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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SANTA RITTS, LLC,

Plaintiff and Respondent,

v.

8445 SMB, INC., et al.,

Defendants and Appellants.

B234515

(Los Angeles County Super. Ct.  
No. BC416502)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Reversed and remanded.

Freedman & Taitelman, Bryan J. Freedman and Jesse A. Kaplan for Defendants and Appellants.

Cyrus V. Godfrey; and David A. Carman for Plaintiff and Respondent.

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Defendants 8445 SMB, Inc., and its president, Richard Weintraub, appeal from the trial court's order denying their special motion to strike the 7th, 9th, 10th, and 12th causes of action of plaintiff and respondent Santa Ritts, LLC's second amended complaint (SAC) under the anti-SLAPP<sup>1</sup> statute, Code of Civil Procedure section 425.16.<sup>2</sup> The relevant causes of action in the underlying lawsuit allege defendants influenced the City of West Hollywood to issue a letter granting an unwarranted waiver of the City's vacant building ordinance with respect to commercial property that 8445 SMB leases from Santa Ritts, thereby allowing 8445 SMB to avoid its obligation to maintain the property in compliance with the City's ordinances as required under the terms of the lease.<sup>3</sup>

We hold the trial court erred in denying the special motion to strike on the ground that defendants' conduct was not in furtherance of their rights to petition and free speech. We therefore reverse and remand to the trial court to rule on multiple evidentiary objections and address the probability that Santa Ritts will prevail on its claims.

## FACTS

On June 25, 2009, Santa Ritts filed a complaint against 8445 SMB relating to the lease for the property and corresponding purchase contract granting 8445 SMB the right to purchase the property at the conclusion of the lease. The events detailed below occurred after the complaint was filed, and as a result, Santa Ritts amended the complaint

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<sup>1</sup> "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.) An order granting or denying a special motion to strike under Code of Civil Procedure section 425.16 is appealable. (Code Civ. Proc., § 904.1, subd. (a)(13).)

<sup>2</sup> All further statutory references are to the Code of Civil Procedure unless otherwise stated.

<sup>3</sup> The City was named as a defendant in the SAC but has settled its dispute with Santa Ritts and is not a party to the appeal.

to add Weintraub and the City as defendants, and to include the causes of action that are the subject of defendants' anti-SLAPP motion, among others.

On August 4, 2009, Allied Insurance, the insurer for Santa Ritts, inspected the property.<sup>4</sup> The insurance inspector identified several fire violations and also noted that a stairway to the upper floor had been blocked off by a wall, creating a potential safety hazard. The insurance inspector suggested that Santa Ritts confer with the Los Angeles County Fire Department about the blocked stairway. Santa Ritts became aware that the building was vacant in the course of the inspection and inquired of 8445 SMB when this had occurred. Sometime after the inspection, counsel for 8445 SMB confirmed that the building had been vacant since July 5, 2009.

On August 18, 2009, the City's Commercial Code compliance division issued a violation warning notice advising Santa Ritts that the property did not have a current Business Tax Certificate on file with the City and that the landscaping appeared to be substandard under the City's municipal code. The notice warned that the property must be brought into compliance for Santa Ritts to avoid the imposition of administrative fines.

On August 25, 2009, per Santa Ritts's request, the fire department inspected the property to evaluate the potential hazard of the blocked stairway. The fire department inspector informed the parties that the blocked stairway was a municipal code question for the City to resolve. On August 27, 2009, Cyrus Godfrey, counsel for Santa Ritts, contacted the City with respect to the blocked stairway and 8445 SMB's remodeling of the property without permits. According to Godfrey, the City's code compliance supervisor, Daniel Mick, told him that it was a "coincidence" Godfrey had contacted him with respect to the property, because the City had noticed the property was vacant and had decided to issue a letter to Santa Ritts requiring it to comply with the City's vacant building ordinance several days earlier. Santa Ritts's concerns regarding the blocked stairway and unpermitted remodeling of the property were formalized in a Commercial Code compliance service request form.

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<sup>4</sup> By the terms of the lease, Santa Ritts is the "insuring party" for the property.

The City initiated an investigation in response to both the service request made by Santa Ritts and the previous problems of noncompliance with respect to the Business Tax Certificate and landscaping. According to Ann McIntosh, the deputy city manager and director of community development for the City, the purpose of the investigation was to “determine the validity of the complaints, gather evidence for future code enforcement action if deemed necessary, and to determine whether a code enforcement proceeding [was] necessary.”

