IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN W. BOYD, JR.,

PLAINTIFF,

v.

KILPATRICK TOWNSEND & STOCKTON LLP and DENNIS M. GINGOLD,

DEFENDANTS.

Civil Action No. 1:14-cv-00889-RJL

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT DENNIS M. GINGOLD'S MOTION TO DISMISS

Plaintiff John W. Boyd ("Plaintiff" or "Mr. Boyd"), by his attorneys, Doyle, Barlow & Mazard PLLC, hereby files this Opposition to Defendant Dennis M. Gingold's ("Defendant Gingold) Motion to Dismiss. In support of this Opposition, Plaintiff submits the following points and authorities:

I. PROCEDURAL HISTORY

Plaintiff brought this action against Defendants Kilpatrick Townsend & Stockton, LLP ("Defendant Kilpatrick") and Defendant Gingold (collectively referred to as "Defendants") in the Superior Court of the District of Columbia ("Superior Court"), Case No.: 2014 CA 002782 B on May 6, 2014. Plaintiff's Complaint alleges breach of implied contract, *quantum meruit*, and unjust enrichment claims against Defendant Kilpatrick and Defendant Gingold.

Defendant Kilpatrick and Defendant Gingold were duly served on May 6 and May 7, 2014, respectively.

On May 27, 2014, Defendant Gingold improperly removed the Superior Court action to federal court even though Defendant Kilpatrick shares Virginia citizenship with Plaintiff. As

acknowledged by Defendant Gingold, the presence of Defendant Kilpatrick destroys federal diversity jurisdiction. Defendant Gingold is attempting to create complete diversity so this Court can exercise jurisdiction over this matter by claiming that Defendant Kilpatrick was fraudulently joined as a defendant in Plaintiff's Complaint. Defendant Gingold's argument with regards to the fraudulent joinder of Defendant Kilpatrick defies credulity.

On June 26, 2014, Plaintiff filed in this Court a Motion for Remand of this case to Superior Court. An order of remand to Superior Court for lack of diversity is not reviewable on appeal. 28 U.S. C. Sec 1447(d).

As more fully detailed in Plaintiff's Motion for Leave to File Opposition Out of Time, after filing the Motion for Remand Plaintiff's counsel for the first time learned from this Court's docket that both Defendant Gingold and Defendant Kilpatrick filed separate Motions to Dismiss this action under Rule 12(b)(6) on June 1 and June 3, 2014 respectively.

Later on June 26, 2014, Plaintiff filed a Motion for Leave to File Oppositions to Defendants' Motions to Dismiss Out of Time and to Stay Disposition of Defendants' Motions to Dismiss Until the Issue of Remand is decided.

All of the above referenced Motions are still pending before this Court.

II. INTRODUCTION

Plaintiff Boyd was an integral force in securing Congressional funding for the *Cobell* settlement, which directly led to a massive payday for Defendants Gingold and Kilpatrick. Defendants Gingold and Kilpatrick directed Mr. Boyd's efforts, which proved to be of immense value to Defendants Gingold and Kilpatrick, as on their own, they had not been able to even secure a Congressional vote on funding for the *Cobell* settlement, much less passage of any actual funding legislation. Defendants Gingold and Kilpatrick violated District of Columbia law

in refusing to compensate Mr. Boyd for his efforts. Moreover, Plaintiff's Complaint states a valid cause of action under District of Columbia law against both Defendants.

Defendant Gingold, through his Notice of Removal and now through his present Motion to Dismiss, is attempting to make an end-run around the District of Columbia Superior Court so he can avail himself of what he perceives to be a friendlier forum. Everything Defendant Gingold filed to date rests upon his mistaken belief that the present case is the same as *Boyd v. Farrin,* Case No. 12-01893 (D.D.C 2012). The *Farrin* case involved Mr. Boyd's claims against attorneys representing class plaintiffs in the *Pigford II* decision. The *Farrin* case settled and a stipulation of dismissal was filed on September 9, 2013. Stipulation of Dismissal, attached as Exhibit 1. Defendant Gingold submits a Motion to Dismiss that is little more than a regurgitation of this Court's memorandum opinion entered in the *Farrin* matter, with little regard or attention paid to the facts and issues currently before this Court, which are fundamentally different with respect to the parties, the legal claims, and the relationship between the parties.

Defendant Gingold continues this end-run by claiming this Court has diversity jurisdiction, despite the fact that both Defendants concede that Defendant Kilpatrick shares Virginia citizenship with Plaintiff, which defeats diversity jurisdiction summarily. As any Court must begin first with a determination of its subject matter jurisdiction over the cause of action, the only question properly before this Court at the present time is whether Plaintiff stated a cause of action against Defendant Kilpatrick under District of Columbia law under the standards used by the Superior Court. As Plaintiff demonstrated in its Motion for Remand, Plaintiff properly alleged claims under District of Columbia law against Defendant Kilpatrick, which necessarily means this Court has no jurisdiction.

Consideration of Defendant Gingold's Motion to Dismiss is not necessary until this Court decides the Motion to Remand. While Plaintiff is now responding to Defendant Gingold's Motion to Dismiss with this Opposition, Plaintiff renews its objection to this Court's jurisdiction over this matter.

III. LEGAL ARGUMENT

1. THE THRESHOLD ISSUE BEFORE THIS COURT IS SUBJECT MATTER JURISDICTION.

Defendant Gingold opens his Motion to Dismiss with the spectacularly wrong statement that it is Plaintiff who bears the burden of proving that this Court does not have jurisdiction to hear this matter. Defendant Gingold's Motion to Dismiss at p. 3. This action could be considered a diversity action at best. Defendant Gingold concedes that Defendant Kilpatrick shares citizenship with Plaintiff. Thus, this Court does not have jurisdiction. Plaintiff timely moved this Court to remand this action to Superior Court. Undeniably, it is Defendant Gingold's burden to establish that jurisdiction exists by showing that Plaintiff fraudulently joined Defendant Kilpatrick to the Superior Court action. *Brown v. Brown & Williamson Tobacco Corp.*, 26 F.Supp.2d 74, (D.D.C. 1998). *See also Pulse One Communications, Inc. v. Bell Atlantic Mobile Systems, Inc.*, 760 F.Supp. 82, 84 (D.Md.1991) ("[T]he state law argument might be meritless as well as novel, but ... the state courts should make that determination, not the federal removal court….").

