

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

In Re: FRANCK’S LAB, INC.	*	MDL NO. 2454
PRODUCTS LIABILITY	*	
LITIGATION	*	SECTION “N” (4)
	*	
	*	JUDGE ENGELHARDT
THIS DOCUMENT RELATES TO	*	MAGISTRATE ROBY
ALL CASES	*	
*****		

**JOINT REPORT NO. 9 OF LIAISON COUNSEL**

Plaintiffs’ Liaison Counsel (“PLC”) and Defendants’ Liaison Counsel (“DLC”), subject to a full reservation of rights and defenses, respectfully submit this Joint Report No. 9.

**I. REPORT OF CLAIMS AND CASE INVENTORY:**

Since the inception of this MDL, 37 cases involving 36 plaintiffs have been transferred, pursuant to MDL panel orders. The attached appendix lists the complaints that were filed or transferred into the MDL, along with their original jurisdiction docket number and MDL docket number.

American Casualty Company of Reading, Pennsylvania (“ACC”) and its insured, James Kilbride have been named as defendants in three new suits filed by the Louisiana plaintiffs (Nos. 14-02604, 14-02608 & 14-02625), which have been transferred to the MDL.

**II. RELATED FEDERAL COURT MATTERS**

Counsel for Evanston and Franck’s in the declaratory judgment action in the Middle District of Florida have advised the court of the pending settlement, which will moot that action. That court has been asked to take no action regarding the submitted motions in anticipation of dismissal due to settlement; pursuant to that request, that court issued an order dismissing the case without prejudice on June 13, 2014.

MDL plaintiffs injured by Brilliant Blue G compounded at Franck's Lab, Inc. filed a new suit in the Middle District of Florida against former Franck's Lab employee and pharmacist-in-charge, James Kilbride (related case number 14-1578). MDL plaintiffs injured by Avastin/Triamcinolone compounded at Franck's Lab, Inc. filed a new suit in the Middle District of Florida against Mr. Kilbride (related case number 14-1579). MDL plaintiffs injured by Triamcinolone compounded at Franck's Lab, Inc. filed a new suit in the Middle District of Florida against Mr. Kilbride (related case number 14-1580). These three actions were transferred on July 9, 2014 to this Court. R. Doc. 133.

### **III. RELATED STATE COURT MATTERS**

The parties are aware of the following state court matters involving the same general facts and allegations of plaintiffs herein:

*Arnulfo Gonzalez v. Franck's Lab, Inc., et al.*, C.A. No. BC526716 (Superior Court of the State of California, County of Los Angeles, Northeast Division)

*Julian James Hendrix v. Franck's Lab, Inc., et al.*, C.A. No. 2012-281 (19<sup>th</sup> Judicial Circuit, Okeechobee County, Florida)

*Nicholas Scunziano v. Franck's Lab, Inc., et al.*, C.A. No. 13-004968 (6<sup>th</sup> Judicial Circuit, Pasco County, Florida)

Although unrelated to the facts and allegations of plaintiffs herein, the parties are aware of the following state court actions, which are identified because coverage is allegedly provided under the same Evanston policy of insurance that provides coverage for the claims of plaintiffs herein:

*Stephen Fulsom, et al v. Franck's Lab, Inc.*, C.A. No. 12-21051 (17<sup>th</sup> Judicial Circuit, Broward County, Florida)

#### **IV. STATE/FEDERAL COORDINATION**

The PSC is in contact with plaintiffs' counsel in the related state court matters for the purposes of coordinating discovery and discussing the prospects of eventual global resolution.

Defendants' Liaison Counsel is in contact with counsel for defendants in the related state court matters for the purposes of coordinating discovery and minimizing the burden on certain eroding insurance policies involved in this litigation.

