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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PAUL MOEBIUS et al.,

Plaintiffs and Appellants,

v.

PIXELS ANIMATION STUDIOS, INC. et
al.,

Defendants and Respondents.

D058396

(Super. Ct. No. 37-2008-00091593-
CU-MC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey B. Barton, Judge. Affirmed.

Plaintiffs and appellants Paul Moebius, Kurt Jafay and Daniel Horwitz, all shareholders of Pixels Animation Studios, Inc. (Pixels), appeal from a judgment on the pleadings in favor of defendants and respondents Silicon Color, Inc. (Silicon), and its directors Peter Carton, Roland Wood, Kenn Walker, Teague Cowley and Steve Thompson. Alleging their action was a derivative suit, plaintiffs sought to recover benefits defendants were alleged to have received as a result of the diversion of a Pixels

business opportunity by another Silicon director, Andrew Bryant. The trial court granted judgment on the pleadings in part on grounds plaintiffs failed to state a claim for unjust enrichment; the claim was time-barred; and absent assertion of an alter ego theory, the individual shareholders could not be held personally liable. The court denied plaintiffs' later request for leave to amend.

Plaintiffs contend the complaint states timely causes of action for unjust enrichment as well as conspiracy to breach fiduciary duty, and the alter ego doctrine is not necessary to impose liability on the defendant directors. They argue the court erred in denying them leave to amend to allege the conspiracy cause of action. In addition to disputing these arguments, defendants contend plaintiffs lack standing to bring suit because they failed to comply with Corporations Code section 800.

We find merit in defendants' assertion that plaintiffs lack standing to bring this derivative action for their failure to meet prerequisite demand requirements or demonstrate such a demand would be futile. In reaching this conclusion we reject plaintiffs' assertion that the action may be brought as an individual direct action. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In keeping with the applicable standard of review, we recite the background facts from the properly pleaded or implied factual allegations of plaintiffs' complaint. (See *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166; accord, *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081 [standard for demurrer].)

Plaintiffs are shareholders of some of the issued and outstanding capital shares of Pixels, and were shareholders of record and/or beneficially at the time of the transactions alleged in the complaint. In early 2003, Bryant was an officer, director, and controlling shareholder of Pixels. During that time, he began developing certain color correction software called Final Touch. Starting in May 2003, Bryant began developing plans to divert the business opportunity of Final Touch from Pixels. Bryant communicated with Carton, Wood and Walker about the formation of a new company to which Bryant would divert Final Touch and through which Bryant, Carton, Wood and Walker would derive that software's profits and benefits. Further to those discussions and communications, Silicon was formed in 2003 with Bryant, Carton, Wood and Walker as its first directors.

In June 2003, Silicon held its organizational meeting of directors, and shares were issued to Bryant, Carton, Wood and Walker. Bryant's shares were issued to him in consideration of his assignment of Final Touch to Silicon.

In October 2006, Silicon sold Final Touch to Apple Computer, Inc. (Apple) for the approximate price of \$4,200,000 and other consideration.

As a consequence of the foregoing, in June 2008, an arbitrator entered an interim award finding Bryant had breached his fiduciary duties of loyalty, trust and confidence to Pixels.

As a result of the sale to Apple, Silicon and its shareholders received benefits, and at the time defendants received the benefits, they knew or should have known Final Touch was a Pixels business opportunity.

On September 11, 2008, plaintiffs filed a "complaint for relief based on unjust enrichment" (capitalization omitted), alleging the foregoing facts and demanding an accounting of benefits, restitution, imposition of a constructive trust, and such other relief deemed proper by the court. In part, plaintiffs allege they "have not attempted to secure from the board of Pixels the assertion of the claims alleged in this complaint because . . . Bryant is a majority and controlling shareholder of Pixels with the ability to elect a majority (2 of 3) of Pixels' [*sic*] board. At any such meeting Bryant would nominate and elect two board members who would not prosecute this action."

