

## MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding [hereafter “MOU”] memorializes a settlement agreement reached on 1<sup>st</sup> day of May, 2014 between authorized representatives of: the Court-Appointed Plaintiff’s Steering Committee [hereafter “PSC”] in the case of *In Re: Franck’s Lab, Inc. Products Liability Litigation*, MDL No. 2454, Section “N” (4); Evanston Insurance Company and its claims service manager(s), assigns, agents and representatives (hereafter “Evanston”), as liability insurer for Franck’s Lab, Inc., Franck’s Pharmacy, Inc., Franck’s Infusion Pharmacy, Franck’s Home Care LLC, and Franck’s Healthy Lifestyles, and Franck’s Management, L.L.C., and any affiliated trade or fictitious business names thereof, and their parents, subsidiaries, and their officers, directors, members, managers, and employees (hereafter collectively “Franck’s”); and Franck’s, for the matters, risks, and claims asserted in the aforementioned MDL proceeding. The PSC, Evanston, and Franck’s agree in principal to the following:

1. In consideration for payment of Evanston’s three million dollar (\$3,000,000.00) policy limits in policy number SM881696 (hereafter the “Evanston Policy”), less the “Wasted Amount,”<sup>1</sup> which remaining unimpaired amount will be paid by Evanston as one of Franck’s liability insurers, it is understood and agreed that: (1) there will be the release and dismissal with prejudice of all claims made and that could have been made against Evanston under the Evanston Policy arising out of alleged exposure of plaintiffs to tainted products compounded by Franck’s, including but not limited to those identified in Appendix A and B, and any extra-contractual and

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<sup>1</sup> The term “Wasted Amount” means the aggregate sum of expenditures by Evanston on behalf of its named insureds in policy number SM881696 in defense attorney fees and costs. The “Wasted Amount” also includes a reserve for attorney fees and costs estimated by Evanston to be incurred through the conclusion of this settlement.

bad faith claims;<sup>2</sup> (2) there will be the release and dismissal<sup>3</sup> with prejudice of all claims made against insureds of Evanston (including but not limited to Franck's) arising out of alleged exposure of plaintiffs to tainted products compounded by Franck's, subject to plaintiffs' reserving all rights to assert these same claims against any and all other insurance carriers of Franck's, other than Evanston; and (3) there will be the release and dismissal<sup>4</sup> with prejudice of all claims made against employees of Franck's, including but not limited to, Paul W. Franck, Anthony J. Campbell, Douglas Thomas, James Kilbride, Stephen Floyd, John Lyons, and Sara Manrique arising out of alleged exposure of plaintiffs to tainted products compounded by Franck's, subject to plaintiffs' reserving all rights to assert these same claims against any and all other insurance carriers of employees of Franck's, other than Evanston.<sup>5</sup> With respect to ongoing discovery of Franck's related to the MDL plaintiffs' claims against other available insurance, plaintiffs agree to pay all reasonable travel and lodging expenses incurred by Franck's for any deposition and/or trial attendance in New Orleans.

2. The plaintiffs and/or claims to be included in this settlement shall include:
  - (a) all actions filed in or transferred into the aforementioned MDL as identified in Appendix A;

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<sup>2</sup> Full and final releases in favor of Evanston will be executed and dismissals of Evanston will be filed prior to or contemporaneously with Evanston's deposit of its policy limits, less the "Wasted Amount," and the deposit to fund the cost of a Court-appointed, independent medical expert as outlined in ¶ 14 herein.

<sup>3</sup> Releases will be executed prior to or contemporaneously with plaintiffs' withdrawal of any money deposited by Evanston into the registry of the Court, but it is expressly understood and agreed that the Evanston Policy will be exhausted immediately upon Evanston's deposit into the Registry of the Eastern District Court of Louisiana the sum of three million (\$3,000,000.00) less the "Wasted Amount" in accordance with ¶ 4 herein.

<sup>4</sup> Releases will be executed prior to or contemporaneously with plaintiffs' withdrawal of any money deposited by Evanston into the registry of the Court.

<sup>5</sup> The parties acknowledge that the PSC has granted an indefinite extension of time for Franck's to file responsive pleadings. The parties agree not to take any default action against Franck's. The parties agree that Franck's and any named employees of Franck's will remain as nominal defendants for the sole purpose of protecting plaintiffs' interests in any and all available insurance insuring Franck's or its employees for the claims and losses asserted by plaintiffs herein.

