IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

JOSEPH POPPELL, ET AL.,	)	
	)	
Plaintiffs,	)	Civil Action No. 2:19-cv-00064-LGW-BWC
	)	
v.	)	
	)	
CARDINAL HEALTH, INC., ET AL.,	)	
	)	
Defendants.	)	

MOVING DEFENDANTS' MOTION TO REOPEN CASE AND JOINT MOTION FOR RELIEF FROM REMAND ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(3)

Defendants Cardinal Health, Inc., Cardinal Health 108, LLC, Cardinal Health 110, LLC, Cardinal Health 112, LLC, Cardinal Health 113, LLC, Cardinal Health 116, LLC, Cardinal Health 200, LLC, Cardinal Health 414, LLC, McKesson Corporation, McKesson Drug Company, LLC, McKesson Medical-Surgical, Inc., McKesson Medical-Surgical Minnesota Supply, Inc., (collectively, "Moving Defendants") respectfully move this Court to reopen the above-styled action and for relief from the Court's Remand Order entered on June 4, 2019. In support of this request, the Moving Defendants submit their memorandum of law herewith.

On June 4, 2019 the Court held an expedited hearing on Plaintiff's Motion to Remand and issued an oral order from the bench followed by the Remand Order granting the same. Later that day, a Minute Entry was entered on the docket closing the case. The Remand Order was procured by fraud, misrepresentation and misconduct by Plaintiffs and Defendant Charles Robert Lott. This Court retains jurisdiction to decide the Rule 60(b)(3) Motion. *See Miller v. Morris Commc'ns Co., LLC*, 234 F. App'x 881, 884 (11th Cir. 2007) (district court retained jurisdiction over Rule 60(b) motion relating to judgments the court had entered); *see also Bapte v. W. Caribbean Airways*, 370 F. App'x 71, 73 (11th Cir. 2010) ("a district court retains jurisdiction to

consider a Rule 60(b) motion for relief from judgment even after an appeal of the judgment . . . has been noticed.").

For these reasons, the Moving Defendants respectfully request that this Court reopen the case to consider their Rule 60(b)(3) Motion.

June 13, 2019

/s/ Cody S. Wiginton
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Christopher A. Wiech (*admitted pro hac vice*)
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Attorneys for McKesson Corporation ; McKesson Drug Company, LLC; McKesson Medical-Surgical, Inc.; and McKesson Medical-Surgical Minnesota Supply, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2019, I caused a copy of the foregoing to be filed electronically through this Court's electronic filing system, and, as such, notice of such filing should be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

June 13, 2019

/s/ Cody S. Wigington
Cody S. Wigington
(Georgia Bar No. 653519)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

JOSEPH POPPELL, ET AL.,	)	
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Plaintiffs,	)	Civil Action No. 2:19-cv-00064-LGW-BWC
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	)	
CARDINAL HEALTH, INC., ET AL.,	)	
	)	
Defendants.	)	

MOVING DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REOPEN CASE AND JOINT MOTION FOR RELIEF FROM REMAND ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(3)

This Court should reopen the case and vacate its remand order of June 4, 2019, under Rule 60(b)(3). That order was procured by fraud, misrepresentation and misconduct by Plaintiffs and Defendant Charles Robert Lott. The remand order rested on Lott's refusal to consent to removal. But, as the Moving Defendants learned after the remand hearing, that refusal was obtained only in exchange for Plaintiffs' agreement to dismiss Lott from the case.

Although Plaintiffs represented to this Court that Lott was a properly joined defendant whose consent to removal was required, their deal with him makes clear that, having obtained his refusal to consent to removal, they had no intention of pursuing their claims against him.

Based on Plaintiffs' and Lott's false and misleading representations, material omissions, and misconduct, vacatur of the remand order is appropriate under Rule 60(b)(3). That rule allows a party to seek relief from a final judgment or order based on "fraud . . ., misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). That is precisely the case here. When a plaintiff colludes with a defendant to defeat removal, the defendant is fraudulently joined and his consent to removal is not required. This Court should therefore vacate the remand order.