Defendants moved for judgment on the pleadings, asking the court to judicially notice the original and first amended complaint in a prior action filed by plaintiffs against Bryant (the Bryant action, *Moebius et al. v. Pixels Animation Studios, Inc., et al.* (Super. Ct. San Diego County, 2009, No. GIC880278)), as well as the interim and final arbitration awards in that case requiring Bryant to pay plaintiffs \$1,960,000 for his breach of fiduciary duty to Pixels. They argued plaintiffs lacked standing for their failure to allege compliance with the prerequisite written notice to filing a derivative suit under Corporations Code section 800 or sufficiently allege the requisite futility under that statute. They further argued the complaint was barred by either the three- or four-year statutes of limitation respectively for conversion or breach of fiduciary duty, and plaintiffs were collaterally estopped from arguing otherwise by the arbitrator's finding in the Bryant action that the statute of limitations began to run on July 9, 2003. Defendants argued plaintiffs' complaint failed as a matter of law because unjust enrichment was a nonexistent cause of action. Finally, defendants argued that having failed to allege any

alter ego liability, plaintiffs could not bring a direct claim against individual shareholders or directors. Plaintiffs opposed the motion, in part arguing the statute of limitations had not run, that collateral estoppel did not apply, and they had adequately alleged a timely cause of action for conspiracy to breach fiduciary duty. They concluded their motion with a request for leave to amend "[i]f the Court is inclined to grant the motion"

The trial court granted defendants' motion. It ruled plaintiffs could not state a claim for unjust enrichment because they "failed to allege that defendants have done anything wrong, only that they received the benefits from the sale to Apple," nor had they alleged a conspiracy or sought leave to amend to allege that or other causes of action. Reciting findings from the arbitrator's award in the Bryant action and finding Bryant's breach of fiduciary duty was the gravamen of the complaint,¹ the court ruled the breach of that duty commenced the statute of limitations, knowledge of the breach was imputed

¹ The court's ruling on these points states: "In 2009, Judge Wayne Peterson found that Bryant breached his fiduciary duties and Final Touch was a corporate opportunity that belonged to Pixels. . . . The date began to run at the time of Bryant's wrongful act, that Pixels lost out on an opportunity to develop and market the color correction software. The breach of fiduciary duty is the gravamen of the complaint. As this is a derivative lawsuit, the named plaintiffs have no rights greater than Pixels itself, and the analysis is whether Pixels had discovered the facts sufficient to put it on notice of the claims. The longest statute is 4 years. Judge Peterson found that as of July 9, 2003, Pixels knew or should have known that Bryant was treating the color correction technology as his own and the statute of limitations began to run from that date. According to Judge Peterson, the statute of limitations for breach of fiduciary duty, the claim upon which plaintiffs now base their complaint for unjust enrichment, began to run on July 9, 2003. His interim award states, 'At that time, [Plaintiff] Jafay knew, or should have known that there was a conflict in the information he had been given earlier by Bryant that the new technology was going to be developed as Pixels['s] product, using a wholly-owned subsidiary, and Bryant's later claim, asserted during the July 9th board meeting, that Pixels[] had no interest in the new technology.' . . . Plaintiffs sued on September 11, 2008, and as a result their claims are barred."

to Pixels, and plaintiffs were collaterally estopped by the arbitrator's findings to assert otherwise. The court concluded the individual shareholders could not be subjected to personal liability because plaintiffs conceded they had not asserted a theory of alter ego liability.

Plaintiffs applied ex parte to reopen argument for the purpose of pointing out they had sought leave to amend. Their counsel submitted a declaration explaining that if the court granted the request, plaintiffs would allege that before forming Silicon, "certain of the defendants agreed to go into business together and thereby formed a partnership which led to [Silicon's] . . . formation" and that "Bryant's knowledge of the wrongfulness of his conduct should be imputed to the defendants with whom he first met and agreed to go into business with." The court denied the request, citing Code of Civil Procedure section 1008 and ruling plaintiffs had not shown how their new facts would toll the statute of limitations.