On September 1, 2009, Godfrey received an e-mail from Mick attaching a letter of agency guidelines, letter of agency, the City’s property maintenance code, and the City’s vacant and abandoned properties code. The e-mail thanked Godfrey for his cooperation and instructed him to contact Mick or Tony Leyva, the code compliance officer handling the case, if he had any questions about the documents. The e-mail did not indicate whether the City had made an official determination that the property was “vacant” or “not vacant” under the municipal code.

On September 2, 2009, Godfrey sent an e-mail to Gregory Gershuni, counsel for 8445 SMB, informing Gershuni that the City had initiated a review of the property because it appeared to be vacant, and because the building was not in compliance with the landscaping plan approved by the City. The e-mail requested that 8445 SMB comply with all City ordinances, as required by the lease for the property. It expressed that if 8445 SMB communicated with the City, it should keep Santa Ritts informed of any such contacts. Godfrey forwarded Mick’s September 1, 2009 e-mail and attachments via e-mail.

On October 6, 2009, Santa Ritts and the City inspected the property. According to Godfrey, Mick told him that the inspection did not relate to the vacant building ordinance but only to the issue of the blocked stairway.

On October 8, 2009, McIntosh issued a letter from the City stating that there were no violations of the municipal code found at the property. The letter mentioned that the City was aware 8445 SMB was in the process of finding a tenant for the space and

informed 8445 SMB that two stairways<sup>5</sup> leading to the upper level storage area would need to be reinstalled before a new tenant could take possession.

On November 4, 2009, Santa Ritts sent a notice of default to 8445 SMB for breaching the lease by not complying with the vacant building and property maintenance ordinances. The letter reminded 8445 SMB that under the terms of the lease, it must cure the breaches within 10 days. The following day, McIntosh sent a letter to Weintraub, as president of 8445 SMB, stating the City's records showed no violations for the property, and the property was not considered "vacant" according to the municipal code's definition of "vacant property."

On November 12, 2009, Gershuni responded to 8445 SMB's notice of default by facsimile to Godfrey, stating "the City has confirmed there are no violations on the property." Godfrey telephoned Mick the same day to confirm whether this was the case. Mick responded that the matter had been taken out of his hands by "higher ups" and connected Godfrey to McIntosh's office. Godfrey spoke with McIntosh's assistant, who confirmed that the City had issued such a letter to Weintraub. Godfrey requested a copy of the letter, which McIntosh's office faxed to him the next day. Santa Ritts had not been copied on the letter and had not received it until the facsimile arrived on November 13, 2009.

Within a few days, Godfrey called McIntosh to discuss the City's letter, and she referred him to Steve Bailey at City Hall. Godfrey met with Bailey, who relayed to him that he was involved with the blocked stairway decision but not the "not vacant" determination and had signed off on the letter because of his involvement with the stairway issue. He said that McIntosh had made the "not vacant" decision. Godfrey then contacted McIntosh a second time, and she stated that she made the decision based on a meeting with J.J. O'Brien, who spoke with her on behalf of 8445 SMB and Weintraub. McIntosh stated that she had authority to make the decision without consulting Santa

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<sup>5</sup> The record is inconsistent with respect to whether one or two stairways had been blocked, but the issue is not material to the merits of the appeal.

Ritts. Godfrey asked if there was a process by which Santa Ritts could appeal the City's determination, and she referred him to the City's website.

On November 20, 2009, Godfrey e-mailed City Councilman Jeffrey Prang asking about the appeal process. About a week later, Michael Jenkins, the city attorney, contacted Godfrey to let him know that he would respond to Godfrey's questions to Councilman Prang. In that conversation, Jenkins stated: "In the interest of full disclosure I ought to tell you that the City has been in negotiations with Mr. Weintraub to lease the [property] as an extension of City Hall." Godfrey and Santa Ritts had not previously been aware of these negotiations.

Jenkins called Godfrey in early December of 2009 to let him know that the matter was not appealable. He indicated the City would be issuing a second letter with respect to the "not vacant" decision, as the first had not been particularly well written. On December 7, 2009, the City issued a second letter clarifying that the first letter "was not intended to opine as to whether the building was occupied by a tenant or furniture, but merely that the City had, at that juncture, found no grounds to warrant application of any of the vacant building sanctions set forth in the [West Hollywood Municipal Code section] 7.24.010."

