IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN W. BOYD, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.: 1:14-cv-00889 (RJL)**
	)	
	)	
KILPATRICK TOWNSEND & STOCKTON, LLP	)	
	)	
and	)	
	)	
DENNIS M. GINGOLD,	)	
	)	
Defendants.	)	

DENNIS M. GINGOLD'S OPPOSITION TO
PLAINTIFF'S MOTION FOR REMAND

Defendant Dennis M. Gingold ("Gingold"), through counsel, opposes plaintiff John W. Boyd's ("Boyd") Motion for Remand. The Motion for Remand purports to attack the propriety of Gingold's Notice of Removal filed with this Court on June 1, 2014. For the reasons set forth more fully below, the Motion for Remand is unsustainable, consisting of little more than a litany of narratives, which miscasts the law governing Article III standing; misconstrues the jurisdictional ambit of this Court and the Superior Court of the District of Columbia; presses arguments against positions Gingold has not taken; and improperly attempts to reconstruct the Complaint in a manner inconsistent with plain language of his pleading. Boyd's Motion for Remand presents no legally cognizable arguments supporting his prayer for relief.

BACKGROUND

On May 6, 2014, Boyd filed an action in the Superior Court for the District of Columbia (Case No. 2014 CA 002782) ("Complaint") against defendants Kilpatrick, Townsend & Stockton

("Kilpatrick") and Gingold asserting claims of unjust enrichment, breach of implied-in-fact contract and quantum meruit, seeking remuneration for lobbying and advocacy services Boyd allegedly performed on behalf of plaintiffs in a class-action lawsuit, captioned *Cobell v. Jewell*, (No. 1:96-cv-01285-TFH) ("*Cobell*") – a case in which Gingold and Kilpatrick served as class counsel.

On June 1, 2014, Gingold removed the action pending before the Superior Court pursuant to 28 U.S.C. §§ 1332(a) and 1441(b) (Diversity). Acknowledging Kilpatrick had at least one partner residing in Virginia, Gingold argued the Complaint's lack of specificity rendered it impossible for Boyd to successfully mount an action against Kilpatrick and that Kilpatrick's citizenship should be disregarded for jurisdictional purposes.

On June 26, 2014, Boyd moved for remand arguing: (1) Gingold's contention that Boyd lacks standing is meritless given "the fact that Boyd plainly pled damages against Defendants for conduct that violates District of Columbia law"; (2) Gingold wrongfully "argue[s] that Mr. Boyd cannot sue Defendants unless and until they 'unequivocally' refuse to pay him, as if Defendants could just remain equivocal in their refusal to pay Mr. Boyd and avoid liability indefinitely"; and (3) Gingold "present[s] a confused and completely unsupported attempt to extract *res judicata* from another lawsuit brought by Mr. Boyd that involved substantially different facts and circumstances, completely different defendants, and which was confidentially settled to the mutual satisfaction of all parties involved." Motion for Remand, at 2-3. Boyd's arguments reflect a misreading of the Notice of Removal and a misapplication of settled law. They should be given no weight.

DISCUSSION

Before addressing the "substance" of Boyd's arguments, Gingold is constrained to respond briefly to Boyd's gratuitous remarks.

Boyd first questions whether the Notice of Removal is procedurally defective. He observes, "[t]here is nothing anywhere on record from Defendant Kilpatrick either responding to the Complaint or directly acknowledging consent to removal of this action to federal court" but, "according to Defendant Gingold, Defendant Kilpatrick consents to this removal." Boyd either has failed to read the Notice of Removal in its entirety or believes there is a special incantation Gingold omitted.

The Notice of Removal provides: "**CONSENT**: KILPATRICK consents to this removal, pursuant to 28 U.S.C. § 1446(a)(2)(A)." Notice of Removal, at 3. Boyd asserts, without authority, this representation is inadequate and reflects, at most, "the tacit consent of Defendant Kilpatrick." Motion for Remand, at 2. Boyd is mistaken. A "notice of removal normally must *reflect the consent* of all of those defendants who have been served." *In re Tobacco Governmental Health Care Costs Litigation*, 100 F.Supp.2d 31, 40 (D.D.C. 2000) (emphasis added) (citing 28 U.S.C. § 1441(a)). The Notice of Removal does exactly that; Boyd has not demonstrated otherwise.