Plaintiffs appeal from the ensuing judgment.

DISCUSSION

I. *Standard of Review*

A judgment on the pleadings should be granted only where, under the facts alleged or properly subject to judicial notice, the plaintiff's complaint fails to state facts sufficient to constitute a cause of action. (*Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5; *Wedemeyer v. Safeco Ins. Co. of America* (2008) 160 Cal.App.4th 1297, 1302.) On appeal, we accept as true the complaint's properly pleaded factual allegations and give them a liberal construction. (*Angelucci v. Century Supper Club*,

supra, 41 Cal.4th at p. 166; *Bezirdijian v. O'Reilly* (2010) 183 Cal.App.4th 316, 321.)

Because the trial court's determination is made as a matter of law, we review its ruling *de novo*. (*Angelucci*, at p. 166.) We will affirm the court's decision if it is correct on any theory; that is, we review the ruling itself, not its rationale. (*Coshov v. City of Escondido* (2005) 132 Cal.App.4th 687, 702; *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787 [standard on demurrer].)

II. *Standing*

Our analysis in this case begins and ends with a claim that was raised below but not addressed by the trial court: defendants' assertion that plaintiffs lack standing to maintain this shareholder derivative suit under Corporations Code section 800. The statute imposes a series of procedural prerequisites for bringing a derivative action, including that the plaintiff allege he or she demanded the desired action from the board and the board's wrongful refusal. (Corp. Code, § 800, subd. (b)(2);² see *Bader v. Anderson*, *supra*, 179 Cal.App.4th at pp. 790; *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1004; *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1258-1259; *Shields v. Singleton* (1993) 15 Cal.App.4th 1611, 1616-1617.) Alternatively, the plaintiff may plead circumstances demonstrating that such a demand on the board would

² In this respect, Corporations Code section 800 provides that the plaintiff in a derivative action allege "with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and allege[] further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file." (Corp. Code, § 800, subd. (b)(2); see *Bader v. Anderson*, *supra*, 179 Cal.App.4th at p. 790.)

have been futile. (*Bader v. Anderson*, at p. 790; *Patrick v. Alacer Corp.*, at p. 1005; *Shields v. Singleton*, at p. 1618.) Failure to comply with the requirements of the statute deprives a litigant of standing, rendering the complaint subject to demurrer. (*Shields*, at p. 1619; see generally *Bader*, 179 Cal.App.4th 775; *Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 127 ["'No action may be instituted or maintained' unless there has been compliance with the statute"].)

Plaintiffs' allegations make it clear they did not demand the board take action on their claims. Rather, on appeal, plaintiffs argue they adequately alleged that such a demand was futile. Specifically, they maintain it was sufficient to allege Bryant was a majority shareholder and could elect and control the majority of Pixels's three-member board under various provisions of the Corporations Code. We disagree.

The requirement that derivative plaintiffs make a suitable demand on the board is excused only under "'extraordinary conditions . . .'" (*Bader v. Anderson*, *supra*, 179 Cal.App.4th at p. 789, quoting *Kaman v. Kemper Financial Services, Inc.* (1991) 500 U.S. 90, 96.) The analysis commonly employed to determine whether a plaintiff has sufficiently alleged such demand futility is whether the facts alleged 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 v. Anderson*, at p. 791, quoting *Aronson v. Lewis* (Del. 1984) 473 A.2d 805, 814 (*Aronson*), overruled on other grounds in *Brehm v. Eisner* (Del. 2000) 746 A.2d 244, 253-254; see also *Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 587 (*Oakland Raiders*).) "[F]utility is gauged by the circumstances existing at the

commencement of a derivative suit.' [Citation.] And the two-prong test under *Aronson* is disjunctive; accordingly, there is demand excusal if either prong is satisfied." (*Bader v. Anderson, supra*, 179 Cal.App.4th at p. 791.)³