BACKGROUND

Plaintiffs originally filed this opioid lawsuit in the Superior Court of Glynn County, Georgia, on April 17, 2019. (D.E. 1 at ¶ 2.) The Complaint named two sets of defendants: pharmaceutical distributors ("Distributors"), none of which is a citizen of Georgia, and various local pharmacies and pharmacists ("Pharmacy Defendants").

Cardinal Health, Inc., a Distributor, removed this action on two grounds: federal question and diversity. (D.E. 1.) Just four days after Cardinal Health filed its notice of removal, Plaintiffs filed a motion to remand the case to state court and requested an immediate hearing. (D.E. 20, 21, 22.) In their motion, Plaintiffs contended that the removal was procedurally improper because one defendant—Charles Robert Lott—had objected to removal. (D.E. 22 at 23.) In support of that contention, Plaintiffs submitted an affidavit signed by Lott's counsel, stating that Lott had expressly refused to consent to removal when asked. (D.E. 20-1.)

On June 4, 2019, this Court held an expedited hearing on Plaintiffs' remand motion. Based on Plaintiffs' representations that Lott was a properly joined defendant, the Court concluded that Lott's consent to removal was required and issued the remand order because Lott had not consented. (D.E. 52.)

Cardinal Health did not learn until after the hearing that Plaintiffs had been colluding with Lott to defeat removal. Cardinal Health has since learned that Plaintiffs had agreed with Lott to dismiss their claims against him in exchange for his objection to removal. *See* Declaration of Christopher A. Wiech dated June 13, 2019 (Wiech Decl.), at ¶¶ 12-15.

On June 10, 2019, McKesson Corporation's counsel sent a letter to Plaintiffs' counsel, seeking confirmation regarding Plaintiffs' pre-removal settlement with Defendant Lott in return for objecting to removal. Wiech Decl. at ¶ 16; *id.*, Ex. 1. On June 11, 2019, Plaintiffs' counsel responded and admitted that Plaintiffs had, in fact, agreed to settle with Lott conditioned on his

refusal to consent to removal. Wiech Decl. at ¶ 17; *id.*, Ex. 2 at 1. In the same letter, Plaintiffs' counsel admitted that they did not disclose to the Court Plaintiffs' settlement with Lott. *Id.*, Ex. 2 at 3. And Plaintiffs' counsel admitted that they had had similar discussions with other Pharmacy Defendants, but broke off those talks once they had secured Lott's opposition to removal. *See id.*, Ex. 2 at 2.

ARGUMENT

Under Rule 60(b)(3), a party may seek relief from a final order on the basis of "fraud . . ., misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). A movant must show (1) "by clear and convincing evidence that an adverse party has obtained the [order] through fraud, misrepresentation, or other misconduct," and (2) "that the conduct prevented the losing party from fully and fairly presenting his case or defense." *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1287 (11th Cir. 2000); *see also Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007); *Waddell v. Hendry Cty. Sheriff's Office*, 329 F.3d 1300, 1309 (11th Cir. 2003). This case satisfies both conditions.

First, there is clear and convincing evidence that Plaintiffs obtained the remand order through fraud, misrepresentation, and misconduct. Plaintiffs represented to this Court that Lott's consent to removal was required when Plaintiffs had no intention of pursuing their claims against Lott. To the contrary, before Cardinal Health had even removed this action, Plaintiffs had agreed to settle their claims against Lott on the condition that he withhold consent to removal. But Plaintiffs did not disclose this material fact to the Court. *See Suite 225, Inc. v. Lantana Ins. Ltd.*, 625 F. App'x 502, 506–08 (11th Cir. 2015) (affirming grant of Rule 60(b)(3) motion to vacate judgment procured by party's "knowing and intentional" omission of material fact); *In re Nationwide Warehouse & Storage, LLC*, 2005 WL 6487199, at *10 (Bankr. N.D. Ga. July 14, 2005) (vacating order under Rule 60(b)(3) when party "never disclosed to the Court" material

information); *Trehan v. Von Tarkanyi*, 63 B.R. 1001, 1006 n.8 (S.D.N.Y. 1986) ("When an attorney misrepresents or omits material facts to the court . . . his conduct may constitute a fraud on the court.").