Godfrey made a public records request to the City to provide all documents it possessed relating to the property. In addition to copies of the August 18, 2009 violation warning notice, the August 27, 2009 Commercial Code compliance service request, and the November 5 and December 7, 2009 letters relating to the "not vacant" decision, the City produced a string of e-mail correspondences spanning from October 8 to November 10, 2009, between O'Brien, McIntosh, and Brendan Rome, who also worked for the City. In an October 9, 2009 e-mail to O'Brien, McIntosh stated she did not believe a letter discussing the outcome of the inspection was necessary, but that if one was issued it would not be sent until after the inspectors made a decision as to the stairway. Any letter should indicate the City's expectations with respect to future leasing of the property, and regardless of the leasing situation, no violations had been found on the property. On November 5, 2009, Rome e-mailed O'Brien confirming that the City

was “constructing a letter regarding [the property] to send to [Weintraub and 8445 SMB].” In the e-mail, Rome asked to whom the letter should be addressed. O’Brien responded with an address for Weintraub. Rome then confirmed the letter was being sent.

On March 23, 2010, Santa Ritts amended the complaint to add Weintraub and the City as defendants and to add various causes of action, including those subject to defendants’ anti-SLAPP motion. The SAC alleges that: “Weintraub, either personally or through one or more of his agents, had contacts [with] City employees or elected officials, and met with City employees, including a meeting Weintraub had with the City around the time the November 5 letter was sent, and, as plaintiff is informed and believes and thereon alleges, in those contacts persuaded the City to issue the November 5 letter stating that the subject building was not vacant in return for incentives, or promises of incentives, by defendants Weintraub and 8445 SMB to one or more City employees.” The 7th cause of action alleges that Weintraub, acting both as an individual and as a representative of 8445 SMB, intentionally interfered with the lease and disrupted Santa Ritts’s business relations with 8445 SMB causing damages to Santa Ritts, including leaving the building in an unsafe condition and causing Santa Ritts to incur unnecessary attorney fees. The 9th cause of action alleges Weintraub and 8445 SMB conspired with the City to commit fraud by having the City take actions that favored Weintraub and 8445 SMB over Santa Ritts, and concealing the reasons for doing so. The 10th cause of action alleges Weintraub committed unfair business practices by influencing the City to unfairly grant defendants an unwarranted waiver of its ordinances by offering the City incentives. Finally, the 12th cause of action alleges Weintraub and 8445 SMB conspired to commit unfair business practices by improperly influencing the City to unfairly grant defendants an unwarranted waiver of its ordinances through offers of incentives.<sup>6</sup>

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<sup>6</sup> The 6th, 8th, and 11th causes of action of the SAC were as to the City, which is no longer a party to the action.

8445 SMB filed a demurrer and regular motion to strike the 9th and 12th causes of action on May 11, 2010.<sup>7</sup> 8445 SMB and Weintraub then jointly filed the anti-SLAPP motion at issue on May 27, 2010.<sup>8</sup>

On June 4, 2010, the trial court sustained the demurrers as to the 9th and 12th causes of action, without leave to amend. On June 21, 2010, Weintraub demurred to the 7th and 10th causes of action. On June 24, 2010, 8445 SMB and Weintraub filed evidentiary objections to the declarations of Godfrey and several others. The trial court overruled Weintraub's demurrer and denied the joint anti-SLAPP motion on June 30, 2011. It did not rule on 8445 SMB and Weintraub's evidentiary objections.

In denying defendants' anti-SLAPP motion, the trial court concluded the illegality exception to protection under section 425.16 set forth in *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326 (*Flatley*) applied to the 7th and 10th causes of action, because the gravamen of those claims concerned the illegal payment of bribes and/or exchanging of favors with government officials. It denied the anti-SLAPP motion as to the 7th and 10th causes of action because the claims did not arise from defendants' exercise of their rights to free speech or petition, and thus failed to meet the first prong of the anti-SLAPP analysis. The trial court did not reach the issue of Santa Ritts's probability of prevailing on its claims under the second prong of the anti-SLAPP analysis. The trial court did not address the 9th and 12th causes of action in its order.

Defendants argue the trial court erred in its application of the illegality exception. They contend the claims arose from statements "made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . ." under section 425.16, subdivision (e)(2), and are therefore subject to a special motion to strike. They assert that Santa Ritts cannot prevail

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<sup>7</sup> 8445 SMB also demurred to the 1st, 2nd, and 4th causes of action, but those causes of action were not the subject of the anti-SLAPP motion and are not relevant here.

