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INSIGHT · CORPORATE GOVERNANCE

Demand Futility After Bader v. Anderson: How to Plead California Derivative Cases in 2026

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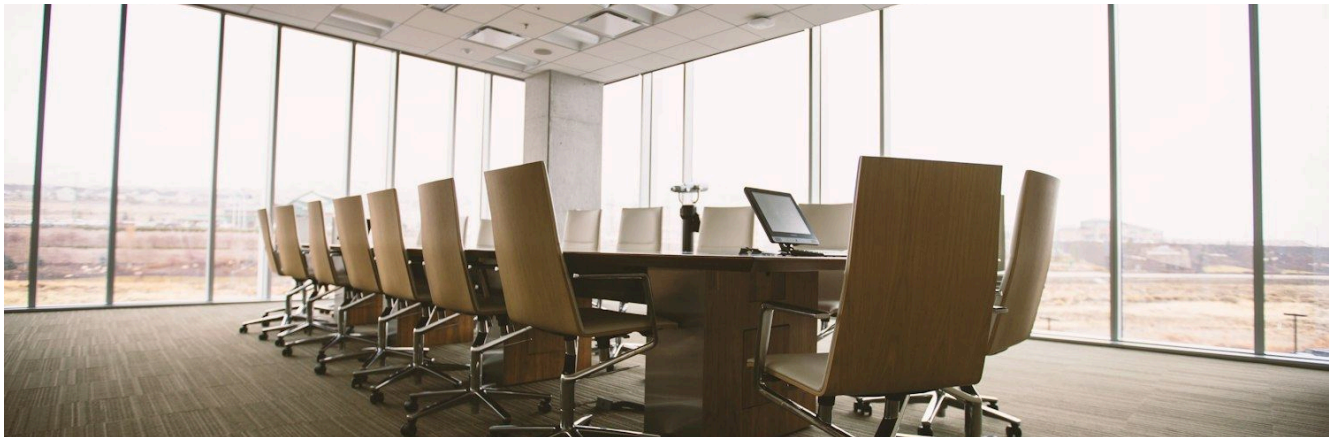

Corporations Code section 800 conditions a shareholder's suit on the corporation's behalf on a pleaded demand or a particularized excuse.

A shareholder who sues on a corporation's behalf must first ask the board to act, or must explain with particularity why asking would be pointless. This memorandum sets out the California statute, the leading appellate decisions, and the effect of Delaware's 2021 restatement of the futility test, as of November 2026.

I. Question Presented

What must a shareholder plead to excuse a pre-suit demand in a derivative action filed in a California court, and does Delaware's universal test from *United Food & Commercial Workers Union v. Zuckerberg* displace the *Aronson* and *Rales* framework applied in *Bader v. Anderson*?

II. Short Answer

Corporations Code section 800, subdivision (b)(2), requires the complaint to allege "with particularity" the plaintiff's efforts to secure board action "or the reasons for not making such effort." *Bader v. Anderson* (2009) 179 Cal.App.4th 775 applied Delaware's *Aronson* and *Rales* tests as persuasive authority to a California corporation and required director-by-director facts. For a Delaware corporation, a California court will likely apply *Zuckerberg*'s three-part test, as the court did in *Tola v. Bryant* (2022) 76 Cal.App.5th 746, where the parties agreed Delaware law governed. We located no published California decision applying *Zuckerberg* to a California corporation.

III. Governing Law

A. Corporations Code Section 800

Section 800, subdivision (b), bars any action "in right of any domestic or foreign corporation" by a shareholder unless two conditions are met. (Corp. Code, § 800, subd. (b).)

1. **Contemporaneous ownership.** The plaintiff must allege ownership, of record or beneficially, "at the time of the transaction or any part thereof" complained of, or devolution of the shares by operation of law from such a holder. (§ 800, subd. (b)(1).) The court may excuse the requirement after a hearing if it finds five conditions, including a "strong prima facie case," no similar action, acquisition before disclosure of the wrongdoing, a risk that a defendant would retain a gain from a willful fiduciary breach, and no resulting unjust enrichment. (*Ibid.*)
2. **Demand or futility, and notice.** The plaintiff must plead with particularity the demand made or the reasons for not making it. The plaintiff must also allege that it informed the corporation or board in writing of "the ultimate facts of each cause of action against each defendant," or delivered a true copy of the proposed complaint. (§ 800, subd. (b)(2).)

B. Security for Costs

Within 30 days after service of summons, the corporation or an officer or director defendant may move for an order requiring the plaintiff to furnish a bond. (§ 800, subd. (c).) The grounds are that there is "no reasonable possibility" the action will benefit the corporation or its shareholders, or that the moving defendant did not participate in the challenged transaction. (*Ibid.*) The court may extend the 30-day period by up to 60 days for good cause. (*Ibid.*) If the movant shows "a probability in support of any of the grounds," the court fixes a bond not to exceed $50,000. (§ 800, subd. (d).) The action is dismissed as to a defendant if the bond is not furnished in the time fixed. (*Ibid.*) A plaintiff may moot the motion by posting a $50,000 bond. (§ 800, subd. (e).) Filing the motion stays the action until 10 days after it is decided, and no responsive pleading is due meanwhile. (§ 800, subd. (f).)

C. The Demand Requirement in the Case Law

In *Shields v. Singleton* (1993) 15 Cal.App.4th 1611, the court held that broad allegations that directors participated in, conspired in, or aided and abetted the wrongdoing did not excuse demand. (*Id.* at p. 1621.) It required that "the court must be apprised of facts specific to each director." (*Id.* at p. 1622.) The demand rule exists "to encourage intracorporate resolution of disputes." (*Id.* at p. 1619.)

