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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

AVTAR S. BANGHU et al.,

Plaintiffs and Respondents,

v.

CITY OF FONTANA,

Defendant and Appellant.

E063998

(Super.Ct.No. CIVDS1503221)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis,  
Judge. Reversed.

Silver & Wright, Curtis R. Wright and Ruthann M. Elder for Defendant and  
Appellant.

Law Offices of Yolanda Flores-Burt and Yolanda Flores-Burt for Plaintiffs and  
Respondents.

## I. INTRODUCTION

Plaintiffs and respondents, Avatar S. Banghu and Rajinder Banghu, sued defendant and appellant, City of Fontana (City), alleging two causes of action for “discrimination” and “harassment.” The trial court granted City’s special motion to strike the second cause of action for harassment (the harassment claim) under the “anti-SLAPP”<sup>1</sup> statute (Code Civ. Proc., § 425.16),<sup>2</sup> but denied City’s special motion to strike the first cause of action for discrimination (the discrimination claim). City claims the discrimination claim should have been stricken along with the harassment claim. We agree. Accordingly, we reverse the order denying City’s special motion to strike the discrimination claim.

The complaint alleges that, during 2008 to 2013, City and two of its employees<sup>3</sup> discriminated against and harassed plaintiffs by issuing citations for violating the Fontana Municipal Code (the FMC) and otherwise enforcing the FMC against the trucking businesses that plaintiffs were operating on the real property located at 14796 Washington Avenue in the City (the property). City annexed the property from San

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<sup>1</sup> The acronym “SLAPP” means “strategic lawsuits against public participation.” (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1241, fn. 2 (dis. opn. of Corrigan, J.).)

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

<sup>3</sup> Plaintiffs named City employees Don Williams and Paul Gonzales, erroneously sued as Paul Gonzalez, as defendants. Neither of these defendants are parties to this appeal.

Bernardino County (the County) in September 2006, and plaintiffs had been operating a trucking business on the property since 2001.

In refusing to strike the discrimination claim, the court acknowledged that the entire discrimination claim was based on City's protected code enforcement activities and that City's motion was "well-taken" regarding the portions of the discrimination claim alleged in paragraphs 13 through 22 of the complaint. The court was concerned with the portion of the discrimination claim alleged in paragraphs 11 and 12 of the complaint, where plaintiffs alleged City offered "[p]reannexation agreements" to "other existing businesses," which afforded the other businesses "[g]randfather" rights which allowed them to continue operating their businesses as they had operated them before the September 2006 annexation, but City failed to offer plaintiffs a preannexation agreement for their trucking business due to plaintiffs' national origin. Plaintiffs are from India.

As we explain, the entire discrimination claim should have been stricken along with the harassment claim. All of the injury-producing allegations of the complaint are based on City's protected code enforcement activities, including City's alleged failure to offer plaintiffs a preannexation agreement, and plaintiffs adduced insufficient evidence to support any part of the discrimination claim.

Plaintiffs demonstrated only that City offered a preannexation agreement to a single property owner, on which a "County-approved" 136-unit apartment complex was being built, and which City annexed in September 2007. City presented evidence that the 2007 annexed property was not part of the 2006 annexation, and that none of the "other

existing businesses” in the vicinity of plaintiffs’ property, or any of the approximately 4,000 parcels which City annexed when it annexed the property in 2006, were offered preannexation agreements. Moreover, City showed that, following the 2006 annexation, it would have allowed plaintiffs to “grandfather” their trucking business—continue operating the business as they had while the property was under the County jurisdiction—had plaintiffs provided documentation to City showing that their trucking business was a permitted use under the County Code of Ordinances (the County Code). Plaintiffs never provided such documentation, however, and plaintiffs’ trucking business was not a permitted use under the FMC.

## II. BACKGROUND

### A. *Plaintiffs’ Discrimination Claim*<sup>4</sup>

Before City annexed the property on September 19, 2006, the property was in an unincorporated area of the County, under the County’s jurisdiction. In 2001, plaintiffs leased the property and began operating a trucking business on it, providing “freight shipping, driver training, and trucking services.” Since 1991, the property had been used as a “site for trucking business,” and since 2001, plaintiffs had been providing “the same kind and type of” trucking services in other San Bernardino County locations. Between 2001 and September 2006, the County conducted “routine inspections” of plaintiffs’

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<sup>4</sup> The facts described in this section are taken solely from the allegations of plaintiffs’ complaint.

trucking business; the inspections “were always uneventful”; “no complaints were ever made”; and “no [c]itations were ever issued” by the County.