As more fully articulated in Plaintiff's Motion for Remand, Defendant Gingold has not, and cannot establish that Defendant Kilpatrick is not a rightful party to the Superior Court action. Indeed, Defendant Gingold's own Motion to Dismiss points out the facts as pled in Plaintiff's Complaint that demonstrate Defendant Kilpatrick's intimate involvement with Mr. Boyd in this matter.

2. DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(b)(1).

A. Standard of Review Under Rule 12(b)(1).

The basic function of the standing inquiry is to serve as a threshold a plaintiff must surmount *before* a court will decide the merits question about the existence of a claimed legal right. If a plaintiff's factual allegations are sufficient to require a court to consider whether the plaintiff has a statutory (or otherwise legally protected right), then the Article III standing requirement served its purpose; and the correctness of the plaintiff's legal theory—his understanding of the statute on which he relies—is a question that goes to the merits of the plaintiff's claim, not the plaintiff's standing to present it. Thus, during this threshold inquiry, "the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue." *Grayson v. AT & T Corp*., 15 A.3d 219, 229 (D.C. 2011) (emphasis added) (quoting *United States v. Beardon,* 328 F.3d 1011, 1013 (8th Cir.2003)). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal citations omitted). For Article III purposes, the question is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id*.

B. Mr. Boyd Has Standing To Bring This Action Against Defendant Gingold.

Defendant Gingold seeks to muddy the water of this state court action by spending over ten pages of its Motion to Dismiss on the idea that Plaintiff Mr. Boyd lacks standing to sue Defendant Kilpatrick under Article III of the United States Constitution. Presumably, Defendant Gingold believes that by invoking the Constitution, he gives this case the air of a federal question jurisdiction. The argument for standing inescapably depends on whether Mr. Boyd pled a valid

claim under District of Columbia law against Defendant Kilpatrick and whether the District of Columbia Court has jurisdiction to hear that claim.

Defendant Gingold cites to a number of irrelevant federal question jurisdiction cases to support its argument that Mr. Boyd does not have standing. For instance, *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996) involved the federal National Environmental Policy Act, 42 U.S.C. 4321 *et seq*; *Raytheon Co. v. Ashborn Agencies, Ltd.*, 372 F.3d 451 (D.C. Cir. 2004) was brought under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*; *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) was brought under the federal Endangered Species Act 16 U.S.C. § 1531 *et seq.*; and *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir., 1980) alleged misuse of federal funds and violations of the First and Fifteenth Amendments to the United States Constitution. Defendant Gingold did not cite a single case that speaks to the issue of diversity or fraudulent joinder. Each case that Defendant Gingold cited in his Motion to Dismiss was completely irrelevant to the present matter. Defendant Gingold wants this Court to apply a standard that presumes federal jurisdiction over Defendant Kilpatrick, when the actual standard the Court must apply goes solely to the question of whether there can be federal jurisdiction over Defendant Kilpatrick.

Plaintiff pled actual, concrete particularized injury caused by Defendants' conduct, including conduct by Defendant Kilpatrick and Defendant Gingold. Mr. Boyd sufficiently pled the elements of unjust enrichment, breach of implied contract and *quantum meruit* under District of Columbia law.

Defendant Gingold further muddies the water on the standing issue with several specious statements claiming that (1) Mr. Boyd is not entitled to attorney fees; (2) it was not Defendant

Gingold, but Defendant Kilpatrick who contacted Mr. Boyd to solicit Mr. Boyd's services;[1] and (3) the present case and the case of *Boyd v. Farrin,* Case No. 12-01893 (D.D.C 2012) are the same case so Mr. Boyd's claims against Defendant Gingold should be estopped. Plaintiff addresses each of these assertions in turn.

1. Plaintiff is not claiming a share of attorney fees, nor is he precluded from bringing equitable claims against a law firm under District of Columbia law.

Defendant Gingold's Motion to Dismiss appears to have been written for the *Farrin* case and does not relate to Mr. Boyd's legal claims against Defendant Gingold. Nowhere in Plaintiff's Complaint does Plaintiff assert that he is entitled to share in the settlement proceeds under the *Cobell* ruling as either a party or an attorney. Defendant Gingold correctly states that Plaintiff "seeks full restitution of all amounts in which Defendants, including Defendant Gingold have been unjustly enriched at Mr. Boyd's expense". Complaint ¶ 102, Defendant Gingold's Motion to Dismiss at 5. Defendant Gingold goes on to suggest, however, that the only source of this restitution can have been the $99 million attorneys' fee awarded by Judge Hogan on July 27, 2011. *Id.* This suggestion is patently false, and materially misrepresents the allegations in Plaintiff's Complaint.

Plaintiff's Complaint seeks restitution for Mr. Boyd's efforts to achieve *funding* Defendants Gingold and Kilpatrick reached for in the *Cobell* settlement. Plaintiff makes no allegation whatsoever that he participated in the underlying litigation or had any part reaching the *Cobell* settlement. Defendant Gingold's mischaracterization of Plaintiff's allegations makes

[1] This position is curious for Defendant Gingold to take considering that he filed a notice of removal on the very idea that Defendant Kilpatrick had no connection to this action and was fraudulently joined. The problem for Defendants Gingold and Kilpatrick is that they both know that they are liable under District of Columbia law and that Defendant Kilpatrick was not fraudulently joined in the Superior Court action.

no sense because the *Cobell* litigation settled on December 7, 2009. Defendant Kilpatrick did not approach Mr. Boyd for his help for another 15 months. When Defendant Kilpatrick's John Loving called Mr. Boyd in March 2011, Defendants Gingold and Kilpatrick had been sitting on the *Cobell* settlement for over a year without so much as a single vote in Congress to fund the settlement, and little prospect of one. For Defendants Gingold and Kilpatrick to now allege that Mr. Boyd's efforts were of no value to them, and for that matter to their clients, is disingenuous.