Boyd next accuses Gingold of filing the Notice of Removal in "a blatant effort to delay and forum shop." Motion for Remand, at 2. This contention is ironic considering the utter disregard demonstrated by Boyd's counsel with respect to monitoring this court's docket and their inexcusable failure to keep abreast of the case as it unfolded during the first month. Indeed, it is this very lack of vigilance that resulted in his failure to file a timely opposition to Gingold's Motion to Dismiss and compelled Boyd to file his June 26, 2014 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, in which Boyd's attorneys supplicated this Court to forgive their "lack of diligence" prosecuting this action.

Boyd's insistence that the Notice of Removal is Gingold's attempt to "forum shop" is equally specious. Boyd either believes this Court incapable of properly adjudicating the Complaint or he intentionally overlooks Gingold's "clear prerogative" to "remove state cases to federal district courts." *Mizell v. SunTrust Bank*, 13–cv–1077, — F.Supp.2d — , 2014 WL 1022888 *4 (D.D.C. March 18, 2014). *See also Wecker v. Nat'l Enameling & Stamping Co*., 204 U.S. 176, 186 (1907) ("the Federal courts . . . should be equally vigilant to protect the right to proceed in Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction").

Boyd next characterizes the Notice of Removal as a "cleverly disguised motion to dismiss." There was no disguise, clever or otherwise. The Notice of Removal is faithful to the proposition that, "[i]t is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove." *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939). Gingold not only recognizes his obligation to demonstrate "there is no possibility the plaintiff can establish a cause of action against the resident defendant," *In re Tobacco Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 39 (D.D.C. 2000), he does so successfully – amply describing Boyd's failure to demonstrate a concrete and particularized injury traceable to any act or omission by Kilpatrick that may be redressed by this or any other court. Boyd's attempt to characterize Gingold's Notice of Removal as subterfuge is disingenuous and unavailing.

I. Article III Standing is an Essential and Unchanging Predicate to the Exercise of Federal and D.C. Jurisdiction.

Boyd presses the curious position that, "Defendants seek to muddy the water of this state court action by opening with a claim that Mr. Boyd lacks standing to sue Defendant Kilpatrick under Article III of the United States Constitution." Motion for Remand, at 3. Boyd specifically accuses Gingold of "giv[ing] this case the air of a federal question jurisdiction" by citing cases and imposing standards reserved for actions implicating "federal question jurisdiction." Motion to Remand, at 4.

Boyd's argument betrays a skewed insight into the underpinnings of Article III jurisdiction as well as a misplaced understanding of "standing" as it applies to cases before this Court and before the Superior Court to which he seeks to have his case remanded.

The novel position propounded by Boyd overlooks not only the fundamental principle that "Article III limits the constitutional role of the federal judiciary to resolving cases and controversies," *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996), but ignores the precept that a "showing of standing" is "an essential and unchanging predicate to *any* exercise of [federal] jurisdiction." *Id.* (internal citation and quotation marks omitted) (emphasis added).

Gingold's contention that Boyd's claim cannot survive a Rule 12(b)(1) motion stems from the mandate that standing, "must be resolved as a threshold matter," *Raytheon Co. v. Ashborn Agencies, Ltd.*, 372 F.3d 451, 453 (D.C. Cir. 2004) – whether the case sounds in diversity or is rooted in federal question. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the

threshold question *in every federal case*, determining the power of the court to entertain the suit") (emphasis added).

Boyd's suggestion that Article III standing does not apply to cases brought in diversity is baseless and particularly perplexing in light of the disposition of Boyd's most recent lawsuit filed in this District. In *Boyd v. Farrin*, 958 F. Supp. 2d 232 (2013) ("*Boyd v. Farrin*"), Boyd and co-plaintiff National Black Farmer's Association ("NBFA") lodged claims against their attorneys under theories of breach of fiduciary duty, breach of oral contract and quantum meruit. Seeking relief from this Court, plaintiffs asserted jurisdiction "pursuant to 28 U.S.C. §1332 . . . diversity." *Boyd v. Farrin*, Complaint, at ¶ 5. None of their claims were rooted in "federal questions."