In paragraphs 11 and 12 of their discrimination claim, plaintiffs allege: “11. . . . While plaintiffs were peripherally aware of [City’s] annexation proceedings, at no point during the process were Plaintiffs informed that the annexation would cause new conditions which would affect their business. The CITY had the ability and indeed offered Preannexation agreements to other existing businesses which allowed them to enjoy . . . Grandfather’s rights to conduct and operate their businesses without interruption. The CITY never offered Plaintiffs any Preannexation agreements as those offered to other business[es] so as to allow[] them to enjoy the same Grandfathering rights as those other businesses so that they (Plaintiffs) too [would] enjoy uninterrupted business activity. [¶] 12. It is Plaintiffs’ good faith belief that the CITY did not offer them their Grandfather agreements to allow them to continue their operation due to their National Origin. Instead the CITY commenced a course of action intended to drive Plaintiffs out of the area . . . alleging that the business did not conform with [its] ‘2003 General Plan for the City of Fontana.’”

In the remaining allegations of the discrimination claim, set forth in paragraphs 13 through 22 of the complaint, plaintiffs allege City discriminated against them by issuing multiple citations for FMC violations on the property, failing to give plaintiffs sufficient time to remedy the FMC violations, and pursuing misdemeanor criminal actions against plaintiffs for the FMC violations. Plaintiffs claim City attempted to drive plaintiffs out of

business by requiring them to make expensive changes to the property and by revoking their City-issued conditional use permit to operate a trucking school on the property. Plaintiffs seek compensatory, punitive, and other damages from City for its “malicious discriminatory conduct.”

*B. City’s Anti-SLAPP Motion and Supporting Evidence*

1. City’s Anti-SLAPP Motion

In its anti-SLAPP motion, City claimed the entire complaint was based on City’s protected code enforcement activities and that plaintiffs could not make a prima facie evidentiary showing in support of either claim. City submitted detailed evidence describing its code enforcement activities against the property, through the declarations of its senior code enforcement inspector Karen Dineen Hampton, its associate planner Paul Gonzales, and its deputy city clerk Cecelia Lopez-Henderson. Numerous exhibits are authenticated in these declarations. City also asked the court to take judicial notice of many of its exhibits, including provisions of the FMC, provisions of the County Code, City’s “Post-Annexation Zoning Map,” and the “County Zoning Map.”<sup>5</sup>

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<sup>5</sup> City submitted 23 exhibits denoted A through W. The court granted City’s request to take judicial notice of its exhibits, with the exception of exhibit K, a letter dated December 8, 2010, and exhibit L, a letter dated January 17, 2013. The December 8, 2010, letter was written by Gonzales and is authenticated in his declaration. The January 17, 2013, letter was written by Don Williams and is not authenticated. Thus we disregard that letter.

## 2. City's Evidence

City annexed the property from the County in September 2006, as part of its “Island Annexation Program,” which involved the annexation of approximately 4,000 parcels, including the property. There were 32 “islands” of annexed properties in the Island Annexation Program, and the property was part of “Island 29.” Before the annexation, the property was zoned “Multiple Residential” under the County Code. “Most of Island 29,” but not the property, was zoned “Community Industrial” under the County Code. Following the annexation, the property was zoned “M-1 Light Industrial” under the FMC.

Lopez-Henderson managed the City’s “Annexation Program,” as the “Annexation Program Coordinator,” and was involved in the City’s Island Annexation Program in 2005 and 2006. She explained that, “[p]re-annexation agreements were not utilized at all during the Island Annexation Program process . . . because, for the most part, the subsequent City zoning provisions applied to the Islands were substantially similar to those of the County prior to the annexation. To the extent an existing land use was no longer legal under the FMC, the City would allow any use which was legal under the County Code to continue. Existing use permits or other entitlements issued by the County would be, and have been, honored by the City. . . .” Thus, City argued, it “did not discriminatorily deny Plaintiffs a pre-annexation agreement, the City simply did not offer *any* pre-annexation agreements.”