Furthermore, District of Columbia law does not foreclose a non-lawyer from being paid by a law firm. Once the attorney fees are deposited into the law firm's general account, there is nothing to distinguish the funds from the revenue of any other for-profit business. Defendant Gingold then runs with the false premise that Plaintiff can only be paid from the attorney fee award itself.[2] He cites cases that only define restitution in a legal sense without swaying the argument as to the source of funds in either direction. Mr. Boyd did not file an injunction, he did not purport to have a right to put any sort of hold on the attorney fee award any more than he would have a right to put a hold on the *Cobell* class plaintiffs' award. Mr. Boyd, at great expense of time, money and effort helped the *Cobell* litigation team, including Defendants Gingold and Kilpatrick to actually realize their attorney fees. Defendant Gingold knew Mr. Boyd was helping their cause; he wanted Mr. Boyd to help their cause; he and his litigation team gave specific direction to Mr. Boyd to help their cause; but, most importantly, he and his litigation team knew Plaintiff did not expect to render his services as a gratuity. Complaint ¶¶ 46-59, 60-82, 85-88. Defendants Gingold and Kilpatrick strung Mr. Boyd along with promises

[2] It is worth noting that even after the *Cobell* litigation team promised to abide by the terms the funding bill passed in December 2011, namely that they would not ask for more than $99 million in their attorney fee petition, they went back on their promise and pressed a claim to the *Cobell* Court for attorney fees of over $228 million.

that they would take care of him. *Id.* Defendant Gingold's actions violate District of Columbia law and he is obligated to compensate Plaintiff.

Defendant Gingold further demonstrates the weakness of his arguments on this point by dredging up an unpublished *per curium* opinion under Michigan law, *Fisher v. Carron* 2010 WL 935742, at *2 (Mich.Ct.App. March 16, 2010) for the proposition that Defendant Gingold cannot possibly compensate Mr. Boyd as he would be violating his ethics. First, the very idea is ludicrous under District of Columbia law or rules of ethics. Defendant Gingold actually cites a case in his Notice of Removal that undoubtedly stands for the proposition that a non-lawyer can be compensated for his efforts in assisting a law firm realize its contingency fee. *Bregman v. Perles*, 747 F.3d 873 (D.C. Cir. 2014). In *Bregman,* the plaintiff was an investigator, who claimed that the law firm had been unjustly enriched when it collected a contingency fee and refused to pay him for his efforts in helping the firm attain that fee. The D.C. Circuit only dismissed the claim because it was time barred, not because it failed to state a claim otherwise. *Id.* at 879.

Furthermore, Defendant Gingold "nobly" claims that by not paying Mr. Boyd, he will be safeguarding the legal profession, specifically, the "need to ensure that the lawyer will control the litigation, the deterrence of solicitation by non-lawyer intermediaries, and the protection of clients from unreasonably high fees." Ethics Opinion 351 of the D.C. Bar. Defendant Gingold's Motion to Dismiss at 7. It is telling that Defendant Gingold quoted this ethics opinion without apparently reading the rest of it. The opinion allowed an attorney to "share" fees in two proposed scenarios. The first scenario was a contingency settlement under a fee shifting statute, where there was a $90,000 settlement, and the defendants had insisted that $60,000 be apportioned as legal fees to which the plaintiff's attorney would have been entitled under the fee

shifting statute. The D.C. Bar saw no problem with the attorney giving $30,000 of the attorney fees to his client equal to the contingency fee arrangement made between the lawyer and the client prior to the commencement of litigation. The second scenario was a *pro bono* attorney who earned attorney fees under a fee shifting statute, and he wanted to give these fees to his client. The D.C. Bar likewise saw no problem with this arrangement. In rendering these opinions, the D.C. Bar stated that it approved both scenarios in part because "there is no indication in either instance that the lawyer promised, let alone made or guaranteed, any such payment while the litigation was pending."

Mr. Boyd had no control over the *Cobell* litigation, nor could he, as the matter was settled for well over a year before he was approached by Defendant Kilpatrick's Mr. Loving. Mr. Boyd likewise did not solicit any *Cobell* class plaintiff, nor did his efforts in any way contribute to the extraordinarily high legal fees the *Cobell* litigation team sought to collect.

2. Defendant Gingold is liable to Plaintiff based upon his own direct actions, as well as actions of the *Cobell* litigation team.

Defendant Gingold played a leadership role in the *Cobell* litigation team. In this role, Defendant Gingold is liable to Mr. Boyd on the basis of both his direct actions and vicariously liable for the actions of the members of the *Cobell* litigation team taken for the common benefit of the team. The word "team" is not an invention of Mr. Boyd's Complaint. It is Defendants' own term used throughout the *Cobell* litigation and during the Congressional negotiations in which Mr. Boyd played such a critical part.

Geoffrey Rempel, a member of this team, as alleged in the Complaint, filed affidavits in support of the Defendants' applications for fees and expenses, describing himself as "engaged as a member of [*Cobell's*] litigation team." Affidavit of Geoffrey Rempel, Dec. 5, 2012, attached as Exhibit 2. Keith Harper, a partner at Defendant Kilpatrick at the time this litigation was filed

and throughout all relevant periods of Mr. Boyd's Complaint, also filed an affidavit describing the litigation team, and how he and Defendant Gingold controlled the operations of the team. Affidavit of Keith Harper, March 31, 2011, attached as Exhibit 3. In this particular affidavit, Mr. Harper describes how he and Mr. Rempel informed Defendant Gingold that they wanted an attorney removed from the *Cobell* team because he negotiated on behalf of the Plaintiffs without the knowledge or consent of the rest of the team.[3] It is clear from the affidavit that the *Cobell* litigation team all worked out of Defendant Kilpatrick's offices, and, at the very least, Defendant Gingold and Defendant Kilpatrick were co-equal leaders of the team, not making decisions concerning the team's strategy without consulting with the other.

There can be no doubt that Defendants Gingold and Kilpatrick acted in concert at all times throughout the *Cobell* litigation, and never more so than during the period in 2011 when they used Mr. Boyd to secure funding for their settlement. As specifically pled in Plaintiff's Complaint, Defendant Kilpatrick and Defendant Gingold were directly involved in engaging Mr. Boyd, directing his work, and refusing him remuneration. Complaint ¶ 27. While Defendant Kilpatrick was the first from the *Cobell* litigation team to contact and recruit Mr. Boyd, Defendant Kilpatrick and Defendant Gingold participated in numerous meetings, phone calls, and emails with Mr. Boyd throughout all relevant times. Complaint ¶¶ 26-28, 46-59, 60-82, 85-88. When Mr. Boyd met with Defendant Gingold and Mr. Rempel at lunch in March 2011, they discussed Mr. Boyd's desire to be paid for his services. Complaint ¶ 40. Defendant Gingold, as a member of the *Cobell* team did not refuse payment at this meeting and actively encouraged Mr. Boyd to continue to help the *Cobell* team. Complaint ¶¶ 41-45. These facts make Defendant Gingold directly liable to Mr. Boyd for all claims.

