

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

THE CITY OF MIAMI FIRE	:	APPEAL NO. C-230487
FIGHTERS' AND POLICE OFFICERS'	:	TRIAL NO. A-2200330
RETIREMENT TRUST,	:	
DERIVATEVLY ON BEHALF OF	:	
FIFTH THIRD BANCORP,	:	<i>JUDGMENT ENTRY.</i>
 Plaintiff-Appellant,	:	
 vs.	:	
 GREG D. CARMICHAEL,	:	
 NICHOLAS K. AKINS,	:	
 B. EVAN BAYH III,	:	
 JORGE L. BENITEZ,	:	
 KATHERINE B. BLACKBURN,	:	
 EMERSON L. BRUMBACK,	:	
 C. BRYAN DANIELS,	:	
 THOMAS H. HARVEY,	:	
 GARY R. HEMINGER,	:	
 JEWELL D. HOOVER,	:	
 EILEEN A. MALLESCH,	:	
 MICHAEL B. MCCALLISTER,	:	
 MARSHA C. WILLIAMS,	:	
 DARRYL F. ALLEN,	:	
 ULYSSES L. BRIDGEMAN, JR.,	:	

JERRY W. BURRIS, :  
 JAMES P. HACKETT, :  
 KEVIN T. KABAT, :  
 HENDRIK G. MEIJER, :  
 TAYFUN TUZUN, :  
 FRANK FORREST, :  
 and, :  
 FIFTH THIRD BANCORP, :  
 Defendants-Appellees. :

This court sua sponte removes this cause from the regular calendar and places it on the court’s accelerated calendar, Loc.R. 11.1(C)(1), and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); Loc.R. 11.1.

Plaintiff-appellant The City of Miami Fire Fighters’ and Police Officers’ Retirement Trust (“Plaintiff”), as shareholder of Fifth Third Bancorp (“Fifth Third”), argues in its first assignment of error that the trial court erred by extending the time in which Defendants Greg D. Carmichael and other current and former board members of Fifth Third (collectively “Defendants”) had to answer or otherwise respond to Plaintiff’s complaint.

Plaintiff argues that Defendants’ motion to extend could only be granted upon a showing of excusable neglect. We disagree. Once the trial court lifted its indefinite stay of the underlying case, and prior to the expiration of the 28-day period under Civ.R. 12, Defendants requested an extension of time on the basis that a nearly identical shareholder-derivative action had been filed against Fifth Third’s board in Illinois federal court, and that the federal court had before it a pending motion to dismiss. Under Civ.R. 6(B)(1), the trial court had the discretion to grant Defendants’ motion for an extension for cause, and the trial court did not abuse its discretion in

granting Defendants' motion to extend time. We overrule Plaintiff's first assignment of error.

In its fourth assignment of error, Plaintiff argues that the trial court erred in granting summary judgment in favor of Defendants on the basis of issue preclusion, applying a decision of the Illinois federal court, *In re Fifth Third Bancorp Derivative Litigation*, N.D.Ill. No. 20 C 4115, 2023 U.S. Dist. LEXIS 39171 (Mar. 8, 2023).

Plaintiff argues that Illinois law determines the preclusive effect of the Illinois federal court judgment, citing *Semtek Internatl., Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-509, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001). *Semtek* governs the preclusive effect of a federal judgment issued by a federal court sitting in diversity jurisdiction. The Illinois federal case at issue here was decided under federal-question jurisdiction and supplemental jurisdiction, not diversity jurisdiction. Defendants argue that Ohio law on issue preclusion applies. We need not decide whether Ohio or Illinois law governs the issue precluded here, because we reach the same result under an application of either law. *See Thompson v. Wing*, 70 Ohio St.3d 176, 183, 637 N.E.2d 917 (1994) (collateral estoppel applies when an issue was actually and directly litigated in a prior action by a court of competent jurisdiction, and the party against whom collateral estoppel is asserted is in privity with the party in the previous action); *Nowak v. St. Rita High School*, 197 Ill.2d 381, 390, 757 N.E.2d 471 (2001) (collateral estoppel requires litigation of an identical issue that has been decided by a final judgment on the merits in a prior adjudication, and the party against whom estoppel is asserted is in privity with the party in the previous adjudication).

The issue sought to be precluded in this case is whether, under Ohio law, Plaintiff's failure to make a presuit demand on Fifth Third's board of directors is excused because a demand would have been futile. The Illinois federal court addressed that exact question and entered a final judgment with prejudice on the merits. The demand-futility allegations directed to the individual board members in this case and the allegations in the Illinois federal case apply to the same majority of board members. Both actions allege demand futility based upon the theory that a majority of Fifth Third's board faces a substantial likelihood of liability for recklessly disregarding "red flags" related to Fifth Third's cross-sell strategy and account gaming, and issuing materially false or misleading disclosures in proxy statements and annual reports, as well as insider trading.

Plaintiff argues that its complaint encompasses additional allegations not covered in the Illinois action, such as additional years of alleged misconduct and the absence of board and committee minutes from the books and records production, which would entitle Plaintiff to a reasonable inference that Defendants failed to act on red flags. The fact that the allegations in this complaint are not identical to the allegations in the Illinois federal complaint is not determinative of whether the same demand-futility issue has been previously determined—both complaints attack the independence of the board members based on the same underlying conduct, namely Fifth Third’s cross-sell strategy and account gaming. *See Laborers’ Dist. Council Constr. Industry Pension Fund v. Bensoussan*, Del.Ch. No. 11293-CB, 2016 Del. Ch. LEXIS 87, 28 (June 14, 2016).

Moreover, Plaintiff is in privity with the plaintiffs in the Illinois action for purposes of demand futility, because in a shareholder-derivative action, the corporation itself is the true party in interest. *California State Teachers’ Retirement Sys. v. Alvarez*, 179 A.3d 824, 846 (Del.2018). Plaintiff argues that the plaintiffs in the Illinois action inadequately represented its interests; however, we cannot conclude that the quality of the representation in the Illinois action was grossly deficient, moreover Plaintiff had notice of the Illinois action. *See id.* at 852. Therefore, we determine that the trial court correctly granted summary judgment in favor of Defendants on the basis of issue preclusion, and we overrule Plaintiff’s fourth assignment of error.

In its second assignment of error, Plaintiff argues that the trial court erred in granting Defendants leave to file evidence of board meeting minutes not produced to Plaintiff in the books and records production. In its third assignment of error, Plaintiff argues that the trial court erred in dismissing Plaintiff’s complaint under Civ.R. 12(B)(6) and 23.1 for failure to adequately plead demand futility. Based on our resolution of Plaintiff’s fourth assignment of error, the second and third assignments of error are moot, and we decline to address them.

We affirm the judgment of the trial court granting summary judgment in favor of Defendants.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App.R. 27.

**ZAYAS, P.J., CROUSE and WINKLER, JJ.**

**To the clerk:**

**Enter upon the Journal of the Court on 6/28/2024 per Order of the Court.**

**By: \_\_\_\_\_**  
**Administrative Judge**