Gonzales explained that when City's annexation of the property was completed in 2006, "most of" the County's records were transferred to City, and it appeared that the County Code required "most industrial uses, such as a trucking business, to obtain either a minor use permit or a [CUP]," but nothing in the County's records showed that a CUP or a minor use permit was ever issued for the property.

City began investigating FMC violations on the property in December 2007, after it received a complaint regarding "illegal businesses" operating on the property. The County had also contacted City regarding "several complaints it had received" regarding the trucking businesses operating on the property and semitrucks driving past a nearby elementary school. In December 2007, William and Carmel Faulkner owned the property. Plaintiff Avtar Singh Banghu (Mr. Banghu) was leasing the property and operating trucking businesses on the property.

In June 2008, Hampton inspected the property and found that its occupants were operating a truck driving school, pallet storage yard, outdoor truck repair, and trailer storage on the property, all without a valid business license, CUP, or ASP as the FMC required. Based on the June 2008 inspection, Hampton issued a notice of violation to the Faulkners, specifying that each of the businesses operating on the property had to obtain a City business license, which would require a CUP and an ASP to be submitted, or the businesses would have to cease operating on the property. On July 14, 2008, Hampton advised the Faulkners that, under the FMC, the truck driving school appeared to be a legal use under the FMC but would require a CUP, and the other uses, namely, "the

trucking logistics and repair businesses” would have to submit documentation from the County showing they were entitled to operate on the property.

In December 2008, the unlicensed businesses were still operating on the property. No ASP had been submitted to City, no steps had been taken to apply for a CUP or the business licenses, and City had not received any documentation that the businesses were entitled to operate under the County Code, prior to the annexation. On December 3, 2008, City issued misdemeanor citations to the Faulkners and to Mr. Banghu for the FMC violations on the property. On December 9, 2008, City issued a second notice of violation to the Faulkners, giving them until January 13, 2009, to submit the necessary documents and obtain the business licenses. Also on December 9, Hampton and other City representatives met with the Faulkners and Mr. Banghu at the City planning department, and explained to them that they had to obtain documentation from the County showing that they were entitled to operate the businesses on the property pursuant to the County Code, prior to the annexation.

Finally, in April 2009, after additional criminal citations and notices of violation were issued for the FMC violations on the property, Mr. Banghu contacted the City planning department regarding the process of obtaining a CUP and ASP. During a May 2009 meeting, Gonzales advised a representative for Mr. Banghu that the FMC would not allow the truck driving school or the pallet factory to continue operating on the property. Mr. Banghu claimed the businesses had been operating on the property before the 2006 annexation. Again, City representatives advised Mr. Banghu that City would honor any

of the County entitlements to operate the business on the property, but Mr. Banghu never provided the necessary documentation to City. Months later, in December 2009, representatives for Mr. Banghu finally initiated the process of applying for the CUP and ASP. In early 2010, Mr. Banghu and his representatives requested additional time to submit their ASP application. City gave them additional time, and the CUP and ASP applications were submitted on April 1, 2010. In October 2010, Mr. Banghu purchased the property from the Faulkner's living trust.<sup>6</sup>

On December 7, 2010, the City planning commission granted the CUP and ASP applications for a "truck and trailer school," subject to certain "conditions of approval" which Mr. Banghu acknowledged and signed. Mr. Banghu did not appeal the planning commission's approval of the CUP and ASP and their conditions of approval. The conditions of approval were designed to ensure that the property would comply with the FMC, would not be detrimental to the public health, safety, or welfare, and would not be materially injurious to properties or improvements in its immediate vicinity. (FMC, § 30-113.)

In a December 8, 2010, letter, Gonzales advised Mr. Banghu's representative that the conditions of approval would "become null and void in two years on or around December 8, 2012, if the proposed use or certain construction failed to commence or if

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<sup>6</sup> In August 2011, Mr. Banghu transferred the property to Bani, LLC, an entity ostensibly owned and controlled by Mr. Banghu.

necessary permits were not obtained.” One condition of approval required the removal of “two large, unpermitted metal structures.”