[3] Keith's Harper's affidavit was actually filed with the *Cobell* Court for the express purpose of denying a former member of the *Cobell* litigation team his share of the attorney fee award.

Defendant Gingold, in his Notice of Removal, undeniably demonstrates that Mr. Boyd sufficiently pled his causes of action with particularity and specificity. Defendant Gingold cites at least 17 paragraphs directly implicating Defendant Kilpatrick through the actions of its lawful agents. Defendant Gingold, however, fails to include many more, which refer to "Defendants" as is clearly defined by the Complaint to include the actions of Defendant Kilpatrick and Defendant Gingold.

Paragraphs 3 through 9 of Plaintiff's Complaint detail the history of the negotiations to secure Congressional funding for the *Cobell* settlement, Defendant Gingold's role in directing Mr. Boyd to work towards that goal, the distinct value of Mr. Boyd's service, and the benefit Defendants Gingold and Kilpatrick received from these services.

Paragraphs 40 through 43 describe the lunch meeting with Defendant Gingold and Mr. Rempel, another member of the *Cobell* team, regarding the lack of success members of the team had so far in dealing with the White House and Congress, and the fact that Mr. Boyd's contacts and experience were necessary for the *Cobell* team to achieve these goals. Paragraph 43 also states Mr. Boyd's direct request for compensation for his efforts from the *Cobell* team.

Paragraphs 48-50 and 52-55 detail emails from the *Cobell* team, including Defendants Gingold and Kilpatrick, directing Mr. Boyd to use his contacts at a local law firm with government contracts to steer support for the *Cobell* funding and to continue his efforts with Congress.

Paragraphs 56-64 detail Mr. Boyd's interactions with the press and members of Congress on behalf of the *Cobell* team, including Defendants Gingold and Kilpatrick. Paragraphs 65-68 detail Mr. Boyd's interaction with the Washington Post and other media outlets at the direction and with the approval of the *Cobell* team, including Defendant Gingold and

Kilpatrick. Paragraphs 86-87 demonstrate that the *Cobell* team and Defendant Gingold directly knew and acknowledged that the interest in settling *Cobell* was negatively impacting Mr. Boyd's efforts for *Pigford II* funding, but insisting that he keep advocating for *Cobell.*

Paragraphs 89-93 describe how Mr. Boyd's efforts were ultimately successful and of great benefit to the *Cobell* team, including Defendant Gingold, and how Mr. Boyd was publicly acknowledged by the press and Congress as playing a key role in the passage of the *Cobell* funding.

The facts indisputably find that Defendant Kilpatrick and Defendant Gingold expended enormous energy in their attempts to micromanage Mr. Boyd's actions. It is also clear from the facts that Defendant Kilpatrick and Defendant Gingold exerted such effort to direct Mr. Boyd's activities precisely because they knew the pivotal importance of Mr. Boyd's activities in obtaining funding for Cobell's settlement, without which Defendant Kilpatrick and Defendant Gingold would not have realized even a dime of the tremendous legal fees that ultimately came with the funding. The facts show that Defendant Kilpatrick's and Defendant Gingold's refusal to pay just compensation for Mr. Boyd's efforts, efforts from which Defendant Kilpatrick and Defendant Gingold derived enormous financial reward, construes unjust enrichment under the laws of the District of Columbia, and should so be tried before the Superior Court.

3. Mr. Boyd's Claims Against Defendants Are Not Precluded By Any Previous Litigation.

Mr. Boyd filed a lawsuit in federal district court in 2012 against attorneys representing class plaintiffs in the *Pigford II* decision. Plaintiffs claims in the present matter involve different parties, different facts, and different causes of actions.

i. The *Farrin* case does not preclude Mr. Boyd's present claims under *res judicata*.

Res judicata holds that a judgment on the merits in a prior suit bars a second suit involving identical parties or their privies based upon the same cause of action. *Drake v. FAA,* 291 F.3d 59, 66 (D.C. Cir. 2002). Under the law of the District of Columbia, a party seeking to apply *res judicata* must establish four elements:

1. identity of the parties;
2. judgment from a court of competent jurisdiction;
3. final judgment on the merits; and,
4. identity of the cause of action.

Tembec, Inc. v. United States, 570 F.Supp.2d 140-141 (D.D.C. 2008).

In the present matter, Defendants cannot satisfy the first and fourth requirements to apply *res judicata* to this action. Defendants were not parties to the *Farrin* case, nor could they have been. The *Farrin* case involved Mr. Boyd's relationship with the attorneys for class plaintiffs prior to, during and after the *Pigford II* litigation. Defendants in the present matter were not involved in the *Pigford II* litigation. Mr. Boyd's claims in the *Farrin* case were discrete claims of breach of fiduciary duty, *quantum meruit* and breach of contract. Mr. Boyd's claims against Defendants Kilpatrick and Gingold are unjust enrichment, breach of implied contract and *quantum meruit*. Mr. Boyd's claims against Defendants are discrete from those brought in *Farrin.* Mr. Boyd's claims against Defendant Kilpatrick and Defendant Gingold are based only on Mr. Boyd's relationship with Defendant Kilpatrick and Defendant Gingold and the *Cobell* litigation team during that period of time in which they were seeking to get Congressional funding for the *Cobell* settlement. Mr. Boyd had no involvement in the underlying *Cobell* litigation, and Mr. Boyd is not claiming compensation for anything done to achieve the *Cobell* settlement.

Here, the *Cobell* settlement was worthless until Congress funded it. Defendants Kilpatrick and Gingold made no progress towards the goal of obtaining Congressional funding

for their settlement agreement, as there had not been a single Congressional vote on the matter prior to their enlistment of Mr. Boyd to champion their cause. It is true that Mr. Boyd was working to achieve funding for the *Pigford II* decision simultaneously, but *Cobell* added to his burden, and in fact hindered the progress of gaining funding for the *Pigford II* settlement. The *Cobell* litigation team, which was led by Defendants Kilpatrick and Gingold, was unpopular in Congress, and their attorney fee demands were seen as excessive. Complaint ¶¶ 7, 40. Defendant Kilpatrick and Defendant Gingold happily used Mr. Boyd and exploited his zeal and dedication for the cause of black farmers to their own objectives. Complaint ¶ 25. Plaintiff's Complaint clearly states facts showing how Defendant Kilpatrick was specifically and directly involved in instructing Mr. Boyd's efforts. Complaint ¶¶ 27-28, 48-50, 54-55. Plaintiff's Complaint also details how Plaintiff relayed to both Defendants his desire and expectation to be remunerated for his efforts. Complaint ¶ 40-45.