By insisting, in this action, that standing is not a jurisdictional predicate to cases arising in diversity, Boyd overlooks that, in *Boyd v. Farrin*, this Court dismissed NBFA's claims "for lack of standing," *id.*, at 239, as well as Boyd's claims seeking "compensation from the [class-action] settlement" on the grounds that "Boyd lack[ed] standing." *Id*. Not only does *Boyd v. Farrin* undermine Boyd's thesis, it reaffirms the axiomatic proposition that Article III standing is a threshold determination whether the parties seek relief in diversity or assert a claim arising out of a federal question.

Finally, Boyd fails to appreciate that a lack of standing, which bars plaintiffs from pursuing a claim in federal court, applies with equal force to actions brought in the Superior Court – Boyd's forum of choice. In *Grayson v. AT&T Corp.*, 15 A.3d 219 (2011) (*en banc*), a full panel of the D.C. Court of Appeals reflected on the applicability of Article III standing to D.C. Courts. In an exhaustively researched opinion, the Court of Appeals took great pains to faithfully recount the history of standing in the federal arena and in the D.C. Courts.

As relevant here, the court concluded, although "Congress created the District of Columbia court system under Article I of the Constitution, rather than Article III, *this court has followed consistently the constitutional standing requirement embodied in Article III*." *Grayson* 15 A.3d at 224 (emphasis added). The *en banc* panel further held that, to survive a motion challenging standing, a party must allege facts demonstrating: "(1) 'the plaintiff['s] . . . injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical'; (2) 'a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court'; [and] (3) a likelihood, as opposed to mere speculation, that an 'injury will be redressed by a favorable decision.'" *Grayson* 15 A.3d at 226 (quoting *Lujan*, 504 U.S. at 560-61) (alteration in *Grayson*). These are the very factors guiding federal courts.

In sum, the criteria employed by federal and local courts in this jurisdiction apropos a party's standing are identical and apply with equal force. *See Friends of Tilden Park, Inc. v. Dist. of Columbia*, 806 A.2d 1201, 1206-07 (D.C. 2002) (District of Columbia courts apply Article III constitutional and prudential standing requirements "in every case"). As this Court examines Gingold's Notice of Removal, asking whether "there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court," *B., Inc. v. Miller Brewing Co*. 663 F.2d 545 (5th Cir. 1981), it would be applying the same standards employed by local courts. Remand is not necessary to dispose of Boyd's claims for lack of standing.

When Sitting in Diversity this Court Adjudicates State Law Claims.

Boyd maintains, "Defendants cleverly attempt to have this federal court dismiss these state law claims against Defendant Kilpatrick in the guise of establishing federal diversity jurisdiction." Boyd offers up the generalization that, "when ruling upon diversity jurisdiction the state court is the proper tribunal to make decisions on the merits of state claims, 'not the federal removal court.'" Motion for Removal, at 6 (quoting *Pulse One Communications, Inc. v. Bell Atlantic Mobile Systems, Inc.*, 760 F.Supp. 82, 84 (D. Md. 1991)).

Boyd seeks to extend the holding in *Pulse One* beyond its permissible contours. In *Pulse One*, the underlying action was initially removed to federal court and then remanded. While in state court, summary judgment was entered in favor of the defendant against non-diverse plaintiffs and defendant again sought to remove the action. The Maryland District Court, characterizing the action as an "elaborate jurisdictional minuet already involving state, federal, and bankruptcy courts in Maryland and New Jersey," compared the summary judgment to an "involuntary dismissal" subject to appeal and held removal to be improvident. On those unique set of facts, the court observed, by way of dictum, that "the state law argument might be meritless as well as novel, but . . . state courts should make that determination, not the federal removal court, at least where the claim is not wholly nonsensical." *Id.*, at 84 (citing *Glass Molders Intern. Union v. Wickes Cos.*, 707 F.Supp. 174 (D. N.J. 1989)).