On November 17, 2012, the City planning division held a meeting with Mr. Banghu’s representatives regarding the progress of Mr. Banghu’s compliance with the conditions of approval. During that meeting, one of the representatives admitted that a “trucking terminal” had been operating on the property, which was not permitted by the CUP and not allowed by the FMC. It was explained that the trucking terminal was not “grandfathered” during the annexation, unless the proper entitlements from the County had been obtained prior to the annexation. Mr. Banghu’s representatives were also advised how to request an extension of time to comply with the conditions of approval. FMC section 30-43.1.1(a)(4) allows an extension to be granted upon a showing of unavoidable delay not caused by the applicant. On November 19, 2012, Mr. Banghu requested an extension to bring the property into compliance with the conditions of approval.

In response to the extension request, Gonzales and other City staff investigated the property and found that (1) no progress had been made toward complying with the conditions of approval, and (2) other alterations had been made to the property, which “added further violations of the FMC, including the unpermitted construction of a gate, storage of tractor trailers unrelated to the trucking school, and the unpermitted addition of a guard shack and an additional metal building.” Further, since the CUP was issued in December 2010, no plans had been submitted to City for making the improvements

required to bring the property into compliance with the conditions of approval. For these reasons, City denied the extension request.

Hampton inspected the property in April and May 2013, and confirmed it was still being used in violation of the conditions of approval. The property was still being used to operate an unpermitted trucking business, though the CUP only allowed for the operation of a trucking school. As a result of these inspections, Hampton issued two more notices of violation to Mr. Banghu, on April 18 and May 15, 2013. Also on May 15, 2013, Mr. Banghu was informed that the City planning commission was initiating proceedings to revoke the CUP, and that a hearing would be held on June 8, 2013. A notice of the public hearing was sent to Mr. Banghu on May 24, 2013.

The June 18, 2013, hearing proceeded as scheduled. Mr. Banghu did not attend, but his representative, Bruce Cash, appeared and spoke on his behalf. The minutes of the hearing state that Cash “commended City staff for being responsive and their continued work with the property owner,” and requested “more time for the applicant to bring the property into compliance.” At the hearing, the City planning commission unanimously voted to revoke the CUP and ASP, after making several findings, including that “the applicant . . . failed to proceed with a good faith intent to commence upon the proposed use pursuant to the approved CUP and ASP.”

### *C. Plaintiffs’ Opposition Papers*

In opposing the anti-SLAPP motion, plaintiffs asserted that the complaint was not based on City’s “administrative proceedings,” but was “about the discriminatory conduct

by this City against Plaintiffs and for which there is plenty of evidence.” City’s “administrative conduct” was the “end result” of its discriminatory conduct, and City’s “self serving statements that no Pre-Annexation agreements were offered to anyone will be proven incorrect once discovery commences.”

Plaintiffs submitted no witness declarations, affidavits, or deposition testimony in support of their discrimination or harassment claims. Instead, they submitted five unauthenticated exhibits, including a June 8, 2007, staff report by the Local Agency Formation Commission (LAFCO), County of San Bernardino, recommending that City approve “LAFCO #3077” or “City of Fontana Annexation No. 170.”

The LAFCO report shows that Annexation No. 170 involved City’s annexation of 125 acres of land, which included a 6.32-acre area on which a “County-approved” “136-unit apartment complex” was to be built. The LAFCO report explains that City submitted its Annexation No. 170 proposal to LAFCO for its review on December 20, 2006, while the County was still considering the 136-unit apartment project. It was agreed that Annexation No. 170 would “move forward,” and that City would “continue processing the project subject to the County’s Conditions of Approval, as well as the conditions outlined in the City’s Pre-Annexation Agreement that was approved by the City Council on May 8, 2007,” and signed by the property owner. Upon completion of the annexation process, the property owner/developer was to begin construction of the project, under City land use jurisdiction. The LAFCO report does not explain what the City’s “pre-annexation agreement” with the apartment complex property owner entailed.

#### *D. City's Reply Papers*

City objected to plaintiffs' exhibits, including the June 8, 2007, LAFCO report, on various grounds. In a reply declaration, Lopez-Henderson explained that the Island Annexation Program, which included the property, "was limited to . . . Annexation No. 168" and did not include "Annexation No. 170," the subject of the June 8, 2007, LAFCO report. The Island Annexation Program or Annexation No. 168 involved City annexation of some 4,000 parcels, in 32 areas or "islands," and the property was part of Island 29. Thus, the property was not part of Annexation No. 170.

