

**BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

IN RE: FRANCK'S LITIGATION

MDL-_____

**BRIEF IN SUPPORT OF MOTION TO TRANSFER ACTIONS TO THE
EASTERN DISTRICT OF LOUISIANA PURSUANT TO 28 U.S.C. §1407
FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS**

Defendants, Franck's Lab, Inc. and Franck's Pharmacy, Inc., in the action captioned *Ruth Smith, et al. v. Franck's Lab, Inc., et al.*,¹ pending in the Eastern District of Louisiana and Defendant, Franck's Lab, Inc., in the action captioned *Josephine Bienick v. Franck's Lab, Inc.*² pending in the Northern District of Indiana, respectfully submit this brief in support of their Motion to Transfer Pursuant to 28 U.S.C. § 1407.

I. Introduction

To date, sixteen products liability actions have been filed in U.S. district courts against Franck's Lab, Inc. ("Franck's") alleging that a solution identified as Brilliant Blue G dye ("BBG") or an anti-inflammatory steroid, Triamcinolone ("TMC"), compounded by Franck's contained fungal contaminants that when injected into plaintiffs' eyes resulted in infection and consequent damages. On March 19, 2012 the United States Food and Drug Administration issued a recall of all remaining BBG from Franck's because of reports of infection in patients who had the dye administered during surgery. Patients allegedly infected from BBG and TMC manufactured by Franck's have been filing suit throughout the United States.

¹ No. 2:12-cv-02398.

² No. 1:12-cv-00197.

Three cases are pending in the U.S. Northern District of Indiana: *Bienick*,³ *McKinley*,⁴ and *Tharp*⁵ (the “Indiana Actions”). Four cases are pending in the U.S. Eastern District of Louisiana: *Smith*,⁶ *Laventhal*,⁷ *Johnson*,⁸ and *Kappelman*⁹ (the “Louisiana Actions”). Seven cases are pending in the U.S. District Court for the Central District of California: *Avakian*,¹⁰ *Romero*,¹¹ *Cotugno*,¹² *Aguilar*,¹³ *Jingoian*,¹⁴ *Hermanson*,¹⁵ and *Hambav*¹⁶ (the “California Actions”). And two cases are pending in the U.S. District Court for the District of Nevada: *McMaster*¹⁷ and *Hess*¹⁸ (the “Nevada Actions”). In addition, Franck’s insurer, Evanston Insurance Company, has filed a Complaint for Declaratory Judgment in the U.S. District Court for the Middle District of Florida.¹⁹ Upon information and belief, at least seventeen additional prospective claimants may have come in contact with allegedly contaminated BBG dye or TMC. It is anticipated that additional “tag-along” cases involving common questions of fact will be filed or removed to U.S. district courts throughout the United States.

³ *Bienck v. Franck’s Lab, Inc.*, No. 1:12-cv-00197.

⁴ *McKinley v. Franck’s Lab, Inc., et al.*, No. 1:13-cv-00060.

⁵ *Tharp v. Franck’s Lab, Inc., et al.*, No. 1:13-cv-00061.

⁶ *Smith v. Franck’s Lab, Inc., et al.*, No. 2:12-cv-02398.

⁷ *Laventhal v. Franck’s Lab, Inc., et al.*, No. 2:12-cv-02608.

⁸ *Johnson v. Franck’s Lab, Inc., et al.*, No. 2:12-cv-02738.

⁹ *Kappelman et al. v. Franck’s Lab, Inc., et al.*, No. 2:12-cv-02838.

¹⁰ *Avakian v. Franck’s Lab, Inc., et al.*, No. 2:13-cv-01068.

¹¹ *Romero, et al. v. Franck’s Lab, Inc., et al.*, No. 2:13-cv-01335.

¹² *Cotugno, et al. v. Franck’s Lab, Inc., et al.*, No. 2:13-cv-01360.

¹³ *Aguilar v. Franck’s Lab, Inc.*, No. 2:13-cv-01371.

¹⁴ *Jingoian v. Franck’s Lab, Inc.*, No. 2:13-cv-01468.

¹⁵ *Hermanson, et al. v. Franck’s Lab, Inc.*, No. 5:13-cv-00432.

¹⁶ *Hambav, et al. v. Franck’s Lab, Inc.*, No. 2:13-cv-02058.

¹⁷ *McMaster v. Franck’s Lab, Inc., et al.*, No. 3:13-cv-00100.

¹⁸ *Hess v. Franck’s Lab, Inc., et al.*, No. 3:13-cv-00121.