Second, Plaintiffs' and Lott's misconduct prevented Cardinal Health from presenting a full and fair defense. When a plaintiff colludes with a non-consenting defendant to defeat removal, the defendant is fraudulently joined and his consent to removal is not required. *See Diaz v. Kaplan Univ.*, 567 F. Supp. 2d 1394, 1402-03 (S.D. Fla. 2008) (holding that consent was not required when "plaintiff colluded with the non-consenting defendant to defeat removal"). This scenario "arises in federal question cases when . . . the non-consenting defendant, in collusion with the plaintiff, agree[s] to refuse to consent to removal and thus affect[s] the choice of forum." *Id.* at 1403 (citing *Hauck v. Borg Warner Corp.*, 2006 WL 2927559, at *6 (M.D. Fla. Oct. 12, 2006)); *see also In re Diet Drugs Prod. Liab. Litig.*, 220 F. Supp. 2d 414, 421 (E.D. Pa. 2002) (finding that non-consenting defendants were fraudulently joined when they "reached agreements whereby plaintiffs will ultimately dismiss the [non-consenting] defendants in exchange for their refusal to consent to removal"); *Ashford v. Aeroframe Servs., LLC*, 2015 WL 13650549, at *12 (W.D. La. Jan. 30, 2015) (defendant's consent to removal not required when plaintiff settled claims against non-consenting defendant such that it "would remain a defendant so that federal court jurisdiction could be avoided"), *aff'd in part, rev'd in part and remanded*, 2015 WL 2089994 (W.D. La. May 4, 2015).

Had Cardinal Health known that Plaintiffs had colluded with Lott to defeat removal, it could have and would have presented a meritorious defense that Lott was fraudulently joined because of that agreement. Plaintiffs' and Lott's failure to disclose their agreement prevented Cardinal Health from doing so.

This Court has the authority to vacate its remand order. While the federal removal statute prohibits federal courts from *reviewing* orders remanding cases to state court, *see* 28 U.S.C. § 1447(d), the statute does not prevent this Court from *vacating* its remand order under Rule 60(b)(3). "Vacatur of a remand order does not necessarily constitute a forbidden 'review' of [a] remand decision." *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1288 (11th Cir. 1999). If a court "vacate[s] an order for reasons that do not involve reconsideration or examination of its merits," then the court "ha[s] not 'reviewed' the order, and therefore ha[s] not fallen afoul of section 1447(d)'s prohibition on review." *Id.*; *cf. McClain v. Lee*, 2013 WL 12158622, at *1 (M.D. Fla. Dec. 6, 2013) (court's amendment or clarification of remand order under Rule 60 does not constitute impermissible review).

Applying the Eleventh Circuit's reasoning in *Aquamar*, the Fourth Circuit has held that, when a court vacates a remand order under Rule 60(b)(3), it does not reconsider or reexamine the order's merits. *See Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1010–12 (4th Cir. 2014) (en banc) (citing *Aquamar*, 179 F.3d at 1288). "[U]nlike reconsideration, vacatur [under Rule 60(b)(3)] does not require reassessing the facts that were presented to the district court at the time the cases were removed." *Id.* at 1012.

In *Barlow*, similar to this case, the defendants removed on the basis of diversity jurisdiction, arguing that certain in-state defendants were fraudulently joined. *Barlow*, 772 F.3d at 1004. The plaintiffs then moved to remand, arguing that they had "viable claims against the non-diverse defendants." *Id.* at 1005. Based on those representations, the district court remanded the case to state court. *Id.* Upon remand to state court, however, the plaintiffs contradicted their representations to the federal court, admitting that they had no evidence to support their claims

against the non-diverse defendants and announcing their intention to proceed only with claims against the diverse defendant. *Id.* at 1006.