- (b) all claims filed against Franck's in related state court actions as identified in Appendix B;<sup>6</sup>
- (c) all claims of individuals identified by the FDA that have been exposed to the allegedly tainted products (i.e., Brilliant Blue G, Avastin, and Triamcinolone) compounded by Franck's that are unfiled and not yet prescribed (i.e., applicable statute of limitations has not passed);
- (d) all claims filed against Franck's that fall within the Evanston Policy period (i.e., August 17, 2011 – August 17, 2012, subject to a one year extended reporting period that expired on August 17, 2013); and
- (e) any other outlier plaintiffs such as those that fall under the Evanston Policy at issue but do not involve the same products that are at issue in the MDL.

In advance of any deposit of funds, the PSC will promptly provide to Evanston written confirmation that all plaintiffs identified in (a) – (b), above, bind themselves to these settlement protocols for participation in the settlement.

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<sup>6</sup> One of the cases listed in Exhibit B is the matter entitled *Nicholas Scunziano v. Franck's Lab, Inc., et al*, C.A. No. 13-004968 (6th Judicial Circuit, Pasco County, Florida). The PSC has agreed to include the *Scunziano* plaintiff in this settlement agreement in consideration of the following: (1) it is alleged that the *Scunziano* case was filed beyond the time for making claims under the claims made Evanston policy; (2) the *Scunziano* plaintiff's alleged injurious exposure to Avastin occurred prior to the time period in which contaminated lots were determined to have been compounded, as identified by FDA investigation and Franck's internal investigation; (3) notwithstanding (1) and (2), the settling defendants herein required inclusion of *Scunziano* in order to reach an agreement on the instant MOU; and (4) the *Scunziano* plaintiff's claims against various Franck's entities could have created a "race-to-the-courtroom" situation that would have placed all participating plaintiffs' interests in potentially available additional insurance at risk. Accordingly, by his attorney's signature below, the *Scunziano* plaintiff agrees to participate in this settlement and agrees to accept 42.5% of any Court-approved allocation pursuant to the binding allocation process defined herein. The *Scunziano* plaintiff further agrees to be a full tag-along participant in any future settlements resulting from this MDL litigation. Notwithstanding any language in this agreement to the contrary, Nicholas and Helen Scunziano specifically reserve any and all claims against any and all medical providers (other than Evanston and Franck's as defined herein, all of whom are fully released and compromised without reservation) for medical negligence or otherwise that are in any way associated with his loss of vision claims. Those claims are not released or in any way compromised herein.

One of the cases listed in Exhibit B is the matter entitled *Stephen Fulsom, et al v. Franck's Lab, Inc., et al*, C.A. No. 12-21051 (17th Judicial Circuit, Broward County, Florida). Notwithstanding any language in this agreement to the contrary, Stephen and Jerona Fulsom specifically reserve any and all claims against any and all health care providers, pharmacists, and others (other than Evanston and Franck's as defined herein, all of whom are fully released and compromised without reservation) for negligence that are in any way associated with his loss of vision claims. Those claims are not released or in any way compromised herein.

3. Franck's does not agree to waive its attorney/client privilege regarding narratives on fee bills. Within ten (10) days of execution of this Memorandum of Understanding, Evanston will produce to the PSC a breakdown of totals for defense costs incurred and paid, and of work-in progress, from each respective jurisdiction where a related claim is pending.

4. Within thirty (30) days of execution of this Memorandum of Understanding, or Evanston's receipt of written confirmation that all claimants identified in Section 2.(a) – (b), above, agree to be bound by these settlement protocols for participation in the settlement, whichever is later, Evanston shall pay into the Registry of the Eastern District of Louisiana the sum of three million dollars (\$3,000,000.00) less the "Wasted Amount."

5. In addition to the amount set forth in paragraph 4, Evanston shall pay into the Registry of the Eastern District of Louisiana the sum of twenty-thousand dollars (\$20,000.00). In exchange for this payment by Evanston, the PSC and all Plaintiffs agree to completely waive and fully release their alleged claim to challenge the reasonableness of the "Wasted Amount," or to seek additional documentation regarding the "Wasted Amount," other than what is set forth in paragraph 3 above. This additional sum will be paid by Evanston at the same time and on the same terms as set forth in paragraph 4 above.