At City's request, the court took judicial notice of a LAFCO staff report, dated August 7, 2006, for Annexation No. 168. In her reply declaration, Lopez-Henderson confirmed that this LAFCO report "accurately reflects Annexation No. 168 . . . and describes in detail the parcels annexed as part of" the Island Annexation Program. As noted, in her original declaration Lopez-Henderson explained that "[p]re-annexation agreements were not utilized at all during the Island Annexation Program process . . . because, for the most part, the subsequent City zoning provisions applied to the Islands were substantially similar to those of the County prior to the annexation. To the extent an existing land use was no longer legal under the FMC, the City would allow any use which was legal under the County Code to continue. Existing use permits or other entitlements issued by the County would be, and have been, honored by the City. . . ."

The LAFCO staff report for Annexation No. 168, submitted by City, does not indicate that City offered any preannexation agreements to any of the property owners

involved in Annexation No. 168, but it directed City to “provid[e] information,” to the annexed property owners, “on the grandfathering of existing legal County uses into the City . . . .” City argued that the LAFCO report for Annexation No. 170 was irrelevant, because “[t]he fact that in an unrelated instance the City offered one pre-annexation agreement in an entirely separate annexation project does nothing to show any discriminatory conduct by the City . . . when the City did not offer Plaintiffs and the owners of 4[,]000 other parcels a pre-annexation agreement in [Annexation No. 168].”

*E. The Trial Court’s Ruling*

In striking the harassment claim but not the discrimination claim, the court explained: “The difficulty that I have is with the first cause of action, and it’s a difficulty for this reason: Part of the cause of action deals not only with what is alleged in the second cause of action, and that is the ongoing harassment by way of City inspections and visits and so forth, but also the allegations include something that is not addressed by [City] in their motion, and that is the allegations set forth that other property owners were allowed to be grandfathered in and that same privilege and opportunity was not extended to these plaintiffs because of their heritage.”

The court noted that City did not address the *portion* of the discrimination claim alleged in paragraphs 11 and 12, and that an anti-SLAPP motion “goes to entire causes of action, not to partial causes of action.” The court agreed that City’s motion was “well-taken” as to the part of the discrimination claim alleging that City discriminated against plaintiffs by issuing citations for FMC violations and otherwise enforcing the FMC

against the property. But the court said: “Inasmuch as there is no evidence presented with regard to the allegations . . . concerning the failure to allow plaintiffs to be grandfathered in, even though the City made such accommodations to other business owners, it seems to me, since I can’t find that the entire cause of action ought to be one as to which the motion to strike is granted, it needs to be denied.”

In response, City pointed out that it had in fact addressed the preannexation agreement allegations, and pointed to the Lopez-Henderson declarations. City argued the Lopez-Henderson declarations, along with the LAFCO report for Annexation No. 168, showed City offered no preannexation agreements in connection with any of the 4,000 properties involved in Annexation No. 168, including the property.

City also argued that the LAFCO report for Annexation No. 170 was inadmissible because it lacked foundation, and it was irrelevant in any event because Annexation No. 170 involved property unrelated to the 4,000 parcels involved in Annexation No. 168. City argued plaintiffs had not met their evidentiary burden on the second step of the anti-SLAPP inquiry: they had offered no evidence to support their allegations that City discriminatorily refused to offer them a preannexation agreement based on their national origin.

In its order, the court found that “the complaint” arose out of City’s protected code enforcement activities and that plaintiffs did not show they were likely to prevail on their harassment claim, but refused to strike the discrimination claim because City “*failed to provide sufficient justification to strike the entire [first] cause of action for*

*Discrimination.*” (Italics and underlining added.) The court’s comments at the hearing also indicate that the court viewed the discrimination claim as a “mixed cause[] of action,” that is, the allegations concerning City’s discriminatory failure to offer plaintiffs a preannexation agreement *were not based on* City’s protected code enforcement activities. The court was also convinced that the Lopez-Henderson declarations did not address this part of the discrimination claim. Thus, it is unclear whether the court refused to strike the “entire” discrimination claim because part of it was *based* on nonprotected activity, or because City failed to adequately address this claim in its evidentiary submissions.