Based on plaintiffs' misrepresentations made to secure remand, the defendants then moved the federal district court for sanctions under Rule 11 and to vacate the remand order under Rule 60(b)(3). *Id.* at 1006–07. The district court initially denied the motions, concluding that "28 U.S.C. § 1447(d) deprived it of jurisdiction to vacate or strike its remand orders." *Id.* at 1007. On appeal, the *en banc* Fourth Circuit reversed, holding that, when a defendant moves to vacate under Rule 60(b)(3), it "seeks vacatur based on a collateral consideration—[its] allegation that the remand orders were procured through attorney misconduct—rather than on the remands' merits." *Id.* at 1010–11. Thus, "the types of relief provided by . . . Rule 60(b)(3) do not involve 'review' as proscribed by § 1447(d)." *Id.* at 1008.[1] The court further held that Rule 60(b)(3) "applies to the present situation, in which a party alleges that misconduct prevented it from fully and fairly presenting its 'claim' of entitlement to a federal forum," *id.* at 1013 n.12, and that the district court retained jurisdiction to consider the motion, *id.* 1012. *See also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990) ("It is well established that a federal court may consider collateral issues after an action is no longer pending.").

[1] In *Bender v. Mazda Motor Corp.*, 657 F.3d 1200 (11th Cir. 2011), the Eleventh Circuit held that 28 U.S.C. § 1447(d) prohibits a federal court from reconsidering a remand order under Rule 60(b)(6). *Bender* does not control the outcome here because: (1) that case involved a motion for *reconsideration* under Rule 60(b)(6), not a motion to *vacate* under Rule 60(b)(3), *see Bender*, 657 F.3d at 1201; and (2) the defendants in *Bender* argued that "the remand order . . . was legally erroneous," *id.* at 1204, and thus expressly sought reexamination of the order's merits. Because a motion to vacate under Rule 60(b)(3) does not require reexamination on the merits, *Bender* does not preclude that relief here. *See Barlow*, 772 F.3d at 1011 n.10 (distinguishing *Bender* as "irrelevant" because Rule 60(b)(6) "do[es] not focus on the means by which a remand order is obtained"). In any event, *Bender* cannot undercut the Eleventh Circuit's controlling decision in *Aquamar* because *Aquamar* came first. *See, e.g., Burke-Fowler v. Orange Cty.*, 447 F.3d 1319, 1323 n.2 (11th Cir. 2006) ("[W]hen a later panel decision contradicts an earlier one, the earlier panel decision controls.").

The same holds true in this case. Cardinal Health does not ask this Court to reexamine or reconsider the merits of its remand order. Instead, it seeks vacatur based on a collateral issue—namely, that the remand order was procured through Plaintiffs' and Lott's fraud, misrepresentations, and misconduct. Accordingly, § 1447(d) does not bar the relief sought here, and the Court retains jurisdiction to vacate its remand order under Rule 60(b)(3).

CONCLUSION

Plaintiffs obtained the remand order by arguing, with an affidavit from Lott's counsel, that Lott objected to removal. Plaintiffs and Lott did not tell this Court that there was already an agreement to dismiss Lott in exchange for his objection to removal. Lott's presence in this case was only to defeat removal. That is fraud, misrepresentation, and misconduct. This Court should vacate the remand order.

June 13, 2019

/s/ Cody S. Wigington
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Christopher A. Wiech (*admitted pro hac vice*)
(Georgia Bar No. 757333)
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Attorneys for McKesson Corporation ; McKesson Drug Company, LLC; McKesson Medical-Surgical, Inc.; and McKesson Medical-Surgical Minnesota Supply, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2019, I caused a copy of the foregoing to be filed electronically through this Court's electronic filing system, and, as such, notice of such filing should be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

June 13, 2019

/s/ Cody S. Wigington
Cody S. Wigington
(Georgia Bar No. 653519)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

JOSEPH POPPEL, ET AL.,	)	
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Plaintiffs,	)	CIVIL ACTION NO.:
	)	2:19-CV-00064-LGW-BWC
v.	)	
	)	
CARDINAL HEALTH, INC., ET AL.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF CHRISTOPHER A. WIECH

In accordance with 28 U.S.C § 1746, I, Christopher A. Wiech, declare as follows:

1. I am over the age of 21 years old, have personal knowledge of all facts stated in this declaration, and if called to testify, I could and would testify competently thereto.