#### **V. PRETRIAL ORDERS**

The Court has issued the following Pretrial Orders:

Pretrial Order No. 1 entered August 16, 2013 – Initial Matters

Pretrial Order No. 2 entered September 13, 2013 (R. Doc. 8) – Case Management, Motion Practice and Discovery Deadlines

Pretrial Order No. 3 entered September 20, 2013 (R. Doc. 17) – Appointing Liaison Counsel and Plaintiffs' Steering Committee

Bellwether Trial Scheduling Order entered May 20, 2014 (R. Doc. 107) – Scheduling Bellwether Trial on March 2, 2015 and Related Deadlines (Cancelled due to Settlement)

Bellwether Trial Scheduling Order entered September 3, 2014 (R. Doc. 140) – Scheduling Bellwether Trial on June 2, 2015 and Related Deadlines

#### **VI. DISCOVERY**

##### **A. Related to Plaintiffs**

The deadline (January 3, 2014) for counsel representing plaintiffs to comply with the provisions of this Court's Order of October 21, 2013 (Rec. Doc. 32) has passed. Accordingly, plaintiffs have produced documentation to Liaison Counsel regarding proof of exposure, pre-morbid condition of affected eye(s), medical documentation (records and bills) of care received as a consequence of exposure, documentation of wage loss and/or other special damages, and documents that will allow defendants to comply with the Medicare, Medicaid and SCHIP

Extension Act of 2007. Plaintiffs who joined the MDL on or after the deadline in the Court's Order of October 21, 2013 (Rec. Doc. 32) are urged to submit the aforesaid documentation to Liaison Counsel as soon as practicable.

Plaintiffs, through Liaison Counsel, have responded to discovery requests and requests for admission propounded Counsel for Underwriters on the plaintiffs.

**B. Related to Defendants**

Plaintiffs' Liaison Counsel has issued written discovery requests to counsel for Franck's Pharmacy, Inc. and to counsel for Lloyd's and Lloyd's insureds. Fact depositions of certain Franck's Lab employees were conducted on January 28-29, 2014, and fact depositions of insurance brokers and agents of Franck's Lab were conducted on February 25-26, 2014. The deposition of Paul W. Franck was conducted on March 1, 2014.

Paul Franck and Anthony Campbell have responded to discovery propounded by Counsel for Underwriters. Franck's Pharmacy has responded to the discovery propounded by plaintiffs.

As a result of facts discovered in the above-mentioned depositions, and in actions where relevant statutes permit, plaintiffs have amended their complaints to add (or filed new complaints against) the professional liability carrier (ACC) of former Franck's Lab employee and pharmacist-in-charge, James Kilbride, and/or Mr. Kilbride as named defendants. Mr. Kilbride has filed Answers and Affirmative Defenses in the *Antenor*, *Aguilar*, and *Mercedes* cases. Counsel for Mr. Kilbride has subpoenaed the files of the plaintiffs' surgeons in those cases. The PSC, ACC, and/or Mr. Kilbride may conduct additional fact depositions of former Franck's Lab employees and other relevant fact witnesses.

### **C. Pending Discovery Deadlines**

Because defendants, Cincinnati and Franck's Pharmacy, have entered into a settlement agreement with plaintiffs, the deadlines in Record Document 107 now are moot. New discovery deadlines will be necessary once answers are filed by ACC and Mr. Kilbride.

### **VII. MOTION PRACTICE**

On November 6, 2014, the Court denied Mr. Kilbride's Motions to Dismiss for Failure to State a Claim. R. Doc. 180. On November 13, 2014, the Court granted ACC's Motions for Judgment on the Pleadings and dismissed ACC without prejudice from this MDL. R. Doc. 184.

The following Motions are pending:

On January 14, 2015, ACC filed a Motion for Summary Judgment on Applicable Policy Limits. R. Doc. 203.

On January 20, 2015, the PSC filed a Motion to Approve Deduction of Common Benefit Fees and Expenses from the Pending Settlements. R. Doc. 204.

On January 20, 2015, Mr. Kilbride filed a Motion for Extension of Time to Answer in *Johnson, et al v. Kilbride, et al*, 14-2625. R. Doc. 205.

### **VIII. SETTLEMENTS**

Plaintiffs and Evanston Insurance Company, as primary general liability carrier for Franck's Lab, Inc., have come to an agreement-in-principle regarding a policy-limits settlement for the remainder of the Evanston policy. Plaintiffs and Evanston have executed a Memorandum of Understanding to memorialize the agreement, and Evanston has deposited settlement funds into the Registry of the Court.