Defendant Gingold attempts to compare the language of the *Farrin* complaint and the present case. Defendant Gingold's Notice of Removal, at 20. However, Defendant Gingold's attempt is misguided because the paragraphs from Plaintiff's Complaint detail meetings with members of Congress and newspaper articles delineating the progress of Mr. Boyd's efforts to secure funding for both the *Pigford II* and *Cobell* settlements. Mr. Boyd never attempted to hide the fact that his actions in seeking funding for these settlements were linked, both because of Presidential prerogative and because of the insistence and direction of the *Cobell* attorneys, *i.e.*, Defendants Kilpatrick and Gingold. This fact does nothing to defeat or even diminish Mr. Boyd's claims against Defendants in the present case.

Accordingly, *res judicata* does not bar Plaintiff's present claims against Defendant Gingold claims for unjust enrichment, breach of implied contract, and *quantum meruit*.

ii. The *Farrin* case does not preclude Plaintiff's present claims under collateral estoppel.

Under District of Columbia law, collateral estoppel only applies to those issues arising in a prior case that was "actually litigated and necessary to the outcome of a prior case involving the party against whom estoppel is asserted." *Pipher v. Odell,* 672 A.2d 1092, 1095 (D.C. 1996) (quoting Restatement (Second) of Judgments § 27). An issue is "actually litigated" when it is (1) "properly raised, by pleadings or otherwise," (2) "submitted for determination," and (3) "determined." *Id.*; *see also Carr v. Rose,* 701 A.2d 1065, 1077 (DC, 1997) ("[P]reclusion applies only to issues actually litigated and determined, and not to matters which might have been raised in the first proceeding, but were not.") (quoting *Lebeau v. Lebeau*, 393 A.2d 480, 483-84 (Pa. Super. 1978). Furthermore, "collateral estoppel renders conclusive "an issue of fact or law that was actually litigated and necessarily decided . . . in a subsequent action between the same parties or their privies." *Brodie v. Dep't of Health & Human Servs.*, 951 F. Supp. 2d 108, 117 (D.D.C. 2013) (quotation marks omitted), *aff'd*, No. 13-5227, 2014 WL 21222 (D.C. Cir. Jan. 10, 2014).

First, the *Farrin* Court did not make a final determination on any issues presently before this Court. The *Farrin* Court found that Mr. Boyd lacked standing to bring a claim based upon the defendant attorneys failing to request compensation from the *Pigford II* Court. See *Boyd v. Farrin,* 958 F.Supp.2d 232 (D.D.C. 2013). No such claim or issue is raised in the present action. As for the rulings on Mr. Boyd's other causes of action, they were dismissed under F.R.C.P. 12(b)(6) for failure to plead sufficient facts to support the underlying claims. There is no such deficiency of pleading in the present action.

In *Farrin*, Mr. Boyd brought claims against the *Pigford II* attorneys starting with facts beginning in 1997 and detailed Mr. Boyd's intimate involvement with the *Pigford II* case and the

Pigford II attorneys, from its beginning throughout its litigation. Mr. Boyd was actually a part of the litigation in the *Pigford II* case, and his claims in the *Farrin* case were based on issues directly related to that involvement.

In the present case, Plaintiff's Complaint against Defendants Kilpatrick and Gingold include factual allegations that are completely different from *Farrin*. *Farrin* relates to Mr. Boyd's relationship with class counsel involved in the *Pigford II* litigation. Mr. Boyd was intimately involved in pre-litigation, litigation, and post litigation activities with *Pigford II* counsel. Defendant Gingold can in no sense be called a privity of the *Pigford II* litigation team. Mr. Boyd's communications with the *Pigford II* litigation team and with Defendant Gingold have no relationship at all. Whether Mr. Boyd entered or failed to enter into a contract with *Pigford II* counsel over a decade ago has no bearing on whether Mr. Boyd properly alleged claims for unjust enrichment, breach of contract or *quantum meruit* claim against Defendant Gingold.

Because Plaintiff's Complaint relates to causes of actions brought against different defendants, a completely different set of factual allegations related to breach of contract and *quantum meruit* claims, and at least one different legal claim related to unjust enrichment,[4] collateral estoppel does not preclude the present action.

Accordingly, collateral estoppel does not bar Plaintiff's present claims against Defendant Gingold.

[4] Judge Leon specifically declined to consider a claim of unjust enrichment in the *Farrin* case, as the claim had not been pled. *See Boyd v. Farrin,* 958 F.Supp.2d 232 (D.D.C. 2013) at n. 10.

3. DEFENDANT GINGOLD'S MOTION TO DISMISS UNDER RULE 12(b)(6).

A. Standard of Review Under 12(b)(6) .

A complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds upon which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003)(citing Fed. R. Civ. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 78 S.Ct. 99 (1957)). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues." *Conle*y, 355 U.S. at 47-48, 78 S.Ct. 99 (internal quotation marks omitted). It is not necessary for the plaintiff to plead all elements of his *prima facie* case in the complaint, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-14, 122 S.Ct. 992 (2002), or tion marks omitted). It is not necessary for the plaintiff to p*Krieger v. Fadely*, 211 F.3d 134, 135 (D.C. Cir. 2000). The plaintiff must allege a). usible entitlement to relief," by setting forth facts consistent with the allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559, 127 S.Ct. 1955 (2007). While these facts must "possess enough heft to 'sho[w] that the pleader is entitled to relief,'"ho[w] that the pleader is entitled to relief,hile these fact*Id.* at 545, 555. In fact, Justice Souter articulated succinctly the pleading standard required under *Twombly: 555. In fact, Justice Souter articulated succinctly the pleading standard required under ," by setting forth facts consistent with the ."wombly*at 570 (emphasis added).