2. I am a litigation partner with Baker & Hostetler LLP in Atlanta, Georgia, and have been practicing law for more than 15 years. I am a member in good standing of the State Bar of Georgia, and I am admitted to practice in the Eleventh Circuit Court of Appeals and the federal district courts for the Northern District and Middle District of Georgia.

3. At all pertinent times, I have been counsel to Cardinal Health, Inc., Cardinal 108, LLC, Cardinal Health 110, LLC, Cardinal Health 112, LLC,

13. During the hearing before Judge Wood, I did not hear any counsel for any party announce that Defendant Lott had reached an agreement to settle his claims with Plaintiffs.

14. Immediately after the hearing—after Judge Wood had issued her ruling from the bench to remand the Federal Action to state court, and the hearing concluded—Alan David Tucker, counsel for Defendant Agape Prescriptions "R" Us, Inc., Janice Ann Colter, and Christopher Grey May, informed me that Plaintiffs had already settled their claims against Defendant Lott for $1,000.

15. According to Mr. Tucker, Plaintiffs had settled with Defendant Lott before the Cardinal Health Defendants removed the State Action to federal court.

16. Attached as **Exhibit 1** is a true and correct copy of a letter dated June 10, 2019, from John M. Tatum, counsel for McKesson Corporation, addressed to John E. Floyd, James D. Durham, and Ronald E. Harrison, II, counsel for Plaintiffs.

17. Attached as **Exhibit 2** is a true and correct copy of a letter dated June 11, 2019, from James D. Durham, counsel for Plaintiffs, addressed to John M. Tatum, counsel for McKesson Corporation.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 13th day of June 2019.

Signature: 

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Exhibit 1

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June 10, 2019

VIA EMAIL

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RE: ***Poppell, et al. v. Cardinal Health, Inc., et al.*, No. 2:19-cv-00064(S.D. Ga.); Communications with Defendant Charles Lott**

Gentlemen:

As you know we represent the McKesson Defendants in the above-captioned case. I write to address a matter of great concern regarding your communications with Defendant Charles Lott, of which we recently became aware. You were present at the hearing on the Plaintiffs' motion to remand on June 4, 2019 before Judge Lisa Wood. After the hearing, we were informed of the following facts:

1. Shortly after filing suit against Defendant Lott, among others, Harrison, Floyd and/or Durham, as counsel for Plaintiffs, approached Mr. Lott or his attorney(s) to present a proposition;

2. Harrison, Floyd and/or Durham advised Defendant Lott or his attorney(s) that one of the conditions to Plaintiffs' offer was that Mr. Lott would be required to refuse to consent to or otherwise not participate in any attempts by Defendants to remove this action to the federal court;

3. Harrison, Floyd and/or Durham advised Defendant Lott or his attorney(s) that one of the conditions to Plaintiffs' offer was that neither Mr. Lott nor his attorney(s) disclose the

settlement or its terms for a period of time sufficiently beyond the time within which they expected the federal court would issue any ruling on a motion to remand;

4. Harrison, Floyd and/or Durham advised Defendant Lott or his attorney(s) that one of the conditions to Plaintiff's offer was that neither Mr. Lott nor his attorney(s) disclose the settlement or its terms to any federal court which undertook to decide any remand motion until after said court had issued a ruling on said motion;

5. Harrison, Floyd and/or Durham advised Defendant Lott or his attorney(s) that one of the conditions to Plaintiffs' offer was that neither Mr. Lott nor his attorney(s) disclose the settlement or its terms to any of the other Defendants or their counsel until after any federal court had ruled on a motion for remand;

6. Harrison, Floyd and/or Durham, on behalf of Plaintiffs, agreed to bestow a benefit on Defendant Lott if he accepted these terms, among others;