6. As part of this settlement agreement, Franck's will be released subject to plaintiffs' reserving the right to pursue Franck's to the extent they carry other valid and collectible insurance issued by insurers other than Evanston. The PSC and any and all related Plaintiffs agree not to execute any judgment against any of the personal or corporate assets of

Franck's. Plaintiffs will promptly<sup>7</sup> dismiss any Franck's employee when provided with (1) a copy of an order or judgment determining that the employee's polic(y/ies) of insurance do(es) not provide coverage for the harms and losses claimed by plaintiffs and/or (2) an affidavit executed by the employee of no other coverage.

7. The PSC and any and all related plaintiffs will, within thirty (30) days of execution of this Memorandum of Understanding, supply Evanston the identity of each plaintiff/claimant which will be part of this proposed settlement and the Medicare/Medicaid information for each plaintiff which Evanston needs to comply with its Medicare/Medicaid reporting requirements. At the very least, this information must include:

- (a) Health Insurance Claim Number ("HICN" a.k.a. Medicare Number);
- (b) Last Name;
- (c) First Name;
- (d) Gender; and
- (e) Date of Birth (MMDDCCYY format).

8. As part of this settlement agreement, plaintiffs agree to execute a full receipt and release agreement which will include plaintiffs' assumption of the duty to defend and indemnify Evanston and Franck's and their counsel from Medicare/Medicaid and any and all other medicals and liens. Each plaintiff shall be required to execute a release to address his/her status as a Medicare Beneficiary as follows:

Plaintiff/Claimant became eligible for and enrolled in Medicare as of [Insert Date]. Plaintiff/Claimant affirms that conditional payment information (any benefits paid by Medicare up to the date of settlement) has been requested from the Centers for Medicare & Medicaid Services (CMS) (this term includes any related agency representing Medicare's interests) and that such conditional payments, if any, are the responsibility of Plaintiff/Claimant and must be satisfied

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<sup>7</sup> If the dismissal is due to plaintiff being provided with a copy of a judgment or order of dismissal, plaintiff may delay dismissal pending the running of all applicable appeal delays.

out of these settlement proceeds. If Plaintiff/Claimant fails to satisfy any such claims by CMS, Plaintiff/Claimant agrees to indemnify, defend and hold Evanston Insurance Company and Markel Service, Incorporated harmless from any action by CMS relating to medical expenses of Plaintiff/Claimant. Plaintiff/Claimant agrees to reasonably cooperate with Evanston upon request with respect to (i) any information needed to satisfy the reporting requirements under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007, and (ii) any claim that the CMS may make and for which Plaintiff/Claimant is required to indemnify Evanston under this paragraph. Furthermore, Plaintiff/Claimant agrees to waive any and all future actions against Evanston or any private cause of action for damages pursuant to 42 U.S.C. § 1395y(b)(3)(A).

9. Defense and indemnification provisions will be included in the receipt and releases. The parties agree to bear their own costs of lien (i.e., Medicare and Medicaid) resolution services and/or reporting requirements under the Medicare Secondary Payer Statute or other laws.

10. The claims of plaintiffs against all other defendants that are not Evanston insureds, any and all primary and excess insurance carriers other than Evanston, and professional liability carriers of employees of Franck's other than Evanston, are not released and are fully preserved under this agreement.

11. As part of this agreement, Franck's agrees to assign any and all rights they may have against their insurance brokers and/or insurance agents for alleged breaches of their duties with respect to provision of adequate insurance coverage to Franck's related to the claims asserted by plaintiffs in the aforementioned MDL proceeding. In the event that Franck's is made a defendant or is otherwise implicated in any such claim or suit, plaintiffs agree to indemnify, hold harmless, and defend Franck's in any such claim or suit.

12. It is understood and agreed that this is not a proposed class settlement, and that all individual claimants included in this settlement, and their counsel, must agree to the final release

and dismissal of the referenced claims against Evanston and its insureds. The PSC agrees to take all steps necessary to achieve this outcome, and Evanston agrees to cooperate with the PSC in providing information to facilitate this effort. In the event that the terms of this Agreement are breached by plaintiffs or the proposed settlement fails, Evanston expressly reserves the right for the full and complete return of the policy limits deposited into the registry of the Court. In advance of any deposit of funds, the PSC will provide written confirmation to Evanston that all claimants bind themselves to these settlement protocols for participation in the settlement.

