Thurston’s duties while remaining in her present rank as a Division Chief he could think of no legitimate
27 business reason for rejecting Chief Hendry’s request. [ADF No. 39]
28

1 **3. Jacobson refused in both August 2020 and June 2021 to allow Chief Hendry to**
2 **return despite being short staffed and facing a global pandemic and the worst**
3 **wildfire season in California’s history.**

4 On July 29, 2020, Chief Hendry emailed Jacobson requesting to return to FF. After hearing nothing
5 from Jacobson for three weeks, she emailed again requesting a response. Despite acknowledging that
6 “we are in the midst of the COVID pandemic” and “we are just starting what appears to be a very
7 difficult fire season,” Jacobson responded that he was “not able to agree to your request.” [ADF No. 40]
8 On June 16, 2021, Chief Hendry again emailed Jacobson requesting a return to FF: “As you know I am
9 committed to getting my career back on track with the Fire department and have continued to look for
10 ways to do that . . . I am requesting that I be returned to Fire where my talents and skills could be put to
11 excellent use.” Despite the fact FF was still in the midst of the COVID pandemic and wildfire season
12 was again approaching, Jacobson again rejected her request: “[M]ostly as a result of your absence from
13 the Department for over two years, we are not able to accommodate your request to return to the
14 Department.” [ADF No. 41] Ironically, it is Jacobson who is largely, if not entirely, responsible for that
15 absence.

16 In addition to the pandemic and increasingly difficult fire seasons, FF also continued to experience
17 a budgetary crisis and staffing shortages throughout 2020 and 2021. [ADF No. 42] Fremont has not
18 articulated *any* reason, much less a legitimate business reason, for refusing to allow Chief Hendry to
19 return to FF where she served with distinction for over two decades.

20 **4. Chief Hendry was denied promotion to the position of Deputy Chief in 2020 under**
21 **circumstances that strongly suggest Jacobson rigged the recruitment.**

22 In the Fall of 2020, as Thurston was about to retire, Fremont hired an outside firm to conduct a
23 recruitment for the soon to be vacated Deputy Chief position. To ensure that the recruitment process is
24 objective and unbiased, the candidates are to be interviewed and ranked by a “professional panel” – a
25 small group of subject matter experts familiar with the Deputy Chief job responsibilities. Critical to this
26 process is that the panelists be objective and free from any influence from FF personnel. [ADF No. 43]
27 In this instance, Jacobson, though he had been accused of retaliation by Chief Hendry, was allowed to
28 recommend the members of the professional panel who would ultimately be ranking her. Jacobson
29 recommended two Fire Chiefs with whom he had worked at San Jose: William McDonald and Ruben

1 Torres. Jacobson regarded Torres, with whom he worked for 23 years at San Jose, as a personal friend.
2 [ADF No. 44] In fact, Jacobson, McDonald and Torres’ shared experience at San Jose included being
3 individually named in a lawsuit in which two female San Jose firefighters alleged they had been subject
4 to retaliation for having raised concerns of gender discrimination. The lawsuit ultimately resulted in a
5 nearly \$800,000 verdict on behalf of one of the firefighters. [ADF No. 45]² Despite Jacobson stacking
6 the panel with McDonald and Torres, Chief Hendry emerged from the professional panel interviews
7 ranked third of eight candidates, and she was actually ranked first by a third panelist (not Torres or
8 McDonald). [ADF No. 46]

9 Although Fremont claims that Chief Hendry lacks “operational experience,” a necessary
10 prerequisite to the position, this claim cannot be reconciled with the fact that Hendry has approximately
11 19 years of operational experience and was found qualified/highly qualified by the professional panel of
12 raters. [ADF No. 47]

13 Following the panel interviews and candidate ranking, Jacobson was left with unfettered discretion
14 to choose among the five candidates who were advanced from the professional panel. [ADF No. 48] In
15 evaluating Chief Hendry’s requests to return to FF, Jacobson admits that he held against her the fact that
16 she has a lawsuit against Fremont. Apparently harkening back to his shared experience with McDonald
17 and Torres wherein all three had been sued for retaliation, Jacobson explained that his decision not to
18 choose Chief Hendry was “[b]ased on my personal experience of having people that have left
19 organizations and/or brought lawsuits against organizations that they still are members of. It just doesn’t
20 end well.” [ADF No. 49]

21 **5. Jacobson refused to allow Chief Hendry to return in January 2021 to fill the vacated DC**
22 **position and has instead left the position vacant for nine months**