As to the first prong concerning disinterested directors, "general, conclusory facts are insufficient" as are "facts relating to the structural bias common to corporate boards throughout America" (*Oakland Raiders, supra*, 93 Cal.App.4th at p. 587.) "The proof must be of 'facts specific to each director from which [the trier of fact] can [find a reasonable doubt] that that particular director could or could not be expected to fairly evaluate the claims of the shareholder plaintiff.'" (*Ibid.*) In *Bader v. Anderson*, the court explained that "[w]here the claim is that specified directors lack independence because they are dominated by a controlling shareholder, the general allegation that the controlling shareholder 'personally selected' the directors is insufficient. [Citation.] Rather, in addition to alleging control, the plaintiff is required to present specific facts showing 'that through personal or other relationships the directors are beholden to the controlling person. [Citation.]' [Citations.] And in this context, simple allegations, of themselves, that a director has a personal friendship or outside business relationship with the controlling person will not suffice to cast a reasonable doubt as to the director's independence." (*Bader v. Anderson, supra*, 179 Cal.App.4th at p. 792, citing *Aronson*,

³ California courts often apply Delaware law on the adequacy of demand futility allegations. (See *Bader v. Anderson, supra*, 179 Cal.App.4th at p. 797; *Oakland Raiders, supra*, 93 Cal.App.4th at p. 586, fn. 5; see also *Shields v. Singleton, supra*, 15 Cal.App.4th at p. 1621 [parties agreed Delaware and California law were identical on the issue].)

supra, 473 A.2d at p. 815 & *Beam v. Stewart* (Del. 2004) 845 A.2d 1040, 1050, 1052.)

The *Bader* court cited *Beam* for the proposition that plaintiff's allegations must show a relationship between a controlling person and director is so substantial that the " 'non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director' " (*Bader v. Anderson*, 179 Cal.App.4th at p. 792.)

Here, plaintiffs' bare allegations that Bryant had the ability to elect a majority of Pixels's board, and that he would nominate and elect two board members who would not prosecute this action, are conclusory and nonspecific. The complaint lacks particularized facts as to the individual directors at the time of the commencement of plaintiffs' suit, and thus its attempt to allege futility suffers from the flaws identified in *Bader*, *Aronson*, and *Beam*. (*Bader v. Anderson, supra*, 179 Cal.App.4th at pp. 798-799; *Aronson, supra*, 473 A.2d at pp. 814-816 [allegation that director owning 47 percent of corporation's outstanding stock "personally selected" each corporate director did not support claim that directors lacked independence]; *Beam, supra*, 845 A.2d at pp. 1051-1052 [allegations that majority shareholder and other directors moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as friends were insufficient without more to rebut presumption of independence].) The facts do not permit a court to "determine on a director-by-director basis whether or not each possesses independence or disinterest such that he or she may fairly evaluate the challenged transaction." (*Bader v. Anderson*, at p. 790.) The mere fact that Bryant could handpick new board members does not by itself establish he would

exercise control over them, and cannot establish demand futility. Finally, general averments that the directors were involved in a conspiracy or aided and abetted the wrongful acts complained of will not suffice to show demand futility. (*Bader v. Anderson*, at p. 790, citing *Shields v. Singleton*, *supra*, 15 Cal.App.4th at p. 1622.)