13. A motion and order of full and final dismissal of all claims against Franck's released by this settlement, shall be submitted to the Court at the conclusion of the MDL proceedings. This Order will itemize and identify by way of attachment all actions and claims which are subject to the settlement.

14. Following entry of the motion and order of dismissal, all claimants included in this settlement will proceed with a binding allocation process to be administered by the MDL court. Neither Evanston nor Franck's will be called upon to participate in this process, but rather they will have been dismissed and also they will have relinquished control over the deposited settlement funds so that these funds may be accessed for allocation and cost-of-allocation purposes.

15. To avoid potential or actual conflicts of interest, the PSC and plaintiffs' counsel agree that the binding allocation process will vest allocation decisional authority in a Court-appointed neutral, e.g., a Magistrate designated in the MDL and/or a Special Master. In addition to the agreed upon settlement amount, Evanston will fund up to \$40,000.00 of the cost of a Court-appointed, independent medical expert to assist the Court-appointed neutral with

allocation criteria.<sup>8</sup> At the conclusion of the independent medical expert's involvement, the PSC will provide to Evanston an accounting of all fees paid to said expert. If the fees paid to the independent medical expert total less than \$40,000.00, the remaining unused portion of the \$40,000.00 amount shall be refunded to Evanston.

16. All disputes or issues regarding interpretation and enforcement of the agreement shall be determined under Louisiana law.



This Agreement to memorialize the settlement reached on May 1, 2014 is executed this 1<sup>st</sup> day of May, 2014.

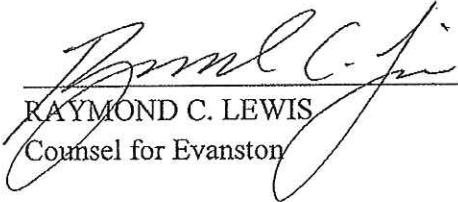

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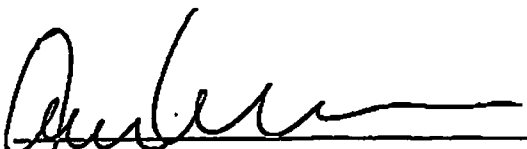
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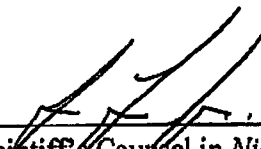
<sup>8</sup> Evanston's responsibility for funding this Court-appointed medical expert will not exceed \$40,000.00. The PSC will be responsible for any expenses of this expert that exceed \$40,000.00.




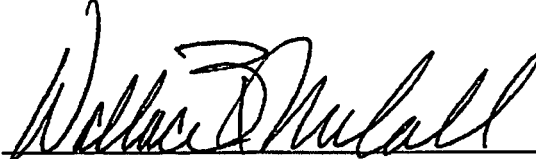
 <hr/> <b>SCOTT E. SILBERT</b> Liaison Counsel for Plaintiffs	 <hr/> <b>CRAIG WATSON</b> Counsel for Franck's (as defined herein)
<hr/> <b>RAYMOND C. LEWIS</b> Counsel for Evanston	<hr/> <b>SONIA ODARCZENKO</b> Markel Service, Incorporated, as Claims Service Manager for Evanston
<hr/> Plaintiff's Counsel in <i>Arnulfo Gonzalez v. Franck's Lab, Inc., et al.</i> , C.A. No. BC526716	<hr/> Plaintiff's Counsel in <i>Julian James Hendrix v. Franck's Lab, Inc., et al.</i> , C.A. No. 2012-281
<hr/> Plaintiff's Counsel in <i>Stephen Fulsom, et al v. Franck's Lab, Inc.</i> , C.A. No. 12-21051	<hr/> Plaintiff's Counsel in <i>Nicholas Scunziano v. Franck's Lab, Inc., et al.</i> , C.A. No. 13-004968