7. Harrison, Floyd and/or Durham communicated that one of the benefits being offered to Defendant Lott was an opportunity to settle Plaintiffs' claims against him for a de minimis amount;

8. Harrison, Floyd and/or Durham communicated that one of the benefits being offered to Defendant Lott was an opportunity to settle the suit without the necessity of filing an answer or otherwise presenting a defense in the case;

9. Before the hearing at 11 a.m. on June 4, 2019, Harrison, Floyd and/or Durham provided a writing to Defendant Lott or his attorney(s) that memorialized Plaintiffs' proposal or offer to Defendant Lott;

10. Before 11 a.m. on June 4, 2019, Harrison, Floyd and/or Durham sent a draft agreement to Defendant Lott or his attorney(s);

11. Before 11 a.m. on June 4, 2019, Harrison, Floyd and/or Durham, on behalf of Plaintiffs, reached an agreement with Defendant Lott;

12. Before 11 a.m. on June 4, 2019, Harrison, Floyd and/or Durham, on behalf of Plaintiffs, entered into a written agreement with Defendant Lott;

13. Plaintiffs insisted that Defendant Lott and/or his attorney(s) conceal the existence and terms of his settlement with Plaintiffs from the other Defendants;

14. Plaintiffs insisted that Defendant Lott and/or his attorney(s) conceal the existence and terms of his settlement from the federal district judge or magistrate that would hear any remand motion; and

15. Harrison, Floyd and/or Durham, on behalf of Plaintiffs, have engaged in similar conduct, making similar offers to other Defendants and/or their counsel.

I would like to believe that these facts are not true, but, given the sources of our information, it appears that they are true. If these facts are true, we believe that you were compelled to advise the Court at the hearing. We intend to make the Court aware of these newly discovered facts. Before we do so, we want to give you the opportunity to add to or correct any of the enumerated facts stated above. Accordingly, please respond to this letter in writing as soon as possible. Needless to say, we consider this matter to be quite urgent. Absent a prompt written response, we will presume that the facts as stated above are true and correct.

This letter is also intended to remind you of Plaintiffs' obligations, including that of their counsel, to preserve evidence. The duty to preserve evidence includes, and is not limited to, preserving all communications or documents exchanged with any of the Defendants or their counsel related to this lawsuit. If Plaintiffs and/or their counsel, including Harrison, Floyd and/or Durham, are in possession of written communications, including e-mails, or documents exchanged with any of the Defendants or their counsel related to this lawsuit, we request that they be provided to us immediately.

Further, we request that you identify all Defendants whom Plaintiffs and/or their counsel, including Harrison, Floyd and/or Durham, have approached and made an offer similar to the one made to Defendant Lott (as described above). We are aware of at least one other Defendant, G&H Pharmacy, Inc., to which you have made the same offer as Defendant Lott. We will address that matter in a separate letter.

We await your prompt response to this urgent matter.

Regards,

John M. Tatum

JMT/amh

Exhibit 2

SAVAGE TURNER DURHAM PINCKNEY AND SAVAGE
TRIAL ATTORNEYS

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ROBERT BARTLEY TURNER
JAMES D. DURHAM
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R. BRIAN TANNER
SHANNON C. O'REILLY
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June 11, 2019

VIA EMAIL & U.S. MAIL
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RE: *Poppell, et al. v. Cardinal Health, Inc., et al.*

Dear John,

I am writing to respond to the letter you sent me via email yesterday. You imply that counsel for Plaintiffs, including myself, have acted in an inappropriate manner, and in particular, attempted to conceal something from the Court. Your contention is false.

