

Filed 8/2/12

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MONGOLS NATION  
MOTORCYCLE CLUB, INC.

Plaintiff and Respondent,

v.

CITY OF LANCASTER et al.,

Defendants and Appellants.

B230908

(Los Angeles County  
Super. Ct. No. BC439791)

APPEAL from an order of the Superior Court of Los Angeles County,  
Malcolm H. Mackey, Judge. Appeal dismissed as moot and matter remanded to trial  
court with directions.

Dapeer, Rosenblit & Litvak, William Litvak for Defendants and Appellants.

Law Office of Albert Perez, Jr. and Albert Perez, Jr. for Plaintiff and Respondent.

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Defendants and appellants City of Lancaster, R. Rex Parris, Ronald D. Smith, Ken Mann, Sherry Marquez, Ed Sileo and Mark V. Bozigian (collectively, the defendants or the City) appeal an order denying their special motion to strike the complaint filed by plaintiff and respondent Mongols Nation Motorcycle Club, Inc. (Mongols Inc.). (Code Civ. Proc., § 425.16.)<sup>1</sup>

This case involves the interplay of corporations law and appellate procedure. One week after Mongols Inc. was served with the appellants' opening brief, Mongols Inc. filed a certificate of dissolution with the California Secretary of State, indicating the corporation "has been completely wound up." A dissolved corporation continues to exist for the purpose of winding up its affairs. (*Penasquitos, Inc. v. Superior Court* (1991) 53 Cal.3d 1180, 1183.) However, the continued pursuit of this lawsuit cannot be deemed part of the winding up process of Mongols Inc., in that the certificate of dissolution indicated the corporation was at all times devoid of any assets, debts or liabilities, and therefore had nothing to wind up. Consequently, the dissolution of Mongols Inc. during the pendency of this appeal renders the appeal moot. Further, in view of the dissolution of the corporate entity, the matter shall be remanded to the trial court with directions to dismiss the action in its entirety.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *1. The complaint.*

On June 25, 2010, Mongols Inc., which is the sole plaintiff, commenced this action, naming the following defendants: the City; Parris, mayor and member of the City Council; Smith, vice mayor and member of the City Council; Mann, Marquez and Sileo, members of the City Council; and Bozigian, City Manager. The complaint pled in pertinent part:

Mongols Inc., a California corporation, is a social and fraternal organization with emphasis on riding motorcycles in Southern California. Mongols Inc. planned to hold its annual convention during the weekend of July 17-19, 2009, in Lancaster.

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<sup>1</sup> All statutory references are to the Code of Civil Procedure, unless otherwise specified.

Mongols Inc. secured lodging for its convention by entering into a contract with the Desert Inn Hotel (the Hotel) in Lancaster. Mongols Inc. paid the Hotel about \$14,000 to reserve over 100 rooms, and an additional \$2,500 for a food and beverage guarantee.

Three days before the convention, on July 14, 2009, Parris stated at a City Council meeting that city officials would do whatever it takes to prevent Mongols Inc. from staying in Lancaster that weekend. On July 15, the various defendants met with the owner of the Hotel and told the Hotel the City would close it down unless the Hotel refused to accommodate Mongols Inc; the City's pretext for the threatened closure was that the Hotel owed the City back taxes.

On July 15, 2009, Parris stated to a local television station that "The Mongols are domestic terrorists, and we will treat them accordingly"; the Hotel "will be closed forever tomorrow"; and "I don't care about the civil rights of gang members." He also publicly stated: "We will direct law enforcement to incarcerate you [the Mongols], we will not tolerate your presence. Anybody wearing Mongol colors will serve as a beacon for law enforcement."

On July 16, the various defendants shut down the Hotel by erecting a chain link fence around the establishment, preventing anyone from entering the premises.

Based on the above, Mongols Inc. pled the following causes of action: (1) interference with exercise of civil rights (Civ. Code, § 52.1); (2) deprivation of civil rights under color of state law (42 U.S.C. § 1983); (3) interference with civil rights (Civ. Code, § 51.7); (4) intentional interference with contractual relationship; (5) negligent interference with contractual relationship; (6) intentional infliction of emotional distress (IIED); (7) libel per se; and (8) slander per se.