### III. DISCUSSION

#### A. *Section 425.16 and the Standard of Review*

“Subdivision (b)(1) of section 425.16 provides that “[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.” Subdivision (e) of section 425.16 elaborates the four types of acts within the ambit of a SLAPP, including, as pertinent here, “(4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”” (Squires v. City of Eureka (2014) 231 Cal.App.4th 577, 588.)

“A special motion to strike triggers a two-stage inquiry: “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech . . . .’ (§ 425.16, subd. (b)(1).) [Second,] [i]f the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. . . .”” (*Pasternack v. McCullough* (2015) 235 Cal.App.4th 1347, 1354.) To establish the requisite probability of prevailing, the plaintiff ““must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgement if the evidence submitted by the plaintiff is credited.”” [Citation.]” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) Only a cause of action that satisfies both prongs of section 425.16 is subject to a special motion to strike. (*Navellier v. Sletten, supra*, at p. 89.)

*B. Plaintiffs’ Entire Discrimination Claim Is Based on City’s Protected Activities*

City claims the court erroneously concluded that the part of the discrimination claim alleged in paragraphs 11 and 12 of the complaint—that City discriminated against plaintiffs by refusing to offer them a “preannexation agreement” to operate their trucking business on the property—did not arise from City’s protected code enforcement activities. (§ 425.16, subd. (b)(1).) We agree. As we explain, the *entire* discrimination claim is based on City’s protected code enforcement activities.

To be sure, a cause of action does not arise from protected activity merely because it was asserted or filed after protected activity took place. (*Citi of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-77.) Nor does a cause of action necessarily arise from protected activity because it “arguably may have been ‘triggered’ by protected activity.” (*Navellier v. Sletten, supra*, 29 Cal.4th at p. 89.) Rather, the question is whether the cause of action is *based on* protected speech or petitioning activity. (*Ibid.*; *Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266, 1275.)

In determining whether a cause of action is *based on* protected speech or petitioning activity, we consider the pleadings, together with the supporting and opposing affidavits adduced on the motion, “stating the facts upon which the liability . . . is based.” (§ 425.16, subd. (b)(2); see *Navellier v. Sletten, supra*, 29 Cal.4th at p. 89.) “[W]e disregard the labeling of the claim and examine its “‘principal thrust or gravamen,’” or “[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.”” (*Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 710; *Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 209.)

Here, the plaintiffs’ *entire* complaint is based on City’s protected code enforcement activities. First, the court clearly found, and the parties do not dispute, that the principal thrust or gravamen of paragraphs 13 through 22 of the complaint, and the discrimination claim, is that City discriminated against plaintiffs by issuing numerous citations for FMC violations, giving plaintiffs insufficient time to correct the violations,

filing criminal charges based on the violations, and revoking plaintiffs' CUP based on their failure to abide by or implement the conditions of approval.

Likewise, City's alleged discriminatory failure to offer plaintiffs a preannexation agreement was based on City's protected code enforcement activities. The principal thrust or gravamen of this portion of the discrimination claim is that City was trying to drive plaintiffs out of business by imposing "outrageous expense[s]" on them *by taking code enforcement actions against them* rather than allowing them to "continue operating their trucking business pursuant to a preannexation agreement with City, free of FMC requirements. Thus, City's alleged discriminatory failure to offer plaintiffs a preannexation agreement is part and parcel of, and cannot be separated from, City's protected code enforcement activities. Nor does City's alleged discriminatory *motive* in failing to offer plaintiffs a preannexation agreement render this portion of the discrimination claim outside the protection of section 425.16. (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 268-270 [the defendants' alleged gender-based motive in not assigning case work to female attorney plaintiff was based on the defendants' protected attorney selection and litigation funding decisions, and their alleged discriminatory motive for not selecting the plaintiff could not be separated from their protected activities].) Thus, the discrimination claim is not a mixed cause of action. (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287-1288 ["A mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless

the allegations of protected conduct are merely incidental to the unprotected activity.”].) Rather, the claim is entirely based on City’s protected code enforcement activities.

