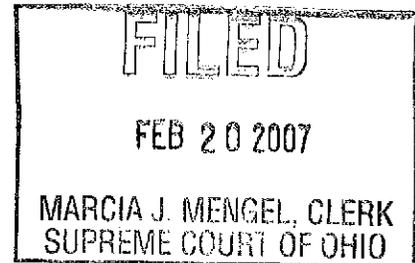


**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO EX REL. : CASE NOS.: 06-2006, 06-2169, 06-2170,
BOARD OF THE STATE : 06-2171, 06-2172, 06-2173
**TEACHER'S RETIREMENT :
SYSTEM OF OHIO, :**
**Relator-Appellee, :
vs. : On Appeal from the**
JUDGE DAVID P. DAVIS, : Hamilton County Court of
Respondent-Appellant, : Appeals, First Appellate District
**and :
MEDCO HEALTH :
SOLUTIONS, INC., et al., :
Defendants-Appellants. :**



**MOTION OF STATE OF OHIO EX REL. BOARD OF THE
STATE TEACHERS RETIREMENT SYSTEM OF OHIO
TO DISMISS ALL PENDING APPEALS**

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Relator/appellee Board of the State Teachers Retirement System of Ohio (“STRS”) hereby moves to dismiss as moot the appeals from the court of appeals’ writ order and from its entries denying defendants’ motions to intervene (Case Numbers 06-2006, 06-2171, 06-2172, and 06-2173) and to dismiss defendants’ discretionary appeals from the entries dismissing their cross-appeals (Case Numbers 06-2169 and 06-2170). The grounds for this Motion are set forth in the accompanying Memorandum in Support.

MEMORANDUM IN SUPPORT

STRS is the plaintiff in the underlying proceedings, captioned *Board of the State Teachers Retirement Systems of Ohio v. Medco Health Solutions, Inc. et al.*, Hamilton County Common Pleas Court Case No. A0309929. The defendants are Medco Health Solutions, Inc. and affiliated companies (collectively “Medco”) and Medco’s parent, Merck & Co., Inc. (“Merck”), the appellees in STRS’s since-dismissed protective appeal. Respondent-appellant, Hamilton County Common Pleas Judge David Davis, has presided over the case up to this point.

Judge Davis presided over a four-week jury trial during November and December 2005, in which the jury found Medco liable for breach of fiduciary duty and constructive fraud, and found Merck jointly liable. (Supp. 14-34).¹ But the jury failed to reach a verdict on, and therefore did not answer, the ensuing punitive damages interrogatory. (*Id.*) The jury also failed to answer a second interrogatory asking whether Medco is liable for breaching a contract regarding rebates. (*Id.*) For more than a year, Judge Davis refused to declare a mistrial and to proceed with a retrial on that which the jury failed to decide. Instead, on September 5, 2006, he entered an order (“the September 5th Entry”) stating that STRS waived a “new trial” by failing to

¹ For the Court’s convenience, all record references in this Memorandum are to the Supplement in Appeal Number 06-2006, which already is on file with the Court.

file a new trial motion within 14 days of the jury's discharge. (Supp. 136-137). Judge Davis entered this order despite explicit, longstanding Supreme Court authority holding that, when a jury fails to answer interrogatories such as occurred in this case, the trial has not been completed and must be retried, regardless whether either party has filed a new trial motion.²

STRS believed that, despite the title of the September 5th Entry ("Order and Final Judgment Entry"), it was not a final, appealable order. Thus, STRS simultaneously filed the following out of an abundance of caution:

- a protective notice of appeal from the "Order and Final Judgment Entry," in which STRS made clear its belief that the September 5th Entry is not, and cannot be, appealable;
- a motion to dismiss STRS's protective appeal on the ground the "Order and Final Judgment Entry" is not appealable; and
- an original action for a writ of procedendo or mandamus in the event the court of appeals concluded that there has been no final, appealable order.

Ultimately concluding there was no final, appealable order, the court of appeals dismissed STRS's protective appeal and defendants' cross-appeals and granted the writ of procedendo, ordering Judge Davis to "proceed with retrial of those claims or causes of action upon which the jury could not reach a verdict." The court of appeals also denied defendants' motions to intervene.