*2. The City's responsive pleadings and special motion to strike.*

Defendants demurred to the complaint in its entirety, and concurrently filed a motion to strike various portions of the complaint, including punitive damages allegations.

In addition, defendants filed a special motion to strike the complaint pursuant to section 425.16. The moving papers asserted: the defendants were entitled to anti-SLAPP protection because Mongols Inc., a notorious motorcycle gang, was an issue of public interest and its intention to bring hundreds of members to Lancaster for a weekend convention was an issue of intense concern to the City, its officials and its inhabitants.

The moving papers further argued Mongols Inc. could not carry its burden to establish a reasonable probability of prevailing on the merits of its complaint. Movants contended, inter alia: the complaint was legally insufficient; Mongols Inc. lacked standing to press any of the claims raised in the complaint; numerous immunities and privileges barred the claims made in the complaint; the alleged statements constituted non-actionable opinion and were protected by absolute privilege; a corporation cannot recover for mental suffering, so as to bar the intentional infliction of emotional distress claim; there was no allegation that Mongols Inc.'s pecuniary interests were harmed by any defamatory statements and Mongols Inc. could not plead a defamation claim on behalf of its members; and the closing of the Hotel was well within the City's police power, which closed the Hotel due to missing smoke alarms and other code violations.

3. *Mongols Inc.'s opposition to the special motion to strike.*

a. *Arguments.*

Mongols Inc. denied its complaint arose out of a public issue; rather, there was no public issue until defendants broadcast their intention to violate Mongols Inc.'s rights. Further, even if the complaint arose out of protected activity by the City, so as to implicate the anti-SLAPP statute, Mongols Inc. easily could meet its minimal burden in opposing the special motion to strike.

b. *Mongols Inc.'s evidentiary showing of a prima facie case.*

The sole evidence which Mongols Inc. submitted in its opposition papers was the six-page declaration of David Santillan, president of Mongols Inc.<sup>2</sup> Santillan stated:

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<sup>2</sup> The trial court sustained the City's objections to large portions of the Santillan declaration, and Mongols Inc. does not challenge the trial court's evidentiary rulings on

Mongols Inc. is an organization whose members like to ride motorcycles. In the past, some of its members were engaged in criminal activity, “but those days are behind us.” Every year, Mongols Inc. holds a large convention; its 2009 convention was to be held in Lancaster during the weekend of July 17 to 19, 2009, with 250 members expected to attend. On July 13, Mongols Inc. entered into a written contract with the owner of the Hotel in Lancaster, paying \$14,000 to reserve hotel rooms and \$2,500 for the food and beverage guarantee.

On July 15, Parris told a local television station, “The Mongols are domestic terrorists, and we will treat them accordingly”; the Hotel “will be closed forever tomorrow”; and “I don’t care about the civil rights of gang members.” On the same day, Parris also stated publicly: “We will direct law enforcement to incarcerate you [the Mongols], we will not tolerate your presence. Anybody wearing Mongol colors will serve as a beacon for law enforcement.”

On July 16, 2009, various defendants and individuals acting on their behalf erected a chain link fence around the Hotel and forcibly shut it down.<sup>3</sup> As a result, members of Mongols Inc. were unable to attend the Lancaster convention that weekend.

4. *Trial court’s rulings, including its denial of the City’s special motion to strike.*

On January 4, 2011, the various motions came on for hearing.

The trial court denied the City’s special motion to strike the complaint under section 425.16.

The trial court sustained the City’s demurrers solely as to the fifth and sixth causes of action (negligent interference with contractual relationship and IIED) without leave to amend, overruled the balance of the demurrers, and partially granted the City’s motion to strike certain allegations of the complaint.

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appeal. Therefore, we limit our summary of the Santillan declaration to the portions which survived the trial court’s evidentiary rulings.