You are correct that Plaintiffs and Defendant Charles Robert Lott, who was represented by counsel at all relevant times, reached a preliminary agreement, which involves, *inter alia*: 1) the entry of a consent judgment against Mr. Lott; 2) an ongoing obligation for Mr. Lott to cooperate fully and honestly with Plaintiffs' counsel in the pending litigation, including providing relevant documents and information; and 3) Mr. Lott's agreement that he will not consent to removal. This preliminary agreement is contingent upon the execution of an agreement to be signed by Mr. Lott and all Plaintiffs. This has not yet occurred. Importantly, there is nothing in the letter to Mr. Lott outlining the terms of the preliminary agreement that prohibits Mr. Lott from discussing or disclosing the existence or terms of the agreement, and counsel for Plaintiffs took no steps to prevent him from disclosing the terms of the preliminary agreement.

Indeed, prior to agreeing to these terms, Mr. Lott discussed the preliminary agreement with Alan David Tucker, counsel for Defendants Agape Prescriptions "R" Us, Inc., Janice Ann Colter, and Christopher Grey May. In a phone conversation well before the June 4, 2019 hearing ("Hearing"), Mr. Tucker informed me that he had reviewed the preliminary agreement between Plaintiffs and Mr. Lott and ***he had advised Mr. Lott to enter into it***. Not only did Mr. Tucker share this information with me in our call, he also ***announced the existence of a settlement agreement in open court in the presence of counsel for the other Defendants prior to the Hearing on June 4, 2019***. Mr. Tucker did this after Whitney Sharp, Deputy Clerk for Judge Wood, asked whether counsel for Mr. Lott was present. In response, Mr. Tucker informed her (in full hearing of all

others present including approximately 12 other attorneys for Defendants) that counsel for Mr. Lott would not be appearing because Mr. Lott had settled his claims with Plaintiffs and that he, Mr. Tucker, had seen the agreement. Therefore, the fact that Mr. Lott had reached an agreement with Plaintiffs was ***known not only to Mr. Tucker but also to counsel for the other Defendants prior to the hearing.***

Moreover, knowledge of the fact that Plaintiffs sought to enter into an agreement on terms similar to those between Plaintiffs and Mr. Lott was known to other Defendants long before the June 4, 2019 hearing. Before discussing a potential resolution with counsel for Mr. Lott, counsel for Plaintiffs discussed a potential resolution on similar terms with Defendant G & H Pharmacy, Inc. As you no doubt know, counsel for Defendant J M Smith Corporation also represents G & H Pharmacy, Inc. And it was certainly no secret that counsel for Plaintiffs were in communication with counsel for Mr. Lott, and that Mr. Lott was cooperating with Plaintiffs, as Plaintiffs attached an affidavit from counsel for Mr. Lott along with email communication between him and your clients' co-counsel to their Motion to Remand ***filed with the Court***. *See* Dkt. 20-1.

Despite Mr. Tucker's statement made prior to the Hearing, none of the counsel for Defendants asked counsel for Plaintiffs about that statement. ***And none of the counsel for Defendants—including Counsel for the Cardinal Defendants that removed the action and opposed remand— raised this issue with the Court.*** You were specifically given the opportunity by the Court to make an argument and you declined to do so. Transcript at 18:18-20. Your contention that Plaintiffs' counsel sought to conceal anything from the Court or other Defendants or prevented anyone from informing the Court of its preliminary agreement with Mr. Lott is baseless. It is unfortunate, that following the rejection of your co-Defendant's frivolous removal attempt—an attempt made without informing the Court that Mr. Lott's counsel had specifically informed your clients of his refusal to consent to removal—you attempt to manufacture a baseless argument about something known to counsel for Defendants before the Hearing began.

Although your letter implied that there is something improper about the preliminary agreement between Plaintiffs and Mr. Lott, you cite nothing in support of that implication. It is well accepted under Georgia law that absent collusion there is nothing improper about plaintiffs resolving claims with a resident defendant to secure venue. *See Motor Convoy, Inc. v. Brannen*, 260 Ga. 340 (1990); *Hankook Tire Co. v. White*, 335 Ga. App. 453 (2016). There was no collusion here. Plaintiffs and their counsel had no contact with Mr. Lott prior to the filing of their Complaint and obtained significant non-monetary consideration from Mr. Lott for the proposed resolution of Plaintiffs' claims against him. Further, Mr. Lott was not even the first Defendant with whom counsel for Plaintiffs discussed an early resolution. However, after speaking with Mr. Lott's counsel, who represented that Mr. Lott was ill and likely unable to pay any judgment, Plaintiffs' counsel proposed a resolution of their dispute with him. After reaching a preliminary agreement with Mr. Lott, Plaintiffs' counsel did not seek an early resolution with any other Pharmacy

Defendant, and indeed, rebuffed Mr. Tucker's attempt to explore an early resolution with his clients.