23 In January 2022, after serving less than a year, Kevin Wise, one of the two DCs hired by Jacobson
24 from the 2020 recruitment, resigned. Chief Hendry immediately emailed Jacobson expressing interest in
25 the position, pointing out that she had been highly rated by the professional panel a little over a year
26

27 ² Plaintiff’s Request for Judicial Notice of the Complaints naming Jacobson, Torres and McDonald, as
28 well as the verdict forms evidencing a nearly \$800,000 verdict for one of the plaintiffs, is relevant to
whether Jacobson attempted to negatively affect Chief Hendry’s ranking in his selection of Torres and
McDonald to be raters. The Complaints and verdict forms are also relevant to whether Torres and
McDonald were biased in their rating of Chief Hendry.

1 earlier. [ADF No. 50] Fremont refused to allow Chief Hendry – who had been deemed by the
2 professional panel to be fully qualified for the position – to fill the vacancy. What’s more, Fremont has
3 allowed the position to remain vacant for almost nine months, the consequence of which is that in a
4 department that was already understaffed (at times critically so), the remaining DC, Zoraida Diaz, has
5 been required to perform both her job and that of the former DC, Wise. Indeed, Chief Diaz has several
6 times over the many months since Wise’s departure approached Jacobson to find out when FF will be
7 filling the position thereby affording her some relief. [ADF No. 51]

8 One option available to Fremont has been to appoint Chief Hendry as an Interim Deputy Chief to
9 serve until Fremont secures a permanent replacement, but Jacobson has refused to do so. [ADF No. 52]
10 Fremont has articulated no legitimate business reason for refusing to appoint Chief Hendry to serve as
11 Interim Deputy Chief, which would have the twin benefit of addressing FF’s chronic staff shortages and
12 relieving Chief Diaz of the strain of having to perform two jobs. The only reason Fremont has offered
13 for denying Chief Hendry the promotion to DC in 2020, and in refusing to appoint her to serve as DC
14 following Wise’s departure, is that she is not qualified. But this position is, at the very least, hotly
15 disputed in that the professional panel, despite being stacked against Chief Hendry, deemed her
16 qualified/highly qualified. [ADF No. 53]

17 **G. Fremont Refused to Investigate Chief Hendry’s Several Reports of “Ongoing Retaliation”**
18 **Dismissing Them as Part of Her “Litigation Strategy.”**

19 When Fremont closed the investigation of Chief Hendry’s internal complaint of retaliation finding
20 insufficient evidence to conclude that rule violations occurred, in a letter HR Director Allen DeMers
21 instructed her to report any additional concerns of retaliation to HR. [ADF No. 54] On June 4, 2020 and
22 again on August 25, 2020 Chief Hendry did exactly as she was advised: she reported what she described
23 as “further and ongoing retaliation” and cited several specific examples in which she sought to return to
24 FF but was denied. [ADF No. 55] Fremont’s harassment policy requires that when an employee makes a
25 complaint that falls within the scope of the policy – i.e., a complaint of retaliation – the HR Director
26 must notify the City Manager who will “identify an appropriate investigator for the matter within (5)
27 business days.” [ADF No. 56] However, instead of identifying an appropriate investigator, Assistant
28 City Manager Stott was put in charge of responding to Chief Hendry’s complaints. Stott concedes that

1 established law that permits, but does not require, a party to file a supplemental pleading to allege facts
2 occurring since the filing of the original pleading.

3 A supplemental pleading is distinct from an amended pleading. Whereas an amended pleading
4 relates to matters existing when the original pleading was filed, a supplemental pleading is for the
5 purpose of alleging relevant facts occurring after the original pleading was filed. CCP § 464(a); *Foster v.*
6 *Sexton* (2021) 61 CA5th 998, 1032. At issue here are factual allegations of ongoing retaliation and
7 Fremont’s failure to prevent that retaliation that postdate the filing of her original complaint in which
8 retaliation and failure to prevent are specifically alleged.³ Thus, Plaintiff is not required to **amend** her
9 complaint.⁴