<sup>8</sup> The City filed a separate anti-SLAPP motion the same day. Santa Ritts settled with the City after it filed its anti-SLAPP motion, the motion was taken off-calendar, and the City was dismissed from the lawsuit.

on its claims under the second prong of the anti-SLAPP analysis even if this court does not consider defendants' unresolved evidentiary objections, and therefore the trial court's order should be reversed. Finally, they argue that the trial court erred in not addressing whether the 9th and 12th causes of action were subject to section 425.16 because the anti-SLAPP statute provides for the awarding of attorney fees and may apply to the claims even if they were previously dismissed.

Santa Ritts disputes these contentions, arguing that the trial court correctly determined the gravamen of the 7th and 10th causes of action was illegal bribery, which is not protected under section 425.16.<sup>9</sup> It additionally asserts that defendants' communications with the City were not a "proceeding" or "matter of public interest" qualifying for protection under section 425.16, subdivision (e), but rather secret negotiations. Santa Ritts argues that it has a reasonable probability of prevailing on its claims under the second prong of the analysis. Finally, it argues that the anti-SLAPP statute does not apply to the 9th and 12th causes of action because the trial court sustained defendants' demurrer on unrelated grounds.

With respect to the 7th and 10th causes of action, we conclude that: 1) the evidence does not conclusively establish defendants' petitioning activity was illegal as a matter of law and therefore unprotected by the anti-SLAPP statute, and 2) defendants have made a prima facie showing that the causes of action arose from their petitioning activity, which is protected activity under section 425.16. We hold defendants have satisfied the first prong of the anti-SLAPP analysis as to those causes of action, and remand to the trial court to resolve defendants' evidentiary objections and determine whether, taking all admissible evidence into consideration, Santa Ritts has demonstrated a reasonable probability of prevailing on these claims.

Moreover, we conclude the trial court erred by not addressing the 9th and 12th causes of action. Because the anti-SLAPP statute provides for an award of attorney fees,

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<sup>9</sup> Although Santa Ritts characterizes the causes of action as illegal bribery, the SAC alleges that defendants improperly influenced the City with inducements.

the cause was not moot although those causes of action were dismissed. We hold that defendants also made a prima facie showing that those claims arose out of their exercise of free speech and/or petitioning activity as well. On remand, we direct the trial court to consider whether the 9th and 12th causes of action satisfied the second prong of the anti-SLAPP analysis, such that an award of attorney fees is appropriate.

## DISCUSSION

### I. The 7th and 10th Causes of Action

“A SLAPP suit is a meritless lawsuit ‘filed primarily to chill the defendant’s exercise of First Amendment rights.’ [Citation.]” (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 861-862.) The Legislature has declared that “it is in the public interest to encourage continued participation in matters of public significance, and . . . this participation should not be chilled through abuse of the judicial process.” (§ 425.16, subd. (a).)

To this end, the Legislature enacted section 425.16, subdivision (b), which provides: “(1) A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”

“The trial court engages in a two-step process to determine whether to grant or deny a section 425.16 motion to strike. [Citation.] The court first decides whether the defendant has made a threshold showing that the acts at issue arose from protected activity. (§ 425.16, subd. (b)(1) . . . .) Once the defendant meets this burden, then the court determines whether the plaintiff has demonstrated a probability that he or she will prevail on the claim. (*Ibid.*) On appeal, we independently review whether

section 425.16 applies and whether the plaintiff has a probability of prevailing on the merits.” (*Summerfield v. Randolph* (2011) 201 Cal.App.4th 127, 135.)

In deciding whether the defendant has met the “arising from” requirement and whether plaintiff has met the probability of prevailing requirement, we consider “the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.” (§ 425.16, subd. (b)(2); *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 [(*Cotati*)].) In doing so, “we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation.]’ [Citation.]” (*Flatley, supra*, 39 Cal.4th at p. 326.)

## **II. The First Prong of the Anti-SLAPP Analysis**

### ***A. The Illegality Exception Does Not Apply***

In denying defendants’ anti-SLAPP motion, the trial court concluded the illegality exception to protection under section 425.16 set forth in *Flatley, supra*, 39 Cal.4th at pages 325-333 applied, because any protected petitioning activity by defendants was incidental to the alleged illegal bribery. The exception in *Flatley* does not extend to the circumstances in this case.