Plaintiffs and Underwriters, as professional liability carrier for Paul Franck and Anthony Campbell, have come to an agreement-in-principle to resolve all claims against Underwriters,

Mr. Franck and Mr. Campbell. As such, Plaintiffs and Underwriters have agreed to suspend the ongoing discovery and motion practice between the parties. Plaintiffs and Underwriters have executed a Memorandum of Understanding to memorialize the agreement, and Underwriters has deposited settlement funds into the Registry of the Court.

Plaintiffs, Franck's Pharmacy, and Cincinnati Insurance participated in a settlement conference with Magistrate Judge Roby on June 9, 2014. Plaintiffs, Franck's Pharmacy, and Cincinnati Insurance now have executed a Memorandum of Understanding, and Cincinnati has deposited settlement funds into the Registry of the Court.

The Court appointed Magistrate Judge Roby as Special Master for the purposes of allocation of the settlement funds and designated Dr. Turkish as a Court-appointed expert to assist with formulation of an allocation protocol. The deadlines for plaintiffs participating in the pending settlements to submit medical bills and/or medical records that support their claims have passed. R. Docs. 187, 191.

The PSC anticipates that preliminary settlement allocations will be issued by Special Master Roby in the near future. The PSC is working with Medicare representatives to address lien issues on a global basis with the assistance of this Court's recent Order (R. Doc. 201) compelling production of conditional payment information to the PSC. The PSC has filed a motion to set aside reserves for common benefit fees and expenses from the pending settlements. R. Doc. 204.

Plaintiffs and settling defendants intend to proceed with the above-referenced settlements in a manner that does not negatively impact the viability or progress of plaintiffs' claims against the remaining defendants (i.e., ACC and Kilbride) in the MDL. Plaintiffs, Mr. Kilbride and ACC participated in an unsuccessful mediation with John Perry on December 11, 2014. As a result, a

schedule for completing all discovery related to plaintiffs' claims against the remaining defendants should be set.

As a result of these settlements, the parties anticipate the need for selection of an attorney other than Kyle Kirsch as Defendants' Liaison Counsel.

#### **IX. POTENTIAL TRIAL ISSUES**

Plaintiffs, Mr. Kilbride and ACC suggest that the primary trial issue will involve testimony regarding the facts necessary to determine the applicable policy limits in the ACC policy of insurance covering the professional liability of Mr. Kilbride. For purposes of the Motions for Summary Judgment on Applicable Policy Limits filed by ACC, plaintiffs and ACC agree that Florida law applies to policy interpretation. Plaintiffs reserve their right to suggest other state laws are applicable to the relevant standards of care. Plaintiffs, Mr. Kilbride and ACC anticipate, however, that jury instructions related to the standards of care applicable to Mr. Kilbride will be based on Florida law.

Plaintiffs suggest that trial should be bifurcated such that the first trial would consist of fact and expert testimony limited to coverage questions (i.e., the policy limits determination), leaving causation and damages to either a second trial or a stipulation that the damages exceed the applicable policy limits. Under the second scenario, the formula ultimately approved by this Court for apportionment of settlement funds, following a review of plaintiffs' medical records by the Court-appointed Expert (Dr. Turkish) and Special Master (Magistrate Judge Roby), could be used to apportion any judgment amount.

Other issues which may arise at causation/damages trials involving plaintiffs, Kilbride and ACC, include, but are not limited to, (1) apportionment of fault and associated choice of law issues related to the standards of care applicable to health care providers in the states where

plaintiffs were injured, (2) whether common causation/damages issues may be tried by this Court as MDL transferee court on cases originally filed in foreign jurisdictions, (3) and choice of law issues related to the “make whole” and “collateral source” doctrines.

**X. NEXT STATUS CONFERENCE**

The Court has scheduled the next status conference on March 27, 2015 at 8:30 a.m.

Respectfully submitted:

**PLAINTIFFS’ LIAISON COUNSEL**

*/s/Scott E. Silbert*

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 26, 2015, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record who are CM/ECF participants. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to all counsel of record who are non-CM/ECF participants.

*/s/Scott E. Silbert* \_\_\_\_\_

Scott E. Silbert