The Supreme Court in *Twombly* reiterated that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A court must not dismiss a complaint for failure to state a claim unless the plaintiff failed to plead "enough facts to state a claim to relief that is

plausible on its face." *Twombly*, 550 U.S. 570. "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiffs' grounds for entitlement to relief - including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.' ai*Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007)(quoting *Twombly*, 127 S.Ct. at 1964-65). ove theolving a Rule 12(b)(6) motion, the court must treat the complaint's factual allegations - including mixed questions of law and fact - as true and draw all reasonable inferences therefrom in the plaintiff's favor." *Shirk v. Garrow*, 505 F. Supp. 2d 169, 172 (D.D.C. 2007) (Urbina, J.) (citing *Macharia v. United States*, 334 F.3d 61, 64, 67 (D.C. Cir. 2003).

When evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), courts presume that all well-pled allegations are true, resolving all doubts and inferences in the plaintiff's favor, and viewing the pleading in the light most favorable to the non-moving party. *Erickson v. Pardus,* 551 U.S. 89 (2007); *In re Rail Freight Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 31-32 (D.D.C. 2008). Claims shall not be dismissed simply because someone may not believe the allegations or feels that recovery is remote or unlikely. *See Twombly*, 127 S. Ct. at 1965 (31-32 (D.D.C. 2008). Claims shall not be dismissed simply because someone may not belif of those facts is improbable."; *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ((D.D.C. 2008). Claims shall not be dismissed simply because someone 's disbelief of a complaint's factual allegations.aint ((D.D.C. 2008). Claims shall not be dismissed simpff's allegations against them, the allegations are that all of the named Defendants are liable under District of Columbia law.

B. Mr. Boyd Pled a Cognizable Claim for Unjust Enrichment Under District of Columbia Law.

Under District of Columbia law, a claim for unjust enrichment has three elements:

1. the plaintiff conferred a benefit on the defendant; 2. the defendant retains the benefit; and, 3. under the circumstances, the defendant's retention of the benefit is unjust. *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.,* 944 A.2d 1055, 1076 (D.C. 2008). In fact, the D.C. Circuit recognized that a non-lawyer can have an unjust enrichment claim against lawyers involved in a contingency fee award. *Bregman v. Perles*, 747 F.3d 873 (D.C. Cir. 2014). In the *Bregman* case, cited by Defendant Gingold, the D.C. Circuit elaborated on the concept of unjust enrichment under District of Columbia law, stating that unjust enrichment "is based not on a contractual duty but rather has its roots in the common law concept of quasi-contract." *Bregman* at 875 (citing *4934, Inc. v. D.C. Dep't of Emp't Servs.*, 605 A.2d 50, 55 (D.C. 1992)). That is:

> A quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. In truth it is not a contract or promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, *or its equivalent*, under such circumstances that in equity and good conscience he ought not to retain it, and which *et aequo et bono* belongs to another. *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 64 (D.C. 2005) (second emphasis added) (quoting *Miller v. Schloss*, 218 N.Y. 400, 407 (1916)); *see also Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 279-80 (D.C. Cir. 2009).

Bregman at 875.

Importantly, for the present case, the D.C. Circuit, in *Bregman*, specifically recognized that circumstances such as Mr. Boyd's, where Mr. Boyd actively worked to achieve a result from which attorneys ultimately received a large contingency fee, would be sufficient to state a cause of action for unjust enrichment under District of Columbia law.

> Although the defendant lawyers were eventually enriched by the Beecham settlement proceeds, they were "enriched" in the legal sense by [plaintiff]'s efforts on their behalf. Whether or not [plaintiff]'s labors got them across the goal line, he conferred a benefit on them by working to move the ball forward.

Id.

The D.C. Court of Appeals held that the equitable doctrine of unjust enrichment entitles a plaintiff to compensation even when the plaintiff acts in her own interest and not solely to further the defendant's interest where the defendant takes proactive steps to benefit from the plaintiff's efforts. *Peart v. District of Columbia Housing Auth.*, 972 A.2d 810 (D.C. 2009). In *Peart*, Ms. Peart brought an action alleging housing code violations against her Section 8 landlord. and theThe D.C. Housing Authority ("DCHA") intervened at the last moment after Ms. Peart had done all of the heavy lifting and successfully asserted a right to all of the award. *Id.* The Court of Appeals recognized that Ms. Peart was acting in her own interest to bring the case against her landlord and that the DCHA intervened and captured the benefit of Ms. Peart's services. *Id.* at 816. The Court of Appeals held that Ms. Peart was not precluded from recovering under an unjust enrichment claim even though she was acting in her own interest because the DCHA was not merely the incidental beneficiary of her efforts. *Id.* The DCHA adopted a posture calculated to ensure maximal recovery with minimal effort, resulting in the DCHA obtaining a recovery on Ms. Peart's success. *Id.* Basically, the DCHA without communicating directly with Ms. Peart on litigation strategy "hitched its wagon to Ms. Peart's horse". *Id.* For this reason, the Court of Appeals found that it would be inequitable under the circumstances to permit DCHA to retain the benefit of her services without paying Ms. Peart. *Id.*

Here, the facts alleged in Plaintiff's Complaint present an even more compelling case for an unjust enrichment claim than in Ms. Peart's case. Defendants not only hitched their wagon to Mr. Boyd's horse (or rather his mule, Struggle), Defendants rode the horse and actively directed it. After Defendants filled the wagon with $99 million dollars, they refused to give Mr. Boyd just compensation for his services or his horse any water. Mr. Boyd was actively recruited and encouraged to do work for the *Cobell* litigation team. Complaint ¶¶ 26-28. Mr. Boyd, at great

expense of time, money and effort, helped the *Cobell* litigation team, including Defendants Gingold and Kilpatrick to actually realize their attorney fees. Defendant Gingold knew Mr. Boyd was helping the *Cobell* team's cause. Complaint ¶¶ 40-45, 46-59, 60-82, 85-88. The *Cobell* team, including Defendants Gingold and Kilpatrick, wanted Mr. Boyd to help their cause and gave specific direction to Mr. Boyd to help their cause, knowing Plaintiff did not expect to render his services as a gratuity. Complaint ¶¶ 40-45, 46-59, 60-82, 85-88. Mr. Boyd was strung along with promises of being taken care of just for so long as he was necessary to Defendants.

Accordingly, Defendant Gingold's motion to dismiss Plaintiff's unjust enrichment claim should be denied.