Boyd's attempt to extract from *Pulse One* the proposition that state courts should be the sole arbiters of state claims obscures the immutable proposition that when "federal courts sit in diversity actions, 'the law to be applied . . . is the law of the state.'" *Diffenderfer v. United States*, 656 F.Supp.2d 137, 139 (D.D.C. 2009) (Leon, J.) (quoting *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). In essence, Boyd urges a position that, if adopted, would

foreclose federal courts from adjudicating any "state law claims" and render diversity jurisdiction a nullity – a position directly in conflict with the Supreme Court's "recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List v. Driehaus*, No. 13–193, — S.Ct. — , 2014 WL 2675871*11 (June 16, 2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. —, —, 134 S.Ct. 1377, 1386 (2014)).

The Principles of *Res Judicata* do not Apply.

Boyd next pushes the position that Gingold's citation to this Court's decision in *Boyd v. Pigford*, represents "a confused and completely unsupported attempt to extract *res judicata* from another lawsuit brought by Mr. Boyd that involved substantially different facts and circumstances, completely different defendants, and which was confidentially settled to the mutual satisfaction of all parties involved." Respectfully, the only "confused and completely unsupported" argument is that posited by opposing counsel.

Before addressing the applicability of *Boyd v. Farrin* to the instant action, it should be noted that, nowhere in the Notice of Removal does Gingold invoke, explicitly or otherwise, the doctrine of *res judicata*, and nowhere does Gingold take the position that *Boyd v. Farrin* has binding or preclusive effect. Rather, he asserts this Court's decision in *Boyd v. Farrin* is "of compelling application" (Notice of Removal, at 12); the instant action "closely resembles" the facts set forth in *Boyd v. Farrin* (Notice of Removal, at 13); and the two actions are "equally specious" and "compel a similar result." Notice of Removal, at 14. Nothing more.

II. There is no Possibility Boyd can Prevail on his Common Law Claims in the D.C. Superior Court.

Standard of Review

Boyd's Motion for Remand implicates three standards of review – those governing motions challenging subject matter jurisdiction, pursuant to Rule 12(b)(1); those challenging the facial validity of Boyd's Complaint, pursuant to Rule 12(b)(6); and those governing motions seeking removal. Before analyzing the validity of Boyd's common law claims, a brief explication of each standard is in order.

Standard for Dismissal under Fed.R.Civ.P. 12(b)(1)

To survive a motion to dismiss pursuant to Rule 12(b)(1) in this Court, the plaintiff bears the burden of establishing that the court has subject matter jurisdiction over its claim. *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007). This standard applies with the same force in D.C. local courts. *See Pardue v. Center City Consortium Schools of Archdiocese of Washington, Inc.*, 875 A.2d 669, 675 (D.C. 2005) (in a challenge to subject matter jurisdiction, "plaintiff bears the burden of proof that jurisdiction does in fact exist).

Presented with a challenge to its jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C.Cir.2003) (citations omitted). And "[a]lthough a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)," resolution of those allegations "'will bear closer scrutiny . . . than . . . a 12(b)(6) motion for failure to state a claim.'" *Wright v. Foreign Serv. Grievance Bd.*, 503 F.Supp.2d 163, 170 (D.D.C. 2007) (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993)).

Standard for Dismissal under Fed.R.Civ.P. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a party may challenge the sufficiency of a complaint on the grounds that it "fail[s] to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). A complaint offering up only "naked assertion[s]" lacking "further factual enhancement" is facially insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Rather, a complaint must "state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, such that it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

In its application of Rule 12(b)(6), a court "need not accept inferences drawn by the plaintiff [ ] if such inferences are unsupported by the facts set out in the complaint." *Kowal v. MCI Comm'ns Corp.*, 16 F.3d 1271, 1276 (D.C.Cir.1994). Neither is a reviewing court bound to accept the legal conclusions of the non-moving party. *Taylor v. FDIC*, 132 F.3d 753, 762 (D.C.Cir.1997). In that vein, "the sparse case law addressing the effect of factual allegations in briefs or memoranda of law suggests that such matters may never be considered when deciding a 12(b)(6) motion." *Henthorn v. Dep't. of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994). *See also Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (when a motion to dismiss is based on the complaint, the facts alleged in the complaint control).

Standard for Fraudulent or Improper Joinder.