<sup>3</sup> The trial court’s evidentiary rulings eliminated the assertion in Santillan’s declaration that the City’s closure of the Hotel due to unpaid taxes “was pretextual.”

With respect to the special motion to strike, the trial court ruled in essence: the defendants had not met their burden of establishing the complaint of Mongols Inc. fell within the ambit of section 425.16 so as to be subject to early scrutiny by way of a special motion to strike. Further, even assuming the complaint fell within the anti-SLAPP statute, plaintiff Mongols Inc. established a probability of success on the merits of all its claims except the fifth cause of action for negligent interference with contractual relationship.

5. *The City's appeal from the order denying the special motion to strike.*

The City filed a timely notice of appeal from the order denying the special motion to strike.<sup>4</sup> The City contended the trial court erred (1) in holding Mongols Inc.'s claims did not arise from protected activity by the City; and (2) in denying the City's special motion to strike, because Mongols Inc. failed to meet its burden to establish a reasonable probability of prevailing on its claims.

On April 10, 2012, following oral argument in this matter, the matter was submitted.

6. *Submission vacated for supplemental briefing with respect to impact of corporate dissolution of Mongols Inc.*

On April 20, 2012, this court notified the parties it had taken judicial notice of the records of the California Secretary of State (Evid. Code, § 452, subd. (c), § 459), which records indicated Mongols Inc. (Entity No. C3181302) is a dissolved corporation.<sup>5</sup>

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<sup>4</sup> An order denying a special motion to strike is appealable. (§ 425.16, subd. (i); § 904.1, subd. (a)(13).)

<sup>5</sup> While postjudgment evidence is generally not admissible on appeal, it may be considered to determine whether it renders an issue moot on appeal. (*Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 813 (*Reserve*); 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 340, p. 390.) "It is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered. [Citation.] . . . . However, the rule is somewhat flexible; courts have not hesitated to consider postjudgment events when legislative changes have occurred subsequent to a judgment [citations] or when subsequent events have caused issues to become moot

This court vacated submission and requested supplemental briefing with respect to the impact of the corporation dissolution on Mongols Inc.'s continued prosecution of the instant lawsuit.

On May 28, 2012, this court issued an order to show cause and placed the matter back on calendar, with the essential questions being “(1) whether the City’s appeal from the SLAPP ruling should be dismissed as moot and (2) whether the matter should be remanded to the trial court with directions to enter an order dismissing Mongols’s lawsuit.”

The parties filed supplemental letter briefs prior to the hearing on the order to show cause, which was scheduled for July 17, 2012.

### DISCUSSION

1. *The impact of Mongols Inc.'s corporate dissolution during the pendency of this appeal; the continued prosecution of the instant lawsuit cannot be deemed part of the winding up process of Mongols Inc.*

In reliance on Corporations Code section 2010, subdivisions (a) and (b), Mongols Inc. contends the corporate dissolution has no impact on this litigation because a dissolved corporation continues to exist for the purpose of winding up its affairs, and no action or proceeding to which a corporation is a party abates by reason of its dissolution.<sup>6</sup> Mongols emphasizes that it “stands to obtain a monetary award if it should win the

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[citation].” (*Reserve, supra*, 30 Cal.3d at p. 813.) In *Reserve*, the Supreme Court deemed it appropriate to take judicial notice of an insurer’s postjudgment insolvency. (*Ibid.*)

<sup>6</sup> Corporations Code section 2010 states in pertinent part: “(a) A corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof. [¶] (b) No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason of proceedings for winding up and dissolution thereof.”

lawsuit,” and that it is “subject to a significant monetary award for attorney’s fees” pursuant to section 425.16, subdivision (c)(1), if it is not successful.

This court has before it a copy of the certificate of dissolution which Mongols Inc. filed with the Secretary of State on September 19, 2011.<sup>7</sup> Mongols Inc. filed the certificate of dissolution with the Secretary of State *one week* after the City served Mongols Inc. with the appellants’ opening brief in the instant case. Despite the pendency of the instant litigation, the certificate of dissolution disclaimed the existence of any assets or liabilities.<sup>8</sup> The certificate of dissolution, which was executed under penalty of perjury by Mongols Inc.’s president, David Santillan, stated “The corporation has been completely wound up and is dissolved[,]” the corporation “never incurred any known debts or liabilities,” and the corporation “never acquired any known assets.”