C. Mr. Boyd Pled A Cognizable Claim For Breach of Implied-in-fact Contract and *Quantum Meruit* Under District of Columbia Law.

The District of Columbia Court of Appeals held that "an implied-in-fact contract is a true contract, containing all necessary elements of a binding agreement; it differs from other contracts only in that it has not been committed to writing or stated orally in express terms, but rather is inferred from the conduct of the parties in the milieu in which they dealt." *Steuart Inv. Co. v. Meyer Grp., Ltd.*, 61 A.3d 1227, 1233 (D.C. 2013) (internal citations omitted).

The elements of establishing an implied-in-fact contract and *quantum meruit* under District of Columbia law are:

> (1) valuable services being rendered;
> (2) for the person sought to be charged;
> (3) which services were accepted by the person sought to be charged, used and enjoyed by him or her; and
> (4) under such circumstances as reasonably notified the person sought to be charged that the [person rendering the services] expected to be paid by him or her.

New Economy Capital, LLC, v. New Markets Capital Group, 881 A.2d 1087, 1095 (D.C. 2005).

In the present case, Mr. Boyd demonstrated the value of his services in securing passage of Congressional funding for the *Cobell* settlement and that those services inured to the great benefit of Defendant Kilpatrick and Defendant Gingold. These facts cannot be reasonably disputed. Moreover, both the circumstances and facts indicate that Mr. Boyd reasonably notified Defendant Kilpatrick and Defendant Gingold of Mr. Boyd's expectation to be paid for his efforts. In fact, as alleged in Plaintiff's Complaint at paragraphs 40-43, Mr. Boyd expressly told Defendant Gingold at a lunch meeting on June 1, 2010 at the Laughing Man restaurant in Washington, D.C. that he expected to be paid for his efforts on behalf of the *Cobell* litigation team in securing funding for the *Cobell* settlement. Defendants Gingold and Kilpatrick did not refuse to pay him rather the Cobell team told him he would be paid. Plaintiff's Complaint at ¶¶43-45. Rather, Defendants Gingold and Kilpatrick prodded and encouraged Mr. Boyd to help them obtain the necessary funding that would allow Defendants Gingold and Kilpatrick to get paid handsomely. Plaintiff's Complaint ¶¶ 46-59. Defendants merely put him off with assurances of payment and then instructed Mr. Boyd about what actions they expected him to take next on their behalf. Plaintiff's Complaint ¶¶ 60-82. In Paragraph 85, Plaintiff's Complaint alleges that Defendant Gingold in an email directed Mr. Boyd, by writing "You, "you [Mr. Boyd] must get [Congressman] Clyburn firmly behind the effort" to pass the Senate CRA in the House. In paragraph 86, Plaintiff's Complaint alleges that Defendant Gingold in an email tells Mr. Boyd that Mr. Boyd's "enemy isn't Cobell" and directed Mr. Boyd that he "ha[d] work to do in the House". This email, along with all of the other communications and face to face meetings with the *Cobell* team from March through November 2010, further led Mr. Boyd to believe that he would be financially compensated for the additional work required to obtain the votes needed to pass the CRA. As Plaintiff's Complaint alleges in paragraph 86, Mr. Boyd knew that *Cobell*

was not the "enemy" because Mr. Boyd understood that Defendants Gingold and Kilpatrick enlisted him to help them get paid, and Defendants would, in turn, pay Mr. Boyd. In paragraph 87, Plaintiff's Complaint alleges that Defendant Gingold emailed Mr. Boyd and directed him to patrick enlisted him to n the accelerator., and Defendants would, in tu's Complaint alleges that Mr. Boyd and Defendant Gingold exchanged congratulations and praise for each other for the passage of the CRA. In fact, on December 1, 2010, Defendant Gingold also specifically recognized and acknowledged Mr. Boyd's efforts again, when telling him dhanged congratulThese allegations set forth in Plaintiff's Complaint are not mere recitations of the elements of a claim but based upon numerous emails, phone calls, and meetings with Defendant Gingold and Defendant Kilpatrick, which are verified by emails and/or can be proven through testimony.

Accordingly, Defendant Gingold's Motion to Dismiss Plaintiff's breach of implied contract and *quantum meruit* claims should be denied.

CONCLUSION

Plaintiff requests this Court to DENY Defendant Gingold's Motion to Dismiss and renews its Motion to Remand this action back to the District of Columbia Superior Court without further delay Case No. 2014 CA 002782, and to enter an Order awarding Plaintiff his just costs and attorney fees as allowed under 28 U.S.C. Sec. 1447(c) for litigating Defendants' meritless removal attempt and unnecessary motions practice arising therefrom.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of July, 2014, I electronically filed the foregoing *Plaintiff's Opposition to Defendant Gingold's Motion to Dismiss* with the Clerk of the Court using the CM/ECF system, and by the same means served the following parties:

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Respectfully submitted,

/s/

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Counsel for John W. Boyd

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN W. BOYD JR., 68 Wind Road Baskerville, VA 23915 Plaintiff,	)	
v.	)	**Civil Case No. 14-889 (RJL)** **Removed from D.C. Superior Court** **(Civil Action No. 2014 CA 002782)** **Judge Richard Leon**
KILPATRICK TOWNSEND & STOCKTON, LLP, 607 14th Street, NW, Suite 900 Washington, D.C. 20005-2018	)	
and	)	
DENNIS M. GINGOLD 8712 Crider Brook Way Rockville, MD 20854	)	
Defendants	)	

ORDER

UPON CONSIDERATION of Defendant Dennis M. Gingold's Motion to Dismiss; and Plaintiff's arguments in opposition, this Court hereby

FINDS that Plaintiff John W. Boyd has pled cognizable claims against Defendant Gingold under District of Columbia law for unjust enrichment, breach of implied contract and *quantum meruit*, and

NOW, THEREFORE, it is hereby, this the ____ day of _____, 2014,

ORDERED, that Defendant Gingold's Motion for Dismiss shall be, and hereby is, DENIED.

_____
Judge Richard Leon
United States District Court
for the District of Columbia

Copies to:

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EXHIBIT 1

Stipulation of Dismissal
September 9, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN W. BOYD, JR. and NATIONAL BLACK FARMERS ASSOCIATION, INC.,

Plaintiffs,

v.

JAMES SCOTT FARRIN and ANDREW H. MARKS,

Defendants.