We turn to the second *Aronson* prong as to whether the " 'challenged transaction was otherwise the product of a valid exercise of business judgment.' " (*Bader v. Anderson*, 179 Cal.App.4th at p. 791; *Aronson*, 473 A.2d at p. 814.) On this point, plaintiffs do not point to any of the complaint's allegations or engage in legal analysis, but merely assert: "A business opportunity worth millions of dollars that belonged to Pixels was taken from Pixels by respondents' conduct. The benefit that should have gone to all Pixels shareholders went, instead, to Bryant and respondents. It strains credulity to suggest that failure to bring a claim against those who received such money would have been a 'valid exercise of business judgment.' "

Plaintiffs misunderstand this aspect of *Aronson's* test. As the court in *Bader v. Anderson* explained, the Delaware Supreme Court stated that where, as here, the lawsuit does not challenge "conscious decisions by directors to act or refrain from acting," the analysis changes. (*Bader v. Anderson*, *supra*, 179 Cal.App.4th at pp. 791, citing *Rales v. Blasband* (Del. 1993) 634 A.2d 927, 933 [an "essential predicate" for application of this prong of *Aronson* "is the fact that a *decision* of the board of directors is being challenged in the derivative suit"], italics added.) In such cases the question becomes " 'whether . . . the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could

have properly exercised its independent and disinterested business judgment in responding to a demand.' " (*Bader*, 179 Cal.App.4th at pp. 791-792, quoting *Rales v. Blasband*, 634 A.2d at p. 934.)

Under this analysis, a key consideration is the composition of the board at the time the lawsuit is initiated. (See *In re Verisign, Inc. Derivative Litigation* (N.D.Cal. 2007) 531 F.Supp.2d 1173, 1189.) Plaintiffs' complaint in the present case does not as a threshold matter identify Pixels board members at the time of the complaint's filing, much less explain their roles, conduct, disinterestedness or independence. Plaintiffs' complaint contains no particularized facts raising a reasonable doubt as to whether, at the time the complaint was filed, a majority of the board could have properly exercised its independent and disinterested business judgment in responding to plaintiffs' demand. (*Rales v. Blasband*, *supra*, 634 A.2d at p. 934.)⁴ In sum, because plaintiffs have not established that demand on the board in this case was excused, they lack standing to

⁴ In *Rales*, the particularized allegations of the amended complaint permitted the court to conclude two interested directors, brothers Steven and Mitchell Rales, who owned 44 percent of the outstanding stock in the corporation (*Rales v. Blasband*, *supra*, 634 A.2d at p. 930) were in positions to exert substantial influence over two *other* directors on the corporate board. (*Id.* at pp. 936-937.) Specifically, the Rales brothers' positions as chairman of the board and chairman of its executive committee gave them considerable power over the employment and \$1 million salary of one director, a Mr. Sherman, who was employed as president and chief executive officer of the corporation. (*Id.* at p. 937.) The other director, a Mr. Ehrlich, was employed by and received his \$300,000 salary from a separate corporation that was controlled by the Rales brothers as majority stockholders and directors thereof. (*Ibid.*) Considering the financial stake that directors Sherman and Ehrlich would have in continuing their employment and salaries, the court held that they were " beholden " to the Rales brothers or so under the brothers' influence that there was reasonable doubt as to their independence. (*Id.* at pp. 936-937.) There are no such specific factual allegations in plaintiffs' complaint in this case.

pursue their derivative claims. (*Bader v. Anderson, supra*, 179 Cal.App.4th at p. 799; *Nelson v. Anderson, supra*, 72 Cal.App.4th at p. 127.)

III. *Plaintiffs' Lawsuit Seeking Recovery of Profits from a Diverted Business Opportunity is a Derivative Action*

Plaintiffs contend compliance with the demand requirements was unnecessary because they have standing to bring the action individually in a direct, as opposed to derivative, lawsuit. They argue recovery to Pixels does not "make sense" here because Bryant, as a 51 percent shareholder, would get the majority of the recovery. To prevent such a result, plaintiffs argue, the recovery should be not by Pixels, but by the minority shareholders pro-rata. Plaintiffs maintain this position is supported by *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238.