The defendant in *Flatley* was an attorney who conceded sending a letter and making several phone calls to the plaintiff demanding “a seven-figure payment” and threatening litigation and public exposure if the demand was not met. (*Flatley, supra*, 39 Cal.4th at pp. 305, 328-329.) The parties agreed as to the substance of the letter and phone calls; however, the plaintiff asserted the communications were criminal extortion, while the defendant argued the communications were protected because they constituted a prelitigation settlement offer. (*Id.* at pp. 305, 320-321.) *Flatley* held that the

defendant's motion failed under the first prong of the anti-SLAPP analysis because there was uncontroverted evidence that the defendant's actions constituted illegal extortion not protected under section 425.16. (*Id.* at pp. 325-333.)

In reaching its conclusion, the *Flatley* court relied on *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356 (*Paul*), a case in which defendants admitted money-laundering, but argued that their laundering of campaign contributions was protected under section 425.16 because they were acting in furtherance of their constitutional right to free speech. (*Id.* at pp. 1361-1362.) *Paul* carved out a narrow exception to the anti-SLAPP statute's protections in this circumstance, reasoning that "section 425.16, by its express terms, does not apply to any activity that can conceivably be characterized as being "in furtherance" of a defendant's protected speech or petition rights if, as a matter of law, that activity was illegal and by reason of the illegality not constitutionally protected. ([*Id.*] at p. 1367.)" (*Flatley, supra*, 39 Cal.4th at p. 316.) *Flatley* agreed with the reasoning of *Paul* that protecting activity illegal as a matter of law would be inconsistent with the purpose of section 425.16, because illegal activity is not a *valid* activity undertaken in the furtherance of free speech. (*Id.* at p. 317.) The *Flatley* court opined that "it would eviscerate the first step of the two-step inquiry set forth in the statute if the defendant's *mere assertion* that his underlying activity was constitutionally protected sufficed to shift the burden to the plaintiff to establish a probability of prevailing where it could be conclusively shown that the defendant's underlying activity was illegal and not constitutionally protected." (*Ibid.* [emphasis added].)

*Flatley* held that "where a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, *but either the defendant concedes, or the evidence conclusively establishes*, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action. In reaching this conclusion, we emphasize that the question of whether the defendant's underlying conduct was illegal as a matter of law is preliminary, and unrelated to the second prong

question of whether the plaintiff has demonstrated a probability of prevailing, and the showing required to establish conduct illegal as a matter of law—either through defendant’s concession or by uncontroverted and conclusive evidence—is not the same showing as the plaintiff’s second prong showing of probability of prevailing.” (*Flatley*, *supra*, 39 Cal.4th at p. 320 [emphasis added].)

Courts have interpreted the ruling in *Flatley* as carving out a very narrow exception to section 425.16, applicable only when the party opposing the anti-SLAPP motion has established that there is no factual dispute between the parties regarding the criminal conduct. (See *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 385-388; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 964-967.) The general rule is that “any ‘claimed illegitimacy of the defendant’s acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff’s [secondary] burden to provide a prima facie showing of the merits of the plaintiff’s case.’ [Citation.]” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94 (*Navellier*).)

Here, the asserted protected activity is defendants’ communication with the City with respect to the application of its ordinances. This case is unlike *Flatley*, where the substance of the communications was undisputed. Here, the parties are not in agreement as to the facts, and defendants assert that they lawfully advocated their position to the City. The allegations of illegality are vague and not fully developed so as to establish illegality as a matter of law. Defendants do not concede, and it has not been conclusively established, that the communications were illegal. Therefore, they are not precluded from meeting the first prong of the anti-SLAPP analysis by *Flatley*’s illegality exception.

Santa Ritts’s reliance on the reasoning in *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435 (*Gerbosi*) is misplaced. The plaintiffs in *Gerbosi* alleged the defendant engaged in wiretapping in the course of representing a client. The defendant disputed that the alleged wiretapping had taken place. (*Id.* at p. 446.) The *Gerbosi* court concluded the defendant’s special motion to strike failed under the first prong of the anti-SLAPP analysis because “[u]nder no factual scenario offered by [the defendant] is such wiretapping activity protected by the constitutional guarantees of free