Civil Action No. 1:12-cv-01893-RJL

STIPULATION OF DISMISSAL

NOW COME the parties, Plaintiff John W. Boyd, Jr. and National Black Farmers Association, Inc., and Defendants James Scott Farrin and Andrew H. Marks, through counsel, and hereby enter into this binding written Stipulation of Dismissal pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure. The parties stipulate that all claims stated in this action between and among the parties or their affiliates, are hereby DISMISSED WITH PREJUDICE with the express understanding that this shall operate, when filed, as a final adjudication upon the merits. Each party shall bear its own costs and attorney fees.

Respectfully submitted, this 9th day of September, 2013.

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Attorneys for Defendant Andrew H. Marks

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Stipulation of Dismissal with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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Michael L. Kuppersmith
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This the 9th day of September, 2013.

/s/ Alexander John Pires, Jr.
Alexander John Pires, Jr.

EXHIBIT 2

Affidavit of Geoffrey Rempel
December 5, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al., on their own behalf and on behalf of all persons similarly situated,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 96-1285 (TFH)
KEN SALAZAR, Secretary of the Interior, et al.,	)	
Defendants.	)	

AFFIDAVIT OF GEOFFREY REMPEL

1. My name is Geoffrey Rempel. I am a Certified Public Accountant and I was engaged as a member of plaintiffs' litigation team in Cobell v. Salazaar, No. 1:96 CV 01285, an action in equity that has been in litigation in the United States District Court for the District of Columbia and this Court since June 10, 1996.
2. I make this affidavit in support of the plaintiffs' application for fees and expenses incurred since December 7, 2009, the date the settlement agreement was filed with this Court.

Time Records

3. I maintain time records in an electronic spreadsheet file that is dedicated solely to recording and tracking my Cobell time. The entries submitted to this Court reflect the day a particular task or service was rendered; a description of that task or service and the

amount of time incurred. I maintain these records in tenths of an hour and no task covers time for more than one day.

4. My hourly rate for this application is $475.00. I have maintained the same rate as reflected in *Plaintiffs' Petition for Class Counsel's Fees, Expenses and Costs Through Settlement* [Dkt. No. 3678-11 at ¶7], even though this rate is substantially below what comparable litigation professionals with similar experience charge who are involved in complex litigation.

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

Executed on December 5, 2012.

/S/
Geoffrey Rempel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing AFFIDAVIT OF GEOFFREY REMPEL was served on the following via facsimile, pursuant to agreement, on this 10th day of September, 2013.

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
406.338.7530 (fax)

/s/ William E. Dorris

EXHIBIT 3

Affidavit of Keith Michael Harper
March 31, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	No. I:96 CV 01285 (TFH)
	)	
KEN SALAZAR, et al.,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

AFFIDAVIT OF KEITH MICHAEL HARPER

1. My name is Keith M. Harper. I am a member of the Bar of this Court and Class Counsel for the plaintiffs in this action. I have worked on this matter since inception. I make this affidavit in support of plaintiffs' opposition to *Attorney Mark Kester Brown's Motion for Attorney's Fees; Mark Kester Brown's Objection to Plaintiffs' Counsel's Fees, Expenses, and Costs through Settlement.*

2. In 2000, Dennis Gingold discussed with me adding another lawyer to the litigation team. He suggested a lawyer named Mark Brown, who I understood Mr. Gingold knew in both a professional and personal capacity. At the time, the workload of the *Cobell* case was quite heavy and, accordingly, adding another attorney seemed by all a necessary step. We met with Mr. Brown on a number of occasions and reviewed his biography extensively and agreed that he should be brought on. I understood that thereafter Mr. Gingold would

recommend Mr. Brown be added to the team to lead plaintiff, Elouise Cobell and thereafter I was informed that the representative plaintiffs had agreed to retain Mr. Brown. I also understood that Mr. Brown had agreed to devote substantially all his professional time to this case.

3. From the inception of his retention, I maintained a cordial and professional working relationship with Mr. Brown. Also from inception, however, there were professional differences of opinion regarding approach and strategic decisions. I observed early-on that Mr. Brown would not always comply with the decisions made by the litigation team after long deliberations. At times, he would continue an approach inconsistent with the agreed one and the interests of the plaintiff class. Nevertheless, I worked with Mr. Brown cooperatively for several years.

4. Other members of the team including Mr. Gingold and especially Geoffrey Rempel clashed bitterly with Mr. Brown. Over time, these clashes became more severe and had the potential to undermine our ability to represent the class effectively. During this period, starting in around 2003, Mr. Gingold asked that Mr. Brown work principally with me. I agreed to attempt to play that role. But over time, that role became untenable because Mr. Brown and I had differences of opinion and he would too often not follow direction. It became often easier for me to just assume tasks he was performing rather than constantly monitoring his work product.

5. Because of the continuing conflict with team members, Mr. Brown began to disengage from the case more and more, especially in 2005. He often was not available and in 2005, I saw very little of him in the office or in court proceedings. In the spring of 2005,

we commenced preparation for a trial regarding information technology security at the Department of Interior. Mr. Brown to my knowledge did not participate in such preparation.

6. As I understood it at the time, Mr. Gingold informed Mr. Brown that he would not participate in examining witnesses during the IT security trial because he was not familiar enough with the record. During the early days of the trial, the Court asked that I negotiate with a designated Justice Department lawyer to reach resolution regarding the scope, procedure and protocol for the production of electronic records from the so-called "Zantaz" database at the Interior Department – information that was critical to the prosecution of our case-in-chief. Despite the Court's direction, Mr. Brown decided on his own accord and without asking either me or Mr. Gingold, to participate in the negotiations. Because he was not sufficiently familiar with the record, Mr. Brown's participation was detrimental to our interests. I, along with Mr. Rempel who joined me in the negotiation, asked that Mr. Brown not participate in further discussions and informed Mr. Gingold that Mr. Brown's continuing participation was counter-productive to the interests of the plaintiff class. As a result of this incident and the cumulative effect of working with Mr. Brown over time, I expressed disinterest in continuing to monitor his work for this case.

7. After the time frame described in Paragraph 6, *supra*, I had very little contact with Mr. Brown. I rarely saw Mr. Brown at this office and, to my recollection, did not speak with him regarding case matters. I understood from other members of the team that they had very little to no contact with him either.

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

Executed on March 31, 2011.

Keith Michael Harper