As stated, a removing party challenging joinder bears the burden of proving "there is no possibility the plaintiff can establish a cause of action against the resident defendant." *Walter E. Campbell Co. v. Hartford Financial Services Group, Inc.*, 959 F.Supp.2d 166 (D.D.C. 2013) (internal quotation marks and citation omitted). Given the inherently "heavy burden"

accompanying assertions of improper or fraudulent joinder, *Brown v. Brown & Williamson Tobacco Corp.,* 26 F.Supp.2d 74, 77 (D.D.C. 1998), this Court must assume all of the facts set forth by plaintiff to be true and resolve all uncertainties as to state substantive law in favor of the plaintiff and "resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff."

Notwithstanding the stringency of this standard, the Notice of Removal demonstrates not only that Boyd lacks standing to assert his claims in this Court or in the Superior Court of the District of Columbia, but confirms Boyd cannot prevail on his individual common law claims in the Superior Court.

Boyd Fails to Assert a Legally Sustainable Claim for Unjust Enrichment.

The Notice of Removal articulates several reasons why Boyd's claim in unjust enrichment is legally unsustainable. The first of those reasons is that Boyd's claim has not yet accrued. Notice of Removal, at 16-18.

As set out in the Notice of Removal, for Boyd to assert successfully a claim sounding in unjust enrichment, he must demonstrate (1) [he] conferred a benefit on the defendant; (2) [Kilpatrick] retains the benefit; and (3) under the circumstances, [Kilpatrick's] retention of the benefit is unjust." *Euclid Street, LLC v. District of Columbia Water and Sewer Authority*, 41 A.3d 453, 463 n.10 (D.C. 2012) (quoting *Peart v. District of Columbia Hous. Auth.*, 972 A.2d 810, 813 (D.C. 2009)).

To meet the "unjust" component, Boyd must demonstrate Kilpatrick committed some "wrongful act." *News World Comms., Inc. v. Thompsen*, 878 A.2d 1218, 1225 (D.C. 2005). Boyd's claim can accrue and become legally cognizable only in the face of this "wrongful act," namely "when the services were rendered *and* when payment was refused." *Vila v. Inter-*

American Investment, Corp., 570 F.3d 274, 283-84 (D.C. Cir. 2009) (quotation marks and citation omitted) (emphasis added).

In *Thompsen*, for example, the plaintiff's claim was adjudged to have accrued when the enrichment became unjust, namely, when the defendant, having retained the benefit of the plaintiff's services, refused payment. 878 A.2d at 1221. In *Vila*, "plaintiff's claim accrued on . . . that date the first unequivocal refusal for all his work that year [occurred]." 570 F.3d at 284. And in *Bregman v. Perles*, 747 F.3d 873 (D.C. Cir. 2014), the Circuit held plaintiffs' claim accrued "when [defendants] unequivocally refused to compensate him for the services he had performed."

In short, a claim for unjust enrichment is ripe for adjudication only in the face of "an unequivocal refusal of payment."

Seeking to distance himself from this standard, Boyd accuses Gingold and Kilpatrick of "try[ing] to turn the *Bregman* decision on its head by alleging that Mr. Boyd's unjust enrichment claim against Defendant Kilpatrick is not ripe because Defendant Kilpatrick has to date chosen not to respond, but only to hide behind Defendant Gingold in this matter." Motion for Remand, at 8. To salvage his claim, Boyd attempts to shore up his argument by positing for the first time that, "on April 18, 2014, Mr. Boyd's counsel sent a demand for payment to Defendant Kilpatrick detailing the claims and attaching a draft of the Complaint." Motion for Remand, at 12. According to Boyd, "to date, Defendant Kilpatrick has not responded in any way, either to the April 28th demand letter or the Complaint filed on May 6, 2014 in Superior Court of the District of Columbia." *Id.*

In a more colorful vein, Boyd reproaches Kilpatrick for having "the audacity to suggest that a lack of a response can indefinitely forestall an unjust enrichment claim." Motion for Remand, at 8.