Surely you do not contend that there is anything improper about a defendant deciding, after consultation with counsel, it is in his best interest to try to resolve claims in order avoid the cost, expense, and risk associated with litigation. Certainly, a defendant may withhold consent to removal when it is in his best interest to do so. Nor could you contend that obtaining a defendant's full cooperation in litigation lacks value to a plaintiff. And while you imply there is something improper about Plaintiffs seeking an agreement with a Defendant that involves not consenting to removal, you cite nothing in support and indeed there is no basis for your suggestion. *See e.g. Russell Corp. v. Am. Home Assur. Co.*, 264 F.3d 1040, 1049 (11th Cir. 2001) (unanimity requirement for removal not met because one defendant had waived its ability to consent to removal through contract with plaintiff); *Helford v. Cheyenne Petroleum Company*, No. 3:14-cv-4539, 2015 WL 5771915, at *3-4 (N.D. Tex. Sept. 30, 2015) (defendants' agreement not to remove the action in exchange for plaintiff's agreement to venue change prevented defendants from consenting to a later-added defendant's removal of the action; remanded for lack of unanimous consent to removal).[1]

You also imply, again without any support, that Plaintiffs' counsel had an obligation to inform the Court of its preliminary agreement with Mr. Lott. As noted above, there is nothing improper about a plaintiff and a defendant reaching an agreement for the defendant not to consent to removal, and Plaintiffs' counsel are not aware of anything that required them to reveal why a defendant properly refused to consent to removal. As the Court noted in its Order remanding this action, "Defendants bear the burden of proving that removal is proper." Dkt. 52 at 4. If counsel for any Defendant believed it was necessary for the Court to know that Plaintiffs had reached an agreement with Mr. Lott—again, a fact known to counsel for Defendants prior to the Hearing—it was their obligation and burden to raise it. More particularly, the Cardinal Defendants—who removed the action and argued against remand on behalf of all Defendants—knew Mr. Lott had an agreement with Plaintiffs and chose not to raise it. And neither you nor counsel for any other Defendant raised the issue, even though the Court offered Defendants an opportunity to present

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[1] The *Helford* Court noted:

> As stated before, the "unanimous consent" rule is well-established and requires all defendants that have been properly joined and served to consent to removal. That the initial Cheyenne Defendants voluntarily elected to bargain away their right to remove and their right to consent to the removal of the action by a later-served defendant is no fault of Helford. It is the initial Cheyenne Defendants' waiver that prevents them from giving consent to the removal. For the court to hold otherwise would be contrary to well-established law and allow later-served defendants to use legal prestidigitation to avoid legally binding contracts.

2015 WL 5771915, at *4.

argument. *See* Transcript at 18:18-23 (Court offering counsel for McKesson Defendants and J M Smith Corporation an opportunity to present argument).

Finally, it is worth noting that even if all of Plaintiffs' claims against Mr. Lott had been fully resolved at the time of the Hearing, his consent to removal was still necessary because he remained a party to the action. *See Holmes v. Progressive Halcyon Ins. Co.*, No. 07-0366-CG-M, 2007 WL 2028915, at *1 (S.D. Ala. July 10, 2007) (although all claims against defendant had been settled, that defendant's consent to removal was still necessary because that defendant had not been dismissed and remained a party to the action).

I hope that this letter clears up any confusion or misunderstanding you may have had. I am available to discuss this matter with you further and you may call or write me to do so.

Sincerely,

James D. Durham

CC: John Floyd, Esq.
Sachin Varghese, Esq.
Ron Harrison, Esq.
Chris Madel, Esq.