10 The appropriate procedure for adding “occurring-after” facts is to **supplement** the causes of action
11 originally pleaded. *Flood v. Simpson* (1975) 45 CA3d 644, 647. However, though a party **may** file a
12 supplemental pleading to introduce evidence that postdates the filing of the original complaint, it is **not**
13 **necessary** where, as here, the evidence of retaliation and failure to prevent that has occurred since the
14 filing of the lawsuit is relevant to plaintiff’s existing claims of ongoing retaliation and failure to prevent.
15 *Kim v. The True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1435, 1449-
16 1450 (specifically rejecting the argument that evidence postdating the filing of the operative complaint is
17 inadmissible unless respondents filed a supplemental complaint under CCP § 464). “[N]ew factual
18 issues presented in opposition to a motion for summary judgment should be considered if the controlling
19 pleading, construed broadly, encompasses them. In making this determination, courts look to whether
20
21
22

23 ³ As detailed in Plaintiff’s Memorandum of Points and Authorities in Support of Motion for Leave to
24 File Supplemental Complaint, currently scheduled to be heard on October 11, 2022, Fremont received
25 actual notice of the alleged further ongoing retaliation through Plaintiff’s July – August 2021 responses
26 to written discovery and her October 2021 deposition testimony. [See Memorandum of Points &
Authorities 4:18-5:7 and the exhibits referenced therein attached to the Declaration of Mathew
Stephenson, served and filed therewith.]

27 ⁴ All of Fremont’s cases in support of this argument are inapposite in that they relate to instances
28 wherein a party opposing summary judgment was attempting to introduce new causes of action and legal
theories not alleged in the operative complaint thus requiring the party to **amend** their complaint.

1 the new factual issues present different theories of recovery or rest on a fundamentally different factual
2 basis.” *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1257.⁵

3 **B. Fremont Failed to Set Forth All Material Evidence and its Separate Statement of Undisputed**
4 **Facts is Replete with Facts that are Disputed**

5 The moving party must set forth all material evidence on point, not just the evidence favorable to it.
6 For example, omitting deposition answers that raise triable issues of fact might be treated as an attempt
7 to mislead the court as to the state of the discovery record. *Rio Linda Unified School Dist. v. Sup.Ct.*
8 (*Diaz*) (1997) 52 Cal.App.4th 732, 740. Defendant fails time and again to set forth evidence that is
9 unfavorable, and in some instances fatal, to its motion. The starkest example is Defendant’s failure to
10 include the direct evidence of Jacobson’s retaliatory animus. [ADF No. 49] Direct evidence of
11 discrimination in and of itself defeats summary judgment. *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998)
12 150 F.3d 1217, 1331. Direct evidence is so probative of discrimination, and so rare, that “[w]ith direct
13 evidence of pretext, 'a triable issue as to the actual motivation of the employer is created even if the
14 evidence is not substantial.'" *Morgan v. Regents of Univ. Of Calif.* (2000) 88 Cal.App.4th 52, 68.. In
15 other words, “[t]he plaintiff is required to produce 'very little' direct evidence of the employer's
16 discriminatory intent to move past summary judgment." *Id.* at 69.

17 Not only did Fremont fail to set forth all material evidence, but its Separate Statement of
18 “undisputed” facts is replete with facts that are disputed. If a triable issue is raised as to any of the facts
19 in the moving party’s separate statement, the motion may be denied. *Nazir v. United Airlines,*
20 *Inc.* (2009) 178 Cal.App.4th 243, 252. If the opposing statement disputes an essential fact alleged in
21 support of the motion, the judge merely has to review the evidence cited in support of that fact. This
22 saves the judge from having to review all the evidentiary materials filed in support of and in opposition
23 to the motion. *St. Paul Mercury Ins. Co. v. Frontier Pac. Ins. Co.* (2003) 111 Cal.App.4th 1243, 1248.
24 Denial is certain if there is any material factual controversy. See *Employment Litigation* (The Rutter
25 Group, California Practice Guide), 19:730. As set forth in Plaintiff’s Separate Statement, Defendant

26 _____
27 ⁵ Even if the Court were to find Plaintiff’s existing complaint insufficient, “on a motion for summary
28 judgment ‘[w]here the complaint is challenged and the facts indicate that a plaintiff has a good cause of
action which is imperfectly pleaded, the trial court should give the plaintiff an opportunity to
amend.’ “*Dorado v. Knudsen Corp* (1980) 103 Cal.App.3d 605, 611. A plaintiff need only to seek leave
to amend **at or prior to the hearing** on defendant’s motion for summary adjudication. *Id.*

1 repeatedly represents facts to be undisputed when they are directly disputed, often by the admissions of
2 its own witnesses.