Inexplicably, the Complaint makes no mention whatsoever of an "April 28th demand letter" or its contents. Nowhere in its 34 pages and 109 paragraphs, does Boyd allude to having requested payment on April 28, or to Kilpatrick having unequivocally rebuffed his request. Moreover, Boyd neither attached a copy of that letter to his Complaint nor sought leave to file an Amended Complaint to include this development. These would have been acceptable vehicles for introducing the "demand letter" as a court, in determining jurisdiction, may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Coal for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted).

Instead, Boyd has chosen to introduce his purported "demand" for payment from Kilpatrick via the unsubstantiated representation of his counsel. Boyd's attorneys offer no clarification whether their letter "demanded" a specific amount; whether that amount was tied to specific lobbying services Boyd says he performed for Kilpatrick; whether the amount of time and dates of his alleged services were detailed; whether his "demand" was in accordance with the terms of the purported agreement he insists he entered into with Kilpatrick; whether any terms for payment were proposed and, if so, with the requisite specificity to permit this Court to determine whether the "April 28th demand letter" is as Boyd describes. More importantly, Boyd cites no authority supporting the proposition that, having received no response between the time he posted the "April 28th demand letter" and the time he filed his Complaint one week later, constitutes an "unequivocal refusal."

In short, Boyd's attempt to circumvent the holdings in *Bregman*, *Vila* and *Thompsen* and avoid dismissal of his claim against Kilpatrick by belatedly amending the Complaint through backdoor assertions of his counsel runs afoul of the "axiomatic" proposition "that a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Coleman v. Pension Benefit Guar. Corp.*, 94 F.Supp.2d 18, 24 n. 8 (D.D.C. 2000) (quoting *Morgan Distrib. Co., Inc., v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989)).

In the final analysis, these machinations are unavailing as the question for removal jurisdiction must be determined by reference to the "well-pleaded complaint." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986). *See also Fink v. Dakotacare*, 324 F.3d 685 (8th Cir. 2003) (noting that court should make removal analysis based on claims as pleaded at time of removal, rather than based on amended complaint later filed in federal court); *LaRoque v. Holder*, 650 F.3d 777 (D.D.C. 2011) ("the existence of federal jurisdiction "'ordinarily depends on the facts as they exist when the complaint is filed'"). *Id.*, at 785 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n. 4 (1992)).

Boyd's Unjust Enrichment Claim Seeks Unlawful Disgorgement of Court-Awarded Fees.

Boyd's claim that Kilpatrick and Gingold were unjustly enriched must fail for reasons beyond its facial infirmity. Boyd admits seeking "full restitution" of "all amounts in which Defendants, including Defendant Gingold, have been unjustly enriched at Mr. Boyd's expense." Complaint, at ¶ 102. He wants those "amounts" restored from the $99 million attorneys' fee awarded by Judge Hogan on July 27, 2011 for the work *Cobell* class counsel performed on behalf of their clients for the previous 15 years. ("Fee Award"). Complaint, at ¶¶ 94, 101 and 102. As a matter of law, Boyd has no legally protected interest in the Fee Award and, thus, no standing to pursue restitution either in this Court or in the Superior Court.

Judge Hogan approved the Fee Award under the "common fund doctrine." The award represented "7.1 percent, approximately, of the common fund . . . . of $1.4 billion . . . . within the range of mega settlement attorney's fees." *Cobell v. Salazar*, (No. 1:96-cv-01285-TFH), Fairness Hearing Transcript (June 20, 2011), at 251. *See* Exhibit 1.

On July 27, 2014, Judge Hogan memorialized his rulings during the Fairness Hearing and issued a Final Approval (Dkt. No. 3850). *See* Exhibit 2. In the Final Approval, the court not only approved the Settlement Agreement entered into between the parties on December 7, 2009, it also approved payment to class members; incentive awards to the four named plaintiffs; and fees to class counsel. Final Approval, at ¶¶ 11, 13 and 15. With respect to the Fee Award, the court held:

> Based on controlling law, the Claims Resolution Act, the Settlement Agreement, the Agreement on Attorneys' Fees, the submissions of the parties, and the record in this case, the Court, giving due consideration to the special status of plaintiffs as beneficiaries of a federally created and administered trust, hereby awards to plaintiffs' attorneys $99,000,000.00 as fair and reasonable fees, expenses and costs for work.