Judge Davis appealed as of right from the writ order issued against him (Case Number 06-2006). Apparently by challenging the denial of their intervention motions, defendants purported to challenge the writ order in their own right (Case Numbers 06-2171, 06-2172, and 06-2173). Defendants also filed discretionary appeals from the entries dismissing their cross-appeals. (Case Numbers 06-2169 and 06-2170).

² *Aetna Casualty & Surety Co. v. Niemiec* (1961), 172 Ohio St. 53, 173 N.E.2d 118.

Judge Davis sought a stay of the writ from the court of appeals. When that stay motion was denied, Judge Davis decided to forgo any further stay requests. In the meantime, defendants asked this Court to stay the writ. In an entry dated January 24, 2007, this Court refused to stay the writ. In the wake of this Court's denial of the stay, Judge Davis reversed course and assigned this case to a visiting judge for trial. On February 9, 2007, he issued an entry setting August 27, 2007 as the trial date before a visiting judge. (See Exhibit A hereto). In other words, Judge Davis now has complied with the writ from which he appealed.

This action renders moot any appeal from the writ order. Defendants are before the Court in the writ proceeding merely as unsuccessful intervenors below. The writ of procedendo was directed to Judge Davis. Now that Judge Davis has complied with it by setting a retrial date and referring the case to a visiting judge for the retrial, it would serve no purpose to proceed further with the consolidated appeals from the writ order. In *State ex rel. Smith v. Fuerst* (2000), 89 Ohio St.3d 456, 457, this Court held that, when a trial judge performs the act that was the object of a writ proceeding, the writ proceeding is moot. Thus, any appeal by Judge Davis (Case Number 06-2006) or defendants (Case Numbers 06-2171, 06-2172, and 06-2173) from the writ order must be dismissed. *Id.* (dismissing an appeal from a writ where the writ proceedings had become moot due to the trial court's compliance with the writ). Now that the writ proceeding is moot, not only must Judge Davis's appeal be dismissed, it also would serve no purpose to proceed with defendants' challenge to the court of appeals' denial of their motion to intervene in the writ action (Case Numbers 06-2172 and 06-2173).

Finally, STRS also requests that the Court dismiss defendants' discretionary appeals from the court of appeals' entries dismissing their cross-appeals (Case Numbers 06-2169 and 06-2170). Judge Davis's entry scheduling this case for a retrial on August 27, 2007 and assigning it

to a visiting judge (Exhibit A hereto) confirms that neither the liability nor damages portion of the case has been fully adjudicated as to either defendant, Medco or Merck, and that, therefore, this is no final, appealable order.³

CONCLUSION

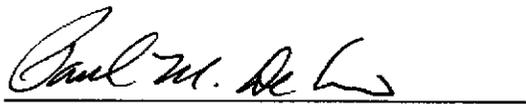
For the foregoing reasons, STRS respectfully requests that the pending appeals from the writ order be dismissed.

Respectfully submitted,


Paul M. De Marco (#0041153)

CERTIFICATE OF SERVICE

The undersigned hereby certifies service of a true and accurate copy of the foregoing on February 20, 2007, by regular mail upon Christian J. Schaefer, Esq., counsel for respondent-appellant Hon. David P. Davis, and upon Earle Jay Maiman, Esq., Renee S. Filiatraut, Esq., and Ronald S. Kopp, Esq., counsel for defendants.



³ STRS also notes that the September 5th Entry contained no Rule 54(B) language.

ENTERED
FEB 09 2007

**IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**



D72000704

**BOARD OF THE STATE TEACHERS
RETIREMENT SYSTEM OF OHIO,**

PLAINTIFF,

v.

**MEDCO HEALTH SOLUTIONS,
INC., et al.,**

DEFENDANTS.

: CIVIL CASE NO.: A0309929
:
: JUDGE DAVID P. DAVIS
:
:
:
: ENTRY SCHEDULING
: RETRIAL OF ISSUES UPON
: WHICH THE JURY COULD
: NOT REACH A VERDICT

The Court hereby schedules for August 27, 2007 the retrial of the issues upon which the jury could not reach a verdict, namely the claim for breach of contract regarding rebates and punitive damages. This jury trial will be conducted by a visiting judge. Any pretrial motions must be filed on or before June 25, 2007.

SO ORDERED.

Judge David P. Davis

MARC DANN, ATTORNEY GENERAL OF OHIO

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EXHIBIT
A

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