3 **C. The Legal Standards Governing Motions for Summary Judgment**

4 Summary judgment or adjudication is only appropriate when no material issue of fact exists or
5 where the record establishes as a matter of law that a cause of action asserted cannot prevail. *Avila v.*
6 *Standard Oil Co.* (1985) 167 Cal.App.3d 441, 446. The defendant must “conclusively negate[] a
7 necessary element of the plaintiff’s case or demonstrate[] that *under no hypothesis is there a material*
8 *issue of fact* that requires the process of trial.” *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763,
9 767 (emphasis added). The Court’s duty is only to determine whether plaintiff’s evidence and
10 inferences could satisfy a “reasonable trier of fact.” *Id.* at 856. Here, Defendant has failed to satisfy its
11 burden. In that “many employment cases present *issues of intent, and motive, and hostile working*
12 *environment* such cases ... are rarely appropriate for disposition on summary judgment.” *Nazir v. United*
13 *Airlines, Inc., supra*, at 286 (emphasis added).

14 Under the three-part test developed in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S.
15 792: “(1) The complainant must establish a prima facie case of discrimination; (2) the employer must
16 offer a legitimate reason for his actions; (3) the complainant must prove that this reason was a pretext to
17 mask an illegal motive.” Where an employer presents proof of legitimate, nondiscriminatory reasons for
18 its actions, the employee may defeat the motion by proving that “the employer’s proffered explanation is
19 unworthy of credence.” *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 75. .
20 The employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or
21 contradictions in the employer's proffered legitimate reasons for its action that a reasonable
22 factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act
23 for the asserted non-discriminatory reasons. *Morgan v. Regents of University of California* (2000) 88
24 Cal.App.4th 52, 75. No additional, independent evidence of discriminatory motive is required. *Id.* “If a
25 plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated
26 motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to
27 be believed.” *Washington v. Garrett* (9th Cir. 1993) 10 F.3d 1421, 1433.

1 Where, as here, there is direct evidence of discriminatory intent, the *McDonnell Douglas* burden-
2 shifting test is unnecessary. *Cordova v. State Farm Ins. Co.* (9th Cir. 1997) 124 F.3d 1145, 1148.

3 **D. Chief Hendry Has Established a Triable Issue of Fact that in Derailing Her Career**
4 **Fremont Subjected Her to Retaliation.**

5 To establish a prima facie case, Chief Hendry must show that she engaged in a protected activity;
6 Fremont subjected her to an adverse employment action; and a causal link exists between the protected
7 activity and the employer's action. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1044.

8 **1. Plaintiff engaged in numerous protected activities beginning with calling out the**
9 **discrimination to which Emily Scott was subjected.**

10 "Protected activity" is broadly defined to mean opposition to practices forbidden under the FEHA
11 (Gov. Code § 12940(h)). "When an employee communicates to her employer a belief that the employer
12 has engaged in... a form of employment discrimination, that communication virtually always constitutes
13 the employee's opposition to the activity." *Crawford v. Metropolitan Gov. of Nashville & Davidson*
14 *County, Tenn.* (2009) 555 U.S. 271, 276. For example, in *Thompson v. Tracor Flight Systems, Inc.*
15 (2001) 86 Cal.App.4th 1156, the plaintiff "was the (former) director of human resources for
16 the...defendant," and, "[a]s such, ... was responsible for implementing personnel decisions." *Id.* at
17 1159. The court noted the plaintiff "engaged in protected activity" when, in carrying out her human
18 resources duties, she alerted upper management about "several instances in which [she] thought [a
19 manager's] actions presented a potential for employment related suits against the company." *Id.* at 1160-
20 61; see also *Flait v. North American Watch Corporation* (1992) 3 Cal.App.4th 467 (a supervisory
21 employee who told his supervisor the supervisor's conduct toward female employee was inappropriate
22 engaged in "protected activity" under FEHA).

23 Chief Hendry's first protected activity was in communicating to Fremont that Emily Scott had been
24 subjected to discrimination. Since then, her protected activities have included the filing of an internal
25 complaint, a lawsuit, and in reporting each failed attempt to return to FF as "ongoing retaliation."

26 **2. Plaintiff has suffered numerous adverse employment actions that have collectively**
27 **derailed her career.**

28 Retaliation is "adverse treatment that is reasonably likely to impair a reasonable employee's job
performance or prospects for advancement or promotion." *Yanowitz, supra*, at 1054-1055. Where a

1 retaliatory course of conduct is alleged, a series of separate retaliatory acts collectively may constitute an
2 “adverse employment action,” although none of the acts individually is actionable. *Id.* at 1055-1056.