Final Approval, at ¶ 15.

Boyd never was among those entitled to receive a share of the Fee Award which, in accordance with the terms of settlement and Congressional authorization, expressly limited the payment of such appropriated funds to Class Counsel. *See generally* Claims Resolution Act of 2010 (H.R. 4783-3). He neither filed a claim nor sought to intervene in any capacity for the amounts he now insists are due and owing. Boyd sought no leave of the *Cobell* court to assert a right against the attorney's fees, interposed no objection during the Fairness Hearing and sought no reconsideration of Judge Hogan's Final Approval.

In *Boyd v. Farrin*, this Court was confronted with compellingly similar facts. There, the parties in the underlying action known as *Pigford II*, "agreed to award attorneys' fees to class

counsel of an amount between 4.1% and 7.4% of an adjusted sum of the settlement funds." *Boyd v. Farrin*, 958 F. Supp. 2d at 236. According to the *Pigford II* settlement agreement, disbursements from the common fund could be appropriated for "certain enumerated purposes: payments to the settlement class, settlement costs/fees, and attorneys' fees." *Id.*, at 239 n.6. Finding Boyd had no legally protected interest in the attorneys' fee award, the court intoned the well-established legal principle that, "when attorneys' fees are available under fee-shifting statutes, nonlawyers cannot receive these 'attorneys' fees.'" *Id.*, at 238 (citing *Kooritzky v. Herman*, 178 F.3d 1315, 1320-21 (D.C. Cir. 1999)) (where the Circuit denied attorneys' fees to a nonlawyer, *pro se* plaintiff). The Court further observed that defendants Farrin and Marks "could not have requested attorneys' fees for plaintiffs since such a request would have violated defendants' ethical obligation not to share fees with nonlawyers. *Id*. (citing D.C. Rules Prof'l Conduct R. 5.4 ("A lawyer or law firm shall not share legal fees with a nonlawyer").

Importing the rationale underlying this Court's decision in *Boyd v. Farrin* to the instant case yields the same conclusion, namely, Boyd has no "legally protected interest" in any share of the Fee Award and, thus, no standing to bring his claim for unjust enrichment either in this Court or in the Superior Court.

This Court and the Superior Court can avail themselves of several avenues of inquiry when assessing Boyd's claim of unjust enrichment. It can apply the "closer scrutiny" standard associated with Rule 12(b)(1) standing motions. *Foreign Serv. Grievance Bd.*, 503 F.Supp.2d 163, 170 (D.D.C. 2007). Alternatively, it can ask whether the Complaint "state[s] a claim to relief that is plausible on its face," pursuant to Rule 12(b)(6). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Finally, it can utilize the standard applicable to petitions for remand, namely, after "assum[ing] all of the facts set forth" in the Complaint "to be true and resolve all

uncertainties as to state substantive law in favor of the plaintiff." *Brown v. Brown & Williamson Tobacco Corp.*, 26 F.Supp.2d 74, 77 (D.D.C. 1998).

Under any of these schemes, there is simply "no possibility" Boyd "can establish a cause of action against" Kilpatrick sounding in unjust enrichment. *In re Tobacco Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 39 (D.D.C. 2000).

Boyd Cannot Possibly Prevail on his Claims for Breach of Implied-in-Fact Contract and Quantum Meruit.

Boyd next insists his claims sounding in breach of implied-in-fact contract and quantum merit are viable. He is mistaken.

It bears mention, at the outset, that Boyd conspicuously avoids addressing the arguments set out in the Notice of Removal. The Notice of Removal, for example, recites how a contract implied-in-fact "is a true contract, containing all the necessary elements of a binding agreement," differing only "that it has not been committed to writing or stated orally." Notice of Removal, at 23 (quoting *Vereen v. Clayborne*, 623 A.2d 1190, 1193 (D.C. 1993)). The Notice of Removal further demonstrates that, to be enforceable, implied-in-fact contracts must manifest an "agreement as to all material terms," *id.* (quoting *New Economy Capital, LLC v. New Markets Capital Group*, 881 A.2d 1087, 1094 (D.C. 2005)) – such as "subject matter, price, payment terms, quantity, quality, and duration" which, in turn, must be stated with specificity such "that the promises and performance to be rendered by each party are reasonably certain." *Id.*, at 24 (quoting *LanQuest Corp. v. McManus & Darden LLP*, 796 F.Supp.2d 98, 102 (D.D.C. 2011)). The Notice of Removal exposes Boyd's failure of the Complaint to meet these criteria. Notice of Removal, at 25-26.