<hr/> <p>SCOTT E. SILBERT Liaison Counsel for Plaintiffs</p>	<hr/> <p>CRAIG WATSON Counsel for Franck's (as defined herein)</p>
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 <hr/> Plaintiff's Counsel in <i>Stephen Fulsom, et al v. Franck's Lab, Inc.</i> , C.A. No. 12-21051	<hr/> Plaintiff's Counsel in <i>Nicholas Scunziano v. Franck's Lab, Inc., et al.</i> , C.A. No. 13- 004968

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<hr/> <p>Plaintiff's Counsel in <i>Stephen Fulsom, et al v. Franck's Lab, Inc.</i>, C.A. No. 12-21051</p>	 <hr/> <p>Plaintiff's Counsel in <i>Nicholas Scunziano v. Franck's Lab, Inc., et al.</i>, C.A. No. 13-004968</p>

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<hr/> <p>Plaintiff's Counsel in <i>Stephen Fulsom, et al v. Franck's Lab, Inc.</i>, C.A. No. 12-21051</p>	<hr/> <p>Plaintiff's Counsel in <i>Nicholas Scunziano v. Franck's Lab, Inc., et al.</i>, C.A. No. 13-004968</p>

## APPENDIX A

1. 13-5306 Aguilar, Migdalia & Linderman, Russell J. (No.: 2:13-cv-01371-CAS-RNB)
2. 13-5311 Arakelian, Ema (No.: 2:13-cv-02437-CAS-RNB)
3. 13-5303 Avakian, Cheryl (No.: 2:13-cv-01068-CAS-RNB)
4. 13-5305 Cotugno, Joseph (No.: 2:13-cv-01360-CAS-RNB)
5. 13-5309 Gonzalez, Ester (2: 13-cv-02358-CAS-RNB)
6. 13-5308 Hambav, Sergio & Kanonyan, Astghik (No.: 2:13-cv-02058CAS-RNB)
7. 13-5313 Hermanson, Jim (No.: 5:13-cv-00432-CAS-RNB)
8. 13-5307 Jingoian, Levon (No.: 2:13-cv-01468-CAS-RNB)
9. 13-5312 Lopez, Natividad (No.2:13-cv-02445-CAS-RNB)
10. 13-6350 Magnet, Robert (No.2:13-cv-07602-0DW-MAN)
11. 13-5304 Romero, Roy (No.: 2:13-cv-01335-CAS-RNB)
12. 13-5704 Antenor, Abraham; Corona, David; Corrales, Raul; Gonzalez, Adolfo Lemus (No.:13-03380)
13. 13-5314 Brown, Randy (No.1:13-cv-00846-CMA-BNB)
14. 13-5315 Bienick, Josephine (No.: 1:12-cv-00 197-TLS-RBC)
15. 13-5316 McKinley, Eldon (No.: 1:13-cv-00060-TLS-RBC)
16. 13-5317 Tharp, Bernice (No.: 1:13-cv-00061-TLS-RBC)
17. 12-2738 Johnson, James Jr. (No.: 2:12-cv-02738-KDE-SS)
18. 12-2838 Kappelman, Susan (No.: 2:12-cv-02838-KDE-SS)
19. 12-2608 Laventhal, Michele (No.: 2:12-cv-02608-KDE-SS)
20. 12-2398 Smith, Ruth (No.: 2:12-cv-02398-KDE-SS)
21. 13-5319 Hess, Brenda (No.: 3:13-cv-00121-LRH-WGC)
22. 13-5318 McMaster, Howard (No.: 3:13-cv-00100-LRH-WGC)
23. 13-5705 Farnsworth, Barbara (No.: 3:13-cv-00361-LRH-WGC)
24. 14-318 Corinne Child, et al (No. 14-cv-330 N(4))

## **APPENDIX B**

(Known Related Cases)

1. *Julian James Hendrix v. Franck's Lab, Inc., et al*, C.A. No. 2012-281 (19<sup>th</sup> Judicial Circuit, Okeechobee County, Florida)
2. *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)
3. *Nicholas Scunziano v. Franck's Lab, Inc., et al*, C.A. No. 13-004968 (6<sup>th</sup> Judicial Circuit, Pasco County, Florida)
4. *Stephen Fulsom, et al v. Franck's Lab, Inc.*, C.A. No. 12-21051 (17<sup>th</sup> Judicial Circuit, Broward County, Florida)