¹⁹ *Evanston Insurance Company v. Franck’s Lab, Inc.*, No. 5:12-cv-00603.

II. Argument

1. Transfer and coordination or consolidation of the Related Actions is appropriate.

Under 28 U.S.C. § 1407(a), civil actions pending in different district courts and involving “one or more common questions of fact” may be “transferred to any district for coordinated or consolidated proceedings.” Transfer is appropriate when it serves the convenience of the parties and witnesses and promotes the just and efficient conduct of the pending actions.²⁰

A. Protection of Insurance Proceeds.

To date there are sixteen federal court claimants alleging various degrees of severe eye injuries including but not limited to permanent blindness. If applicable, the Evanston policy of insurance provides Franck’s with an aggregate of three million dollars of insurance coverage. Notably, the policy is eroded by the cost of defense. Transfer and consolidation will reduce litigation costs, and save time and effort on behalf of the numerous attorneys, the witnesses, and the courts. Moreover, the reduction in defense costs and attorney’s fees resulting from consolidation through a MDL proceeding will protect Franck’s from uninsured exposure and safeguard available assets for compensation to any successful claimant.

B. Convenience of the parties.

There are four pending cases in Louisiana, which represent the 2nd, 3rd, 4th, and 5th filed suits. The Louisiana, Indiana, Nevada, and California Actions (collectively the “Related Actions”) involve numerous common questions of fact as required by 28 U.S.C. § 1407. Streamlining party, witness, and expert depositions through consolidated

²⁰ 28 U.S.C. § 1407(a),

pretrial proceedings will undoubtedly serve the convenience of the witnesses, experts, parties and their counsel. Transfer under Section 1407 will have the effect of placing all actions in a single docket before a single judge who can ensure that pretrial proceedings will be conducted in an efficient manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties and the judiciary.

C. Common issues of fact and law predominate in the Related Actions.

In each of the Related Actions the claimant makes the same fundamental allegations: presentation for an ophthalmological procedure; the utilization of BBG or TMC by a treating physician; a subsequent eye infection; consequent damages as a result of the defective BBG or TMC products manufactured by Franck's.

In addition to the nearly identical factual assertions made by the claimants in the Related Actions, predominate questions of law are also at issue. Specifically, all claimants assert a cause of action under the theories of general negligence and products liability. The central issues in dispute in each of the Related Actions surround whether BBG or TMC were defective or unreasonably dangerous in its construction, composition, design, furnished warnings, or afforded warranties. Moreover, issues concerning whether Franck's deviated from acceptable standards of care under general negligence theories are germane to each of the Related Actions, supporting consolidation under Section 1407. Any unique facts or theory of law specific to a particular jurisdiction would not militate against consolidation because the transferee judge has the broad discretion to allow discovery on issues unique to any action concurrently with the

common discovery.²¹

D. *Transfer and consolidation will promote the just and efficient conduct of the Related Actions and “tag-along” actions.*

“[T]he primary purpose behind assigning multidistrict litigation to a transferee court is to promote efficiency through the coordination of discovery.”²² And, the factual questions in the Related Actions are sufficiently complex and numerous to justify Section 1407 transfer. Specifically, the facts surrounding purported liability are complex and include the need for considerable discovery into product identification, department of health regulations, product recalls, inspection efforts, investigation analysis, third-party laboratory results, pharmacy standards of care, operating procedures, policies and guidelines, training and monitoring procedures, environmental analysis, quality assurance, pharmacopeia standards, and medical causation. The complexity of these issues will necessitate substantial document analysis and production, and the need for the retention of numerous experts. Transfer and consolidation through an MDL proceeding will eliminate duplicative discovery, prevent redundant motion practice, mitigate conflicting pretrial rulings, conserve judicial resources, reduce of the cost of litigation, and allow the Related Actions to proceed more efficiently to resolution. Moreover, upon information and belief, approximately thirty-

²¹ *In re Republic National Realty Equities Securities Litigation*, 382 F.Supp. 1403, 1405-06 (Jud.Pan.Mult.Lit.1974).

²² *In re Nuwaring Prods. Liab. Litig.*, MDL No. 1964, 2009 WL 4825170, at *1 (E.D.Mo. Dec. 11, 2009) (citing *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1997 WL 109595, at *2 (E.D.Pa. Mar. 7, 1997)); *In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Practices Litig.*, 840 F. Supp. 2d 1193, 1198 (D. Minn. 2012).

three patients may have come in contact with the allegedly contaminated BBG and/or TMC. It is anticipated that additional “tag-along” actions with common issues of fact will be filed, which further supports the need for streamlined discovery through an MDL proceeding.