A corporation is a legal entity distinct from its shareholders, and thus the authority to manage its business and affairs, including the authority to commence, defend and control actions on the corporation's behalf, is vested in its board of directors, not in its shareholders. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108.) "Because a corporation exists as a separate legal entity, the shareholders have no direct cause of action or right of recovery against those who have harmed it. The shareholders may, however, bring a derivative suit to enforce the corporation's rights and redress its injuries when the board of directors fails or refuses to do so. . . . [¶] An action is deemed derivative ' "if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its

assets." ' ' When a derivative action is successful, the corporation is the only party that benefits from any recovery; the shareholders derive no benefit ' "except the indirect benefit resulting from a realization upon the corporation's assets." ' ' " (*Grosset*, at p. 1108, quoting *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106-107 (*Jones*); see also *Shuster v. Gardner* (2005) 127 Cal.App.4th 305, 313 (*Schuster*).)

A direct claim, in contrast, asserts a right against the corporation that the shareholder possesses as an individual separate from the corporate entity. (*Jones, supra*, 1 Cal.3d at p. 107.) If an injury is not "incidental to an injury to the corporation, an individual cause of action exists." (*Ibid; Schuster, supra*, 127 Cal.App.4th at p. 313 ["An individual cause of action exists only if damages to the shareholders were not *incidental* to damages to the corporation"].) In *Nelson v. Anderson, supra*, 72 Cal.App.4th 111, a case involving a corporation with only two shareholders, the court explained that "[w]hether there is one minority shareholder or many, an action is individual only if the stock of the individual plaintiff or plaintiffs is the only stock affected adversely." (*Nelson*, at p. 127.) "Examples of direct shareholder actions include suits brought to compel the declaration of a dividend, or the payment of lawfully declared or mandatory dividends, or to enjoin a threatened ultra vires act or enforce shareholder voting rights." (*Schuster*, at p. 313.)

Focusing on the gravamen of the complaint (*Grosset v. Wenaas, supra*, 42 Cal.4th at p. 1108; *Nelson v. Anderson, supra*, 72 Cal.App.4th at p. 124), plaintiffs here seek to recover benefits and profits defendants received from their alleged theft of Pixels's corporate opportunity in its asset Final Touch. These allegations manifestly make out

derivative claims. That is, plaintiffs "seek to recover on behalf of [Pixels] for injury done to [Pixels]" (*Jones, supra*, 1 Cal.3d at p. 107; accord, *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958 (*PacLink*); *Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 426 [summarizing *PacLink* and *Nelson*; "where the wrongful acts of a majority shareholder amounted to misfeasance or negligence in managing the corporation's business, causing the business to lose earnings, profits, and opportunities, and causing the stock to be valueless, . . . the claim was derivative and not individual because the resulting injury was to the corporation and the whole body of its stockholders"]; *Avikian v. WTC Financial Corp.* (2002) 98 Cal.App.4th 1108, 1115 [plaintiffs' core claim that defendants mismanaged a corporation and entered into self-serving deals to sell its assets to third parties amounted to derivative claims].)

PacLink involved a limited liability company⁵ in which the plaintiffs had an approximately 38 percent ownership interest. (*PacLink, supra*, 90 Cal.App.4th at p. 961.) The majority members transferred the company's assets, without receiving consideration, to another company in which the plaintiffs had no interest. The plaintiffs sued the majority members for depriving them of payment for their ownership interests in the company and its business and assets, alleging (among others) causes of action for

⁵ The distinction between a limited liability company and a corporation is of no consequence to the analysis. " 'A limited liability company is a hybrid business entity formed under the Corporations Code and consisting of at least two "members" [citation] who own membership interests [citation]. The company has a legal existence separate from its members. Its form provides members with limited liability to the same extent enjoyed by corporate shareholders [citation], but permits the members to actively participate in the management and control of the company.' " (*PacLink, supra*, 90 Cal.App.4th at p. 963.)

fraudulent transfer, conspiracy to defraud creditors and commit conversion, and imposition of a constructive trust. (*Id.* at pp. 961-962.) The defendant majority members demurred, arguing the company was the injured party, if any, with standing to sue for the purported wrongful transfer of company assets. (*Id.* at p. 962.)