In dissolving, Mongols Inc. was taking irreconcilable positions – it sought to continue prosecuting its complaint for damages against the City, while seeking to avoid the prospect of having to pay the City’s attorney fees and costs in the event the City were to obtain an appellate reversal of the order denying the special motion to strike. (§ 425.16, subd. (c)(1).)

It is settled a dissolved corporation continues to exist for the purpose of winding up its affairs. (See, e.g., *Penasquitos, Inc. v. Superior Court*, *supra*, 53 Cal.3d at p. 1183 [after it has dissolved, a corporation, although no longer permitted to do business as a going concern, continues to exist for purposes of winding up its affairs and, in particular, for discharging obligations and defending lawsuits].) Although a dissolved corporation continues to exist for the purpose of winding up its affairs, the discrete issue presented is

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<sup>7</sup> The certificate of dissolution was appended as an exhibit to a supplemental letter brief filed by the City. The certificate of dissolution, which was filed with the Secretary of State, is properly before this court by way of judicial notice. (Evid. Code, §§ 452, subd. (c), 459; see fn. 5, *ante*.)

<sup>8</sup> A cause of action to recover money in damages is a chose in action and therefore a form of personal property. (*Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949, 956.)



the impact of the instant certificate of dissolution, filed by Mongols Inc. under penalty of perjury.

In the certificate of dissolution, Mongols Inc. represented to the California Secretary of State that the “corporation has been *completely wound up*.” (Italics added.) The certificate of dissolution, in stating the “corporation has been completely wound up,” contradicts any claim that the instant lawsuit is part of a plan of winding up and dissolving. The certificate of dissolution also stated the corporation “never acquired any known assets” and that the corporation “never incurred any known debts or liabilities.”<sup>9</sup>

The “winding up” of a corporation consists of “ ‘realizing its assets, paying its debts and appropriating the amount of profit or loss.’ ” (*Estate of Traung* (1947) 30 Cal.2d 811, 814.) The continued pursuit of this lawsuit cannot be part of the winding up process of Mongols Inc., in that the certificate of dissolution indicated the corporation was at all times devoid of any assets, debts or liabilities, and therefore had nothing to wind up.

In sum, because the corporation admittedly was completely wound up as of the dissolution date of September 19, 2011, the continued prosecution of the instant litigation cannot be deemed part of the winding up process of Mongols Inc.<sup>10</sup>

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<sup>9</sup> Corporations Code section 1905 requires the certificate of dissolution to state the corporation’s “known debts and liabilities have been actually paid, *or* adequately provided for, *or* paid or adequately provided for as far as its assets permitted, *or* that it has incurred no known debts or liabilities, *as the case may be*.” (*Id.* subd. (a)(2), italics added.) The certificate of dissolution must also state the corporation’s “known assets have been distributed to the persons entitled thereto *or* that it acquired no known assets, *as the case may be*.” (*Id.* subd (a)(3), italics added.) Here, Mongols Inc. stated it *never* had any assets and that it *never* incurred any debts or liabilities.

<sup>10</sup> In its supplemental briefing, Mongols Inc. indicates that on April 17, 2012, it submitted the paperwork to become an LLC, and that approval is pending. However, the creation of a new limited liability company, many months after the corporate dissolution, precludes Mongols Inc. from characterizing this circumstance as a “mere transformation” from a corporation to a limited liability company. To reiterate, as of September 19, 2011, the corporation was “completely wound up and [was] dissolved.”

**DISPOSITION**

The City's appeal from the order denying the special motion to strike is dismissed as moot. The matter is remanded to the trial court with directions to enter an order dismissing Mongols Inc.'s action in its entirety. The parties shall bear their respective costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.