3 As the California Supreme Court noted after Yanowitz, a highly rated and honored employee of
4 L'Oreal for 18 years, refused to carry out an order from a male supervisor to terminate the employment
5 of a female sales associate who, in the supervisor's view, was not sufficiently sexually attractive or
6 “hot,” she was subjected to heightened scrutiny and increasingly hostile adverse treatment. Her
7 supervisors began to actively solicit negative information about her and then employed this information
8 to criticize Yanowitz both in the presence of her subordinates and in written memoranda. These
9 supervisors refused to review her response to these charges and employed the negative information
10 received to justify new, restrictive directives regarding her future performance and to impair her
11 effectiveness with her staff. The Court concluded that these actions placed her career in jeopardy and
12 held that *actions that threaten to derail an employee’s career are objectively adverse*, thereby creating
13 a factual dispute that cannot be resolved at the summary judgment stage. *Id.* at 1060 (emphasis added).

14 While Fremont characterizes the retaliatory conduct to which Chief Hendry has been subjected as
15 “minor adverse actions,” this is not a case in which the plaintiff alleges merely commonplace indignities
16 typical of the workplace. Chief Hendry alleges a pattern of systematic retaliation that has resulted in the
17 derailment of her career culminating in the loss of a promotion to the position of DC with an associated
18 financial loss. [ADF 62] [See also ADF Nos. 12, 24, and 27-54.]

19 **3. There is a causal connection between Plaintiff’s protected activities and retaliation.**

20 Plaintiff must show a causal link between the employee's protected activity and the employer's
21 adverse action, which may be established by an inference derived from circumstantial evidence such as
22 the proximity in time between the protected action and allegedly retaliatory employment decision and
23 a pattern of conduct consistent with a retaliatory intent (e.g., hostile treatment, exclusion from
24 meetings). *Morgan v. Regents of Univ. of Calif.* (2000) 88 Cal.App.4th 52, 69; *Wysinger v. Automobile*
25 *Club of Southern Calif.* (2007) 157 Cal.App.4th 413, 421. “[W]hen adverse employment decisions are
26 taken within a reasonable period of time after complaints of discrimination have been made, *retaliatory*
27 *intent may be inferred.*” *Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212
28 F3d 493, 507 (emphasis added). “A long period between an employer's adverse employment action and

1 the employee's earlier protected activity” may still support an inference of a causal connection “if
2 between these events the employer engages in a pattern of conduct consistent with a retaliatory intent.”
3 *Wysinger v. Automobile Club of Southern Calif.* (2007) 157 Cal.App.4th 413, 421; see *Green v. Laibco,*
4 *LLC* (2011) 192 Cal.App.4th 441, 456 (passage of one year did not defeat causal connection based upon
5 temporal proximity in light of intervening events).

6 Here, the retaliatory conduct to which Chief Hendry has been subjected began immediately after
7 what Chief LaTendresse described as her “critical” involvement in the Scott investigation which led to
8 the forced resignation and discipline of several senior FF officers. As discussed above, the retaliation
9 has since been unremitting: her requests to return to FF following her temporary transfer to PD have
10 been denied without a legitimate business reason for doing so; her offers to fill in when critical positions
11 were vacant (e.g., ESM, Deputy Chief during Thurston’s sabbatical, Deputy Chief following Wise’s
12 resignation), were summarily rejected despite FF’s obvious need for Chief Hendry’s services; and
13 Jacobson rigged the professional panel for the Deputy Chief recruitment, to name a few.

14 **4. Chief Hendry has established that Fremont’s proffered reasons for its actions are**
15 **pretextual.**

16 Although Fremont contends that it has legitimate business reasons for all its employment decisions
17 relating to Chief Hendry, as detailed above Plaintiff has demonstrated that the legitimacy of Fremont’s
18 reasons is at least unworthy of credence and, in some instances, directly contradicted by the admissions
19 of its own witnesses. To cite but three examples, Stott conceded that there was no legitimate business
20 reason for Fremont not to allow Chief Hendry to perform Deputy Chief Thurston’s duties during his 12-
21 week sabbatical.