Relying on *Flatley v. Mauro* (2006) 39 Cal.4th 299, 322-325, plaintiffs argue that section 425.16 does not apply to any part of their discrimination claim because City acted *unlawfully* in refusing to allow plaintiffs to enter into a preannexation agreement with City. Section 425.16 does not apply when “either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law.” (*Flatley v. Mauro, supra*, at p. 320.) An activity is unlawful as a matter of law if the defendant concedes the activity was unlawful, or uncontroverted evidence conclusively shows the activity was unlawful. (*Dwight R. v. Christy B., supra*, 212 Cal.App.4th at pp. 711-713; see also *Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1654 [interpreting *Flatley* to mean that the illegal activity must be criminal and not merely violative of a statute in order to be unprotected under § 425.16].) Here, City does not concede, and no uncontroverted evidence shows, that City acted unlawfully in enforcing the FMC against plaintiffs in any respect. Plaintiffs’ mere allegation that City’s code enforcement activities were unlawful is insufficient to render City’s actions unprotected under the anti-SLAPP statute.

### C. *Plaintiffs Did Not Meet Their Burden of Substantiating Their Discrimination Claim*

Because plaintiffs’ entire discrimination claim is based on City’s protected code enforcement activities, the burden shifted to plaintiffs to state and substantiate a legally

sufficient discrimination claim. (*Navellier v. Sletten, supra*, 29 Cal.4th at pp. 88-89.)

Plaintiffs did not meet their burden on this second step of the anti-SLAPP inquiry.

To establish a probability of prevailing on their discrimination claim, plaintiffs were required to “state[] and substantiate[] a legally sufficient claim. [Citations.]” (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) More specifically, they were required to adduce competent, admissible evidence that the claim was “‘legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment . . . .’ [Citation.]” (*Chabak v. Monroy* (2007) 154 Cal.App.4th 1502, 1512-1513.)

In determining whether plaintiffs made a prima facie evidentiary showing on the second prong of the anti-SLAPP inquiry, we consider the pleadings and the evidence adduced on the motion. (§ 425.16, subd. (b)(2).) We neither weigh the credibility nor compare the probative strength of competing evidence (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821), and we disregard declarations lacking in foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26).

City emphasizes that plaintiffs produced *no evidence* to support their discrimination claim. We agree. Though City effectively conceded the authenticity of the June 8, 2007, LAFCO report concerning Annexation No. 170, which plaintiffs adduced without a supporting declaration or request for judicial notice, that LAFCO

report did not indicate that City discriminated against plaintiffs by refusing to offer plaintiffs a preannexation agreement for their trucking business.

The LAFCO report for Annexation No. 170 indicated that City entered into a preannexation agreement with the owner of a 6.32-acre property on which a “County-approved” “136-unit apartment complex” was to be built, prior to annexing that property, as part of a 125-acre annexation in 2007. Ostensibly, that preannexation agreement allowed the owner of the 6.32-acre property to continue with the “County-approved” entitlements for that property, after that property was annexed to City in 2007 and City assumed land use jurisdiction over that property.

Lopez-Henderson explained, however, that no preannexation agreements were offered for any of the 4,000 or so properties annexed in 2006, pursuant to Annexation No. 168, including plaintiffs’ property, because, “for the most part, the subsequent City zoning provisions applied to the Islands were substantially similar to those of the County prior to the annexation.” Plaintiffs adduced no evidence that City offered preannexation agreements to any of the “other existing businesses” operating in the vicinity of plaintiffs’ property, or to any of the 4,000 or so properties that were annexed to City along with plaintiffs’ property in September 2006, under Annexation No. 168.

City also presented evidence that it would have allowed plaintiffs to grandfather or continue operating their trucking business following the September 2006 annexation, had plaintiffs provided documentation to City showing that their trucking business was a permitted use under the County Code. But plaintiffs never provided any such

documentation, and no such documentation was included in the records the County transferred to City in connection with the September 2006 annexation of plaintiffs' property. And no such documentation was ever presented to City during the entire time City attempted to work with plaintiffs in order to bring their property into compliance with the FMC.

#### IV. DISPOSITION

The order denying City's special motion to strike plaintiffs' first cause of action for discrimination is reversed. The matter is remanded to the trial court with directions to dismiss plaintiffs' cause of action for discrimination under section 425.16, the only cause of action alleged in the complaint after the harassment claim was dismissed. The parties shall bear their respective costs on appeal. (Cal. Rules of Court, rule 8.278.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

HOLLENHORST  
J.