speech and petition.” (*Ibid.*) Despite the factual dispute between the parties as to whether defendant had, in fact, engaged in wiretapping, the *Gerbosi* court concluded it was not necessary to evaluate the second prong of the anti-SLAPP analysis because wiretapping was illegal as a matter of law and therefore unprotected. (*Ibid.*) *Gerbosi* distinguished between unprotected activity that is criminal as a matter of law, such as wiretapping and other assertedly protected activity, stating that “when a defendant’s assertedly protected activity *may or may not be* criminal activity, the defendant may invoke the anti-SLAPP statute . . . .” (*Ibid.*) *Gerbosi* reiterated *Flatley*’s holding that “a defendant’s ‘*mere assertion* that his [or her] underlying activity was constitutionally protected’ will not suffice to shift to the plaintiff the burden of showing that the defendant’s underlying activity was criminal, and not constitutionally protected. (*Flatley, supra*, 39 Cal.4th at p. 317, italics added.)” (*Gerbosi, supra*, at p. 446.)

The present case is not analogous to *Gerbosi*. Here, defendants were communicating with the City to persuade it that the property was not in violation of municipal ordinances. Unlike wiretapping, such communications are not illegal as a matter of law. The communications may have been legitimate advocating of defendants’ position as they assert, or they may have been attempts to improperly influence the City as Santa Ritts alleged. *Gerbosi*, as well as all other precedent, dictates that the illegality exception does not apply.

### ***B. Defendants’ Communication with the City is Protected Activity***

The remaining question to resolve the first prong of the anti-SLAPP analysis is whether defendants’ communication with the City, although not concededly or conclusively established to be illegal, is protected activity in furtherance of defendants’ free speech or petitioning activity. We conclude that it is.

The 7th and 10th causes of action “arose from” an act of defendants in furtherance of defendants’ right of petition or free speech. “[T]he statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of

action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . .' [Citations.]" (*Cotati, supra*, 29 Cal.4th at p. 78.)

Section 425.16, subdivision (e) provides: "[An] 'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue'" includes, among other categories, "(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ."

"[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. (*See Paul v. Friedman* [, *supra*,] 95 Cal.App.4th [at p.] 866 ["[t]he statute does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding").) . . . [I]t is the *principal thrust or gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies (*Cotati, supra*, 29 Cal.4th at p. 79), and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.' [Citation.]" (*USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 63.)

The California Supreme Court's discussion of this standard in *Navellier, supra*, 29 Cal.4th 82 is instructive. In *Navellier*, the plaintiffs sued the defendant for fraud in state court, alleging that he falsely represented his intention to be bound by a partial release he executed in connection with the plaintiffs' earlier lawsuit in federal court. The plaintiffs also claimed the release agreement was breached when the defendant filed counterclaims against the plaintiffs in their federal action. The defendant moved to strike the plaintiffs' claims under section 425.16. The trial court denied the motion. (*Id.* at pp. 85-87.) The

California Supreme Court held that the plaintiffs' claims were subject to the anti-SLAPP statute because the defendant's negotiation and execution of the release involved "statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body" and his arguments to the federal court as to the release's validity were "statement[s] or writing[s] made before a . . . judicial proceeding." (*Id.* at p. 90.)

*Navellier* found the plaintiffs' arguments flawed because of the "false dichotomy between actions that target 'the formation or performance of contractual obligations' and those that target 'the exercise of the right of free speech'" urged in their brief. (*Navellier, supra*, 29 Cal.4th at p. 92.) The *Navellier* court explained that a cause of action may target both free speech and contractual obligations, and therefore fall under the purview of the anti-SLAPP statute. (*Ibid.*) It clarified that the emphasis was not on the form of the cause of action, but rather on the defendant's action that gives rise to his alleged liability. The *Navellier* court noted "[t]he Legislature recognized that 'all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights.'" [Citation.] (*Id.* at pp. 92-93.)

*Navellier* expounded on the distinction between the first and second prongs of the anti-SLAPP analysis, which are often mistakenly confused or conflated. It cautioned against "fall[ing] prey . . . to the fallacy that the anti-SLAPP statute allows a defendant to escape the consequences of wrongful conduct by asserting a spurious First Amendment defense . . . [because] the statute does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning [citation]; it subjects to potential dismissal only those actions in which the plaintiff cannot 'state[] and substantiate[] a legally sufficient claim' [citation]." (*Navellier, supra*, 29 Cal.4th at p. 93.) *Navellier* emphasized that the anti-SLAPP statute would not thwart a suit that has even minimal merit. (*Ibid.*)

Here, Santa Ritts seeks to hold defendants liable for their communications with the City regarding the vacant building ordinance. The causes of action in the SAC target both defendants' alleged action of improperly influencing the City with inducements and

their rights to free speech and petition, because they arise from defendants' communications with the City rather than some separate action taken by defendants unrelated to their petitioning. Where a cause of action arises from both the exercise of the right of free speech or petition and unprotected activity, we treat the defendant's actions as protected unless the right of free speech or petition is only incidental to the cause of action. (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414; *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103.) In this case, the petitioning activity and alleged improper influence are intertwined, and petitioning activity is, at a minimum, of equal importance to Santa Ritts's claims. Because the petitioning activity is not merely incidental to the causes of action, we hold that the causes of action arise from defendants' communications with, and petitioning of, the City.