Bader v. Anderson involved a derivative challenge to an Apple bonus plan approved after an allegedly misleading proxy statement. The Court of Appeal held that failure to satisfy section 800(b)(2) leaves the shareholder without standing. (179 Cal.App.4th at p. 793.) Noting that Apple was a California corporation, the court found "little to suggest that the law of Delaware controls," but treated Delaware decisions as instructive because Delaware law was "not inconsistent with California law relevant here." (*Id.* at p. 791, fn. 5.)

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IV. Analysis

A. The Bader Framework

Bader adopted two tests. Under *Aronson v. Lewis* (Del. 1984) 473 A.2d 805, demand is excused if particularized facts create a reasonable doubt that "(1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." (*Bader*, *supra*, 179 Cal.App.4th at p. 791.) The prongs are disjunctive. (*Ibid.*) Under *Rales v. Blasband* (Del. 1993) 634 A.2d 927, which governs when the board did not make the challenged decision, the question is whether the board in office when the complaint is filed could impartially consider a demand. (*Bader*, at pp. 791–792.)

The court applied both. The claim that the full board never approved the plan involved no board decision, so *Rales* governed. (179 Cal.App.4th at p. 797.) The proxy claim rested on a conscious board decision, so *Aronson* governed. (*Ibid.*) The allegation that every director was liable for the proxy statement was "wholly conclusory." (*Ibid.*) A "mere threat of personal liability" does not impugn disinterestedness, and board approval alone does not establish futility. (*Id.* at pp. 792–793.) The court also refused to create an exemption from demand for proxy-statement claims. (*Id.* at pp. 794–796.)

B. Pleading Interest and Independence

Bader collected the Delaware standards a pleader must meet. A director is interested where the facts show "a potential personal benefit or detriment to the director as a result of the decision." (179 Cal.App.4th at p. 792.) Lack of independence requires specific facts that the director is "beholden" to an interested person. (*Ibid.*) An allegation that a controlling shareholder personally selected the directors is not enough. (*Ibid.*) Nor are allegations of friendship or outside business ties, standing alone. (*Ibid.*)

C. Zuckerberg's Universal Test

In September 2021, the Delaware Supreme Court adopted a three-part test "as the universal test for assessing whether demand should be excused as futile." (*United Food & Commercial Workers Union v. Zuckerberg* (Del. 2021) 262 A.3d 1034, 1058.) On a director-by-director basis, the court asks whether the director (i) received a material personal benefit from the alleged misconduct, (ii) faces a substantial likelihood of liability on any of the claims, or (iii) lacks independence from someone in either category. "If the answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile." The court stated that "[i]t is no longer necessary to determine whether the *Aronson* test or the *Rales* test governs" a complaint's demand-futility allegations. (*Zuckerberg*, *supra*, 262 A.3d 1034.)

In *Tola v. Bryant*, a derivative suit concerning Intel, a Delaware corporation headquartered in California, the First District applied *Zuckerberg* on de novo review and affirmed dismissal. (76 Cal.App.5th 746.) The parties there agreed that Delaware law governed. (*Ibid.*)

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D. California Corporations

For a California corporation, *Bader* remains the most detailed published statement. Its footnote 5 treats Delaware law as persuasive only to the extent consistent with California law. A California court could find *Zuckerberg* persuasive on the same basis. We found no published decision that has done so. A pleader should therefore satisfy both formulations. Section 800's own requirements, including written notice of the ultimate facts and the bond procedure, apply by their terms to domestic and foreign corporations alike. (§ 800, subd. (b).)

E. Timing

Bader quoted *Aronson* that futility "is gauged by the circumstances existing at the commencement of a derivative suit." (179 Cal.App.4th at p. 791.) In *Apple Inc. v. Superior Court* (2017) 18 Cal.App.5th 222, the Court of Appeal held that where an amended complaint "alleges derivative claims that were previously deemed legally insufficient," the demand requirement "must be assessed in relation to the board of directors in place when the amended complaint is filed." (*Id.* at p. 251.) A change in board composition matters only for claims "not already validly in litigation." (*Id.* at p. 234.)

V. Practical Considerations

- **Plead director by director.** For each member of the demand board, allege the specific benefit, the specific liability exposure, or the specific relationship that compromises independence. Group allegations failed in *Shields* and *Bader*.
- **Count the board.** Under *Zuckerberg*, futility requires a "yes" answer for at least half of the demand board. Identify that board as of the operative complaint.
- **Serve the statutory notice.** Deliver the ultimate facts of each cause of action against each defendant in writing, or a copy of the proposed complaint, and plead that delivery. (§ 800, subd. (b)(2).)
- **Prepare for the bond motion.** A defense motion under section 800(c) stays the case. The plaintiff's evidence of a reasonable possibility of corporate benefit should be ready at filing. The bond ceiling is $50,000.
- **Confirm ownership dates.** Section 800(b)(1) requires ownership at the time of the transaction. A late purchaser must satisfy all five statutory conditions for discretionary relief.
- **Identify the state of incorporation early.** It controls which demand-futility standard the court will treat as governing.

VI. Authorities Cited

- Corporations Code section 800
- *Bader v. Anderson* (2009) 179 Cal.App.4th 775
- *Shields v. Singleton* (1993) 15 Cal.App.4th 1611
- *United Food & Commercial Workers Union v. Zuckerberg* (Del. 2021) 262 A.3d 1034
- *Tola v. Bryant* (2022) 76 Cal.App.5th 746

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- *Apple Inc. v. Superior Court* (2017) 18 Cal.App.5th 222
- *Aronson v. Lewis* (Del. 1984) 473 A.2d 805, and *Rales v. Blasband* (Del. 1993) 634 A.2d 927, as quoted in *Bader v. Anderson*, *supra*

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