E. The Related Actions are in the early stages of litigation; limited discovery has been conducted.

Given the eroding policy of insurance, the parties have generally performed limited informal discovery pending consideration for consolidation through an MDL proceeding. Upon information and belief, such discovery has been limited to investigations related to applicable insurance policies and proper party identification. No depositions have been conducted and no trial dates are set. Accordingly, the Related Actions are ripe for consolidation and coordinated pretrial discovery which has yet to ensue.

F. Party coordination and stipulation has been attempted to no avail.

Formal centralization through an MDL proceeding is not only preferable but necessary. Franck’s has attempted exhaustive measures to coordinate a stipulated discovery and tolling agreement amongst the parties.²³ Unfortunately, given the over twenty parties, their numerous counsel, and disparate agenda, such efforts have not proved successful.

2. The United States District Court for the Eastern District of Louisiana is the appropriate transferee court for coordination and consolidation.

A. U.S. Eastern District Court Judge Kurt D. Engelhardt has agreed to serve as the transferee judge.

²³ See Discovery and Tolling Agreement, attached as Exhibit 1.

Judge Kurt D. Engelhardt has expressed his willingness to serve as transferee judge.²⁴ Having four of the Related Actions pending on his docket, Judge Engelhardt is familiar with the contours of the litigation and will be able to set the matters on a prudent course. Moreover, Judge Engelhardt has extensive experience in handling complex multi-district litigation having been appointed as transferee judge to oversee the Formaldehyde Products Liability Litigation Multi District Litigation (MDL 1873).

B. Additional factors support the Eastern District of Louisiana serving as the transferee court.

The number of actions pending in the potential transferee court is relevant to selection of most appropriate district for consolidated or pretrial proceedings.²⁵ Four of the sixteen products liability Related Actions are pending in the Eastern District of Louisiana, with three of the plaintiffs and four of their treating physicians located within Louisiana. Moreover, the 2nd, 3rd, 4th, and 5th federal court suits were filed in Louisiana.

Additionally, Louisiana's Direct Action Statute, La. Rev. Stat. Ann. § 22:1269 provides the basis for suit against the insurers, which has been accomplished in the Louisiana Actions with the inclusion of Evanston Insurance Company, Certain Underwriters at Lloyd's, London, and The Cincinnati Insurance Company. Moreover, the claimants in the Louisiana Actions have joined or sought to join parties not involved in actions filed in other jurisdictions and are the first filed suits against: Paul Franck, Franck's Pharmacy, Inc., Franck's Management, L.L.C., Wells Pharmacy Network, LLC, Anthony Campbell, Evanston Insurance Company, Certain Underwriters at Lloyd's,

²⁴ See 12/5/12 electronic correspondence, attached as Exhibit 2.

²⁵ *In re Mid-Air Collision, Fairland, Ind.*, Jud.Pan.Mult.Lit.1970, 309 F.Supp. 621 Federal Courts .

London, and The Cincinnati Insurance Company. Finally, the judicial caseload profiles indicate that the Eastern District of Louisiana is well-suited to manage this litigation because it has the experience, resources, and personnel sufficient for the management of a multidistrict litigation proceeding.

III. Conclusion

The transfer for coordinated and consolidated pretrial proceedings to the Eastern District of Louisiana will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. There are currently sixteen products liability actions in four districts with additional “tag-along” cases likely to be filed. The actions involve common questions of fact but are sufficiently numerous and complex to support centralization under Section 1407. An MDL proceeding will eliminate duplicative discovery, streamline pretrial proceedings, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary. Given the eroding policy of insurance, consolidation will further serve the interest of the parties by safeguarding available insurance assets.

The Eastern District Court of Louisiana is an appropriate transferee court because Eastern District Court Judge Kurt Engelhardt is an experienced transferee judge who will steer this litigation on a prudent course and has agreed to serve as transferee judge. Moreover, the Eastern District Court of Louisiana contains four of the sixteen Related Actions, comprises the first-filed suit against many of the defendants, and the Louisiana direct action statute affords the court the opportunity to adjudicate many of the insurance coverage issues in dispute. Finally, no action in any other jurisdiction is significantly more advanced in the discovery process than those in Louisiana.

For these reasons, Franck's respectfully moves this Court to grant its Motion to Transfer Pursuant to 28 U.S.C. § 1407 and transfer the products liability actions listed in the Schedule of Actions to the Eastern District of Louisiana, and with consent of that court, assign them to Honorable Kurt D. Engelhardt for coordinated or consolidated pretrial proceedings.

Respectfully submitted on April 12, 2013:

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