The Court of Appeal in *PacLink* held that the causes of action could only be brought as a derivative action on the company's behalf and issued a writ compelling the superior court to sustain the defendants' demurrer without leave to amend. (*PacLink, supra*, 90 Cal.App.4th at pp. 960-961.) Noting that the same principles governing derivative lawsuits for corporations apply to limited liability companies, the court stated: "In this case, the essence of plaintiffs' claim is that the assets of PacLink[] were fraudulently transferred without any compensation being paid to the LLC. This constitutes an injury to the company itself. Because members of the LLC hold no direct ownership interest in the company's assets (Corp. Code, § 17300), the members cannot be directly injured when the company is improperly deprived of those assets. The injury was essentially a diminution in the value of their membership interest in the LLC occasioned by the loss of the company's assets. Consequently, any injury to plaintiffs was incidental to the injury suffered by PacLink[]. (*PacLink, supra*, 90 Cal.App.4th at p. 964, fn. omitted.) Like *PacLink*, plaintiffs' allegations of diversion of a corporate asset and profits describes an injury to the corporation and not to the individual shareholders. If they as individual shareholders did not eventually benefit or share in the profits from the sale of Final Touch, that injury is merely incidental to the harm to the corporation.

In urging us to reach a contrary conclusion, plaintiffs claim that the case authority is unsettled or contradictory, making it difficult to distinguish a derivative suit from an individual suit. They rely on the First District, Division One's analysis in *Jara v. Suprema Meats, Inc.*, *supra*, 121 Cal.App.4th 1238, and point to *Smith v. Telecommunication Inc.* (1982) 134 Cal.App.3d 338 and *Crain v. Electronic Memories & Magnetics Corp.* (1975) 50 Cal.App.3d 509 as cases evidencing uncertainty. We are not persuaded.

Jara does not reject the distinction between direct and derivative claims where there are few shareholders in a closely-held corporation. Rather, perceiving "tension" in some cases, *Jara* ultimately found *Jones, supra*, 1 Cal.3d 93 offered "controlling authority" with clarity and relevance to its unique facts. (*Jara, supra*, 121 Cal.App.4th at p. 1257.) *Jara* read *Jones* as "allowing a minority shareholder to bring a personal action alleging 'a majority stockholders' breach of a fiduciary duty to minority stockholders, which resulted in the majority stockholders retaining a disproportionate share of the corporation's ongoing value.'" (*Jara*, 121 Cal.App.4th at pp. 1257-1258.) *Jara* involved a three-shareholder corporation in which a minority shareholder sued to recover excess compensation from the two other majority shareholders. (*Id.* at p. 1242.) The plaintiff claimed the defendants used their control of the corporation to increase their salaries as corporate officers to more than the amount agreed to by all three shareholders, with the objective of reducing the amount of profit they had to share with the plaintiff. (*Id.* at p. 1258.) In permitting the plaintiff to sue directly, *Jara* noted he was not alleging the extra compensation injured the corporation, but rather acknowledged the corporation's success:

"[T]he record shows that the company in fact experienced extraordinary growth while preserving operating reserves and access to credit. Indeed, [the plaintiff] testified that he was happy with the way [the majority] ran the business. He does not claim that the company would have experienced still greater prosperity and growth if the salaries had been smaller but rather maintains that the payment of generous executive compensation was a device to distribute a disproportionate share of the profits to the two officer shareholders during a period of business success." (*Id.* at p. 1258.) Under the circumstances, the court found the case came within the scope of allowable individual actions permitted by *Jones*, as it had interpreted that case. (*Ibid.*)