Santa Ritts argues there was no "official proceeding" or "matter of public interest" that would qualify the communications for protection under section 425.16, subdivision (e), because defendants and the City allegedly engaged in secret negotiations. We are unpersuaded.

Preliminarily, we note that defendants assert their communications with the City are protected under section 425.16, subdivision (e)(2), which does not require that the communications be related to a "matter of public interest." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113-1114 (*Briggs*)). The sole issue is whether the communications were in connection with an "official proceeding."

Santa Ritts points to no authority requiring the City to include it in communications concerning the Property's compliance with City ordinances, nor has it cited authority requiring the City to follow a procedure that would require notifying it of such communications. "[C]onfidentiality . . . [does not] transmute [a proceeding] into an unofficial or nonpublic activity. [Even if an] investigation itself is closed to the public, . . . it is an authorized, public proceeding [if] it is government-sponsored and provided for by statute." (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1049 (*Braun*)). There is therefore no basis to conclude that any discussions between

defendants and the City were improper or did not qualify as an “official proceeding” simply because the communications were not disclosed to Santa Ritts, and Santa Ritts did not participate in them.

Moreover, as the Legislature mandated in section 425.16, subdivision (a), the courts have construed the anti-SLAPP statute broadly, holding it applicable in numerous situations where defendants were not engaged in formal communications but the communications were nonetheless “made in connection with issues under consideration or review . . . [in an official proceeding authorized by law]” pursuant to section 425.16, subdivision (e)(2). (*Briggs, supra*, 19 Cal.4th at p. 1115.) Official proceedings have been held to include, among other proceedings, a California Department of Corrections and Rehabilitation internal investigation (*Hansen v. California Dept. of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1544-1545; *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1399 [a statutory hearing procedure before the Regents of the University of California]; *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199 [a hospital peer review that was required under the Business and Professions Code and subject to judicial review by administrative mandate]; *Computer Xpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1009 [the filing of a complaint with the Securities and Exchange Commission]; *Braun, supra*, 52 Cal.App.4th at p. 1049 [an investigative audit by the State Auditor]). Even ““communications preparatory to or in anticipation of the bringing of an . . . official proceeding are within the protection of . . . section 425.16. [Citations.]” (*Briggs, supra*, at p. 1115.)

In *Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252, 1255-1256, a neighbor complained to the City of Santa Monica because the plaintiffs built a large playhouse in their backyard, in violation of the city’s building code. The plaintiffs sued the neighbor and the city after the city notified them that the structure violated the building code and would have to be modified or removed. (*Ibid.*) *Levy* held that the claims against the City of Santa Monica were subject to the anti-SLAPP statute because they arose from the communications between the neighbor and the building inspector and city employees. (*Id.* at p. 1258.)

This case is analogous to *Levy*. Here, the City notified Santa Ritts that the property did not appear to be occupied and would need to be brought into compliance with the municipal code. Santa Ritts then informed defendants of the issue and suggested that defendants might have some direct contact with the City on the matter if the City deemed communications with a lessee of property appropriate. Following an inspection of the property, the City issued a letter notifying the parties that there were no violations found on the property, but stating that the City was aware that defendants were in search of a new tenant and that two stairways would have to be reinstalled before the property could be occupied. Finally, the City issued two letters reiterating that the property was not in violation of its ordinances. Santa Ritts complained that at different unknown points during this time period, defendants contacted the City for the purpose of persuading it that the vacant building ordinance did not apply. It is clear that the 7th and 10th causes of action of the SAC arose from alleged contacts and communications that occurred during the City's code compliance investigation, which was government-sponsored and provided for by the City's ordinances. The communications were therefore related to an "official proceeding." Accordingly, we hold that defendants satisfied the first prong of the anti-SLAPP analysis. We reverse the trial court's order with respect to its finding that the communications were not protected under section 425.16.