22 Another example is Jacobson’s excuse for not selecting Chief Hendry for the Deputy Chief position
23 in 2021 or allowing her to serve in an interim Deputy Chief position after Wise resigned in January
24 2022. Jacobson flatly contends that Chief Hendry is not qualified to serve as Deputy Chief. [Jacobson
25 depo, 325:14-17, 522:02-05, attached as Ex. 10 to Kochan Dec.] However, he admits that the
26 professional panel who interviewed her was specifically charged with determining which candidates are
27 qualified, and its recommendation of Chief Hendry means that she was qualified for the position. [*Id.* at
28

1 520:25-521:08.] Additionally, both Stott and DeMers acknowledge that Chief Hendry is qualified to
2 serve as Deputy Chief.

3 As a final example, Fremont repeatedly contends that Chief Hendry was rated last in the
4 recruitment process. However, as the ranking summary demonstrates, she was rated third of eight
5 candidates and was actually rated No. 1 by one of the panelists. The lengths Fremont has gone in an
6 attempt to prevent Plaintiff from learning that the panel rated Chief Hendry as highly qualified
7 punctuates Fremont's duplicity. Initially, Fremont claimed that no forced ranking occurred because this
8 was a "high level" recruitment. Then, over the course of several hearings before the Discovery Referee,
9 the Honorable Bonnie Sabraw (Ret.), Defendant submitted two false declarations signed under penalty
10 of perjury by HR Director Allen DeMers, claiming that Fremont did not have possession, custody, or
11 control of the recruitment documents (which included the forced ranking sheet). Ultimately, Plaintiff
12 subpoenaed the recruitment documents directly from the outside recruiting firm that conducted the
13 Deputy Chief recruitment and was produced over three thousand documents, including the ranking
14 summary which Fremont had claimed did not exist. On August 9, 2022, Judge Sabraw issued a
15 Recommendation that Fremont and its counsel be sanctioned in the amount of \$14,606.25 for abuse of
16 the discovery process.

17 It is well settled that an issue regarding an employer's veracity "may arise where the employer has
18 given shifting, contradictory, implausible, uninformed, or factually baseless justifications for its
19 actions." *Guz v. Bechtel Nat'l. Inc.* (2000) 24 C4th 317, 363. Here, Fremont's shifting, contradictory,
20 implausible, and factually baseless justifications for its actions preclude summary judgment.

21 **E. Chief Hendry Has Established a Triable Issue of Fact That Fremont Failed to Prevent the**
22 **Retaliation that Has Derailed Her Career.**

23 To prevail on her Failure to Prevent cause of action, Plaintiff must prove: 1) she was subjected to
24 retaliation; 2) Fremont failed to take all reasonable steps to prevent the retaliation; and 3) Fremont's
25 failure to take all reasonable steps to prevent retaliation was a substantial factor in causing Chief
26 Hendry's harm. CACI 2527.

27 Employers must "take all reasonable steps necessary to prevent discrimination and harassment from
28 occurring." Gov. Code § 12940(k); *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128,

1 1146; *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286. The employer's duty to
2 prevent is affirmative and mandatory. Gov. Code § 12940(j)(l) and (k). Prompt investigation of a
3 discrimination claim is a necessary step by which an employer meets its obligation to ensure a
4 discrimination-free work environment. See, e.g., *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 881-
5 882; *Jones v. Los Angeles Community College Dist.* (1988) 198 Cal.App.3d 794, 810-811. The most
6 significant immediate measure an employer can take in response to a retaliation complaint is to launch a
7 prompt and fair investigation to determine whether the complaint is justified. An investigation is a key
8 step in the employer's response. *Swensen v. Potter* (2001) 271 F.3d 1184, 1193.

9 As discussed above, there are numerous instances where Fremont undertook no investigation into
10 Chief Hendry's complaints of ongoing retaliation and/or left the "investigation" in the hands of the
11 Assistant City Manager, Brian Stott, who admits he was unqualified to conduct a workplace
12 investigation *and* harbored a bias toward Chief Hendry that precluded him acting as an objective
13 evaluator of her claims. Perhaps the most significant fact supporting Plaintiff's failure to prevent claims
14 is that Jacobson, despite having been the subject of Chief Hendry's retaliation claims, has been given
15 unfettered discretion to decide whether to allow Chief Hendry to resume her career in FF.

16 Finally, though Fremont maintained legally compliant policies regarding retaliation in the
17 workplace, and even advised Chief Hendry in a letter to promptly report it if it occurred, the evidence
18 discussed above demonstrates repeated instances where Fremont simply failed or refused to follow its
19 own policies.

20
21 DATED: September 2, 2022

Respectfully submitted,

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