Jara cited but offered no criticism of the holding in *Nelson, supra*, 72 Cal.App.4th 111, where the appellate court found a minority shareholder lacked standing to sue the majority stockholder for mismanagement of the corporation, which had only two shareholders. (*Jara*, 121 Cal.App.4th at p. 1255.) Further, the *Jara* court found traditional justifications or policy reasons favoring derivative action requirements did not apply in its context, where there was a single minority shareholder, "the defendants constitute the entire complement of the board of the directors and all the corporate officers," and the corporation "remains a viable business." (*Id.* at pp. 1258-1259.)⁶ The

⁶ The *Jara* court stated: "We find further support for this conclusion in the absence of any policy considerations favoring derivative actions in the procedural context of the present case. . . . [T]he traditional justification for requiring a derivative action is that 'it is designed to prevent a multiplicity of actions by each individual shareholder and a preference of some more diligent shareholders over others, and to protect the creditors who have first call on the corporate assets' [Citations] [¶] The rule requiring a derivative action may also be justified as serving the policies of Corporations Code

procedural context of the present case, involving Pixels's shareholders suing to recover corporate benefits or profits from directors of an entirely different business entity, does not permit us to reach the same conclusions.

As for other authorities cited by plaintiffs, they are distinguishable on their facts. In *Crain v. Electronic Memories & Magnetics Corp.*, *supra*, 50 Cal.App.3d 509 minority shareholders were held to have stated an individual action where they alleged the majority shareholders engaged in activities (forming a second corporation holding only their own shares in the corporation) that rendered worthless only the stock of the minority shareholders. (*Id.* at pp. 520-521.) *Smith v. Telecommunication Inc.* (1982) 134 Cal.App.3d 338 held the plaintiff—the sole minority shareholder in a subsidiary—asserted an individual cause of action for fraud and breach of fiduciary duty against

section 800 Subdivisions (b)(1) and (c) have the purpose of shielding the corporation from meritless lawsuits by requiring the plaintiffs to have contemporaneous stockownership and by giving the defendants the right to move the court for an order requiring a bond. [Citation.] Subdivision (b)(2), which requires the plaintiffs to submit a demand to the board of directors before filing suit, reflects the legislative intent of encouraging the 'intracorporate resolution of disputes' and protecting 'managerial freedom.' [Citation.] [¶] These policies find little or no application in the present case. The objective of preventing a multiplicity of lawsuits and assuring equal treatment for all aggrieved shareholders does not arise at all when there is only one minority shareholder. The objective of encouraging intracorporate resolution of disputes and protecting managerial freedom is entirely meaningless where the defendants constitute the entire complement of the board of directors and all the corporate officers. And the policy of preserving corporate assets for the benefit of creditors has, at best, a very weak application where the corporation remains a viable business. [¶] In the absence of policy considerations favoring a derivative action, we have no reason to look beyond the strict application of precedent in determining whether a derivative action must be brought to assert a shareholder grievance. We see nothing in *Jones* that bars [plaintiff] from bringing an individual action claiming damages for the breach of fiduciary duty of majority shareholders" (*Jara, supra*, 121 Cal.App.4th at pp. 1258-1259.)

directors of the subsidiary and the parent corporation, when the defendants allegedly had manipulated a consolidated tax procedure to afford increased tax benefits to the corporations, which resulted in a decreased distributive share to the plaintiff upon a sale of the subsidiary's assets. (*Id.* at pp. 344, 345.) The court concluded "it is clear that Smith does not seek to recover on behalf of Crystal Brite [the subsidiary]. He does not contend that the diminishment in his share of the assets reflects an injury to Crystal Brite and a resultant depreciation in the value of its stock. As in [*Jones, supra*, 1 Cal.3d 93], the gravamen of the causes of action is injury to Smith as the only minority shareholder. Smith suffered sufficient injury to bring this action in his individual capacity." (*Smith, supra*, 134 Cal.App.3d at p. 343.)

Having no basis to bring suit on their individual behalf, and failing to meet requisite derivative suit demand requirements, plaintiffs lack standing to bring the present lawsuit. We affirm the judgment in defendants' favor.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.