### **III. The Second Prong of the Anti-SLAPP Analysis**

The remaining issue is whether Santa Ritts has established a reasonable probability of prevailing on its claims. Despite the fact that the parties have extensively briefed this issue, we believe that it is more appropriate to remand the matter to the trial court to decide in the first instance. In evaluating whether Santa Ritts has established a reasonable probability of prevailing on its claims, the trial court must review all admissible evidence. (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1147). There are factual issues involved in

determining whether Santa Ritts has made a prima facie showing under the second prong of the anti-SLAPP analysis, and the trial court has not yet ruled on defendants' evidentiary objections, including the admissibility of Godfrey's affidavit. We therefore remand to the trial court to rule on the evidentiary objections and determine whether Santa Ritts has met its burden under the second prong of the anti-SLAPP analysis.

#### **IV. The 9th and 12th Causes of Action**

The trial court did not address the applicability of the anti-SLAPP statute to the 9th and 12th causes of action, presumably because the claims were dismissed without leave to amend when it sustained defendants' earlier demurrer. We agree with defendants that this was error, because section 425.16, subdivision (c) provides for attorney fees, and therefore the motion was not rendered moot by the previous demurrer. (*White v. Lieberman* (2002) 103 Cal.App.4th 210, 220 (*White*).)

In *White*, the trial court sustained a demurrer to the complaint without leave to amend. The defendant, who prevailed on the demurrer, argued the trial court erred in refusing to also consider his anti-SLAPP motion. The reviewing court agreed. "[A] defendant who prevails in an anti-SLAPP motion is entitled to attorney's fees. (§ 425.16, subd. (c).) The trial court therefore erred in determining [the defendant's] motion was moot." (*White, supra*, 103 Cal.App.4th at p. 220.)

Santa Ritts's argument that defendants are not entitled to attorney fees because they sought dismissal of the claims on different grounds is unavailing. The trial court sustained defendants' demurrer to the 9th and 12th causes of action because the City had been dismissed from the case, and without a conspirator there could be no conspiracy. That the claims were dismissed on this basis does not preclude them from arising out of defendants' exercise of its rights to free speech and/or petition. One of the purposes of section 425.16 is to reimburse "the prevailing defendant for expenses incurred in extricating [himself or itself] from a baseless lawsuit." [Citation.]" (*GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 910.) A lawsuit may be

baseless even where claims are dismissed on alternate grounds. A defendant is not spared from the expense incurred simply because there is more than one reason a claim should be dismissed.

*S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374 (*S. B. Beach Properties*) and *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94 (*Coltrain*), upon which Santa Ritts relies, are distinguishable. Both *S. B. Beach Properties* and *Coltrain* involved claims that had been voluntarily dismissed. In *S. B. Beach Properties*, the plaintiff voluntarily dismissed the action before defendants filed their anti-SLAPP motion. (*S. B. Beach Properties, supra*, at p. 380.) *S. B. Beach Properties* held the motion was properly denied because it was filed after the suit had been dismissed and the motion was “based on a claimed entitlement arising from their success on a motion they did not file.” (*Ibid.*) In this case, contrary to the situation in *S. B. Beach Properties*, there is still a viable lawsuit, and the claims at issue were dismissed on defendants’ motion. In *Coltrain*, the plaintiffs voluntarily dismissed their lawsuit while the defendants’ anti-SLAPP motion was pending. (*Coltrain, supra*, at p. 100.) The Court of Appeal held that in such cases the court has discretion as to whether to award attorney fees because there must be a judicial determination as to who the prevailing party is when a case has been voluntarily dismissed. (*Id.* at pp. 106-107.) Here, Santa Ritts did not voluntarily dismiss its lawsuit or any of its claims during the pendency of defendants’ anti-SLAPP motion. It is clear that defendants prevailed on the demurrer. We conclude that if defendants prevail on their anti-SLAPP motion they will be entitled to attorney fees under section 425.16.

Finally, we hold that the 9th and 12th causes of action satisfy the first prong of the anti-SLAPP analysis for the reasons articulated above with respect to the 7th and 10th causes of action.

## **DISPOSITION**

The order granting the special motion to strike is reversed. The cause is remanded to the trial court to resolve defendants’ evidentiary objections and determine whether,

taking all admissible evidence into consideration, Santa Ritts has demonstrated a reasonable probability of prevailing on its claims in the first instance. Costs on appeal are awarded to 8445 SMB, Inc., and Richard Weintraub.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.