Boyd's Motion to Remand does not address these arguments; his failure to do so should be construed as a concession.

Apropos of Boyd's theory under quantum meruit, the Notice of Removal amply demonstrates that, in the District of Columbia, an attempt to recover in quantum meruit can be applied either to an implied-in-fact or to one implied-in-law. The Notice of Removal explained how, viewed from either perspective, Boyd's claim is not sustainable as contracts, whether implied-in-fact or implied-in-law, require an agreement "containing all the required elements of a binding agreement." Notice of Removal, at 27 (quoting *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 176 (D.C. 1996).

In the Motion for Remand, Boyd makes no attempt to address these deficiencies. He responds, instead, with the following conclusory statements: "Mr. Boyd demonstrated the value of his services": "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"; defendants "prodded and encouraged Mr. Boyd to help them obtain the necessary funding that would allow Defendant Kilpatrick and Defendant Gingold to get paid handsomely." Motion to Remand, at 9.

As stated, any court in the District of Columbia, when adjudicating a motion challenging subject matter jurisdiction, must "accept[ ] all of the factual allegations in [the] complaint as true." *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1250 (D.C. Cir. 2005) (citation omitted). The court, however, "is not required . . . to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations," *Cartwright Int'l Van Lines, Inc. v. Doan*, 525 F.Supp.2d 187, 193 (D.D.C.2007). Boyd's reliance on conclusory statements and his inability to respond to the arguments set forth in the Notice of Removal are fatal to his equitable claims – irrespective of which court sits in judgment.

Similarly, there is no possibility Boyd's claims under the theories of implied-in-fact contract and quantum meruit could survive dismissal under Rule 12(b)(6). As stated, Boyd articulates *no* contractual terms upon which he grounds his claims. His failure in that regard renders it impossible either for this Court or the Superior Court to "identify the obligations that it should enforce." *See In re U.S. Office Prods. Co. Sec. Litig.*, 251 F. Supp. 2d 58, 71 (D.D.C. 2003). Boyd's position is not advanced by unsupported allegations describing his expectations. In this jurisdiction "verbal promises to pay, absent a description of the pertinent obligations, cannot 'nudge...claim[s]...across the line from conceivable to plausible.'" *Boyd v. Farrin*, 958 F. Supp. 2d at 241 (quoting *RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S.*, LLP, 682 F.3d 1043, 1052 (D.C. Cir. 2012)).

Finally, Boyd's equitable claims, even when held up to the light of the stringent standards imposed on defendants facing remand, cannot be sustained. Assuming "all of the facts set forth" in the Complaint "to be true and resolve all uncertainties as to state substantive law in favor of the plaintiff," *Brown* , 26 F.Supp.2d at 77, there simply is "no possibility" Boyd "can establish a cause of action against" Kilpatrick sounding in breach of implied-in-fact contract or under the theory of quantum meruit. *In re Tobacco Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 39 (D.D.C. 2000).

In sum, Boyd's complaint against Kilpatrick cannot survive dismissal either in this Court or in the Superior Court for the District of Columbia. His claim sounding in unjust enrichment fails to meet the minimum standards demanded in this jurisdiction and seeks restitution from a fee award to which he has no legally protected interest. Boyd's claims in breach of implied-in-fact contract and quantum meruit are equally meritless as the Complaint asserts no facts from which a court can reasonably construe a contract between Boyd and

Kilpatrick. Applying the law of the District of Columbia, there "is no possibility" that Boyd can establish a cause of action against Kilpatrick in D.C. Courts.

For the aforementioned reasons, defendant Dennis M. Gingold respectfully requests that this Court deny John W. Boyd's Motion for Remand and retain jurisdiction over this case.

Date: July 11, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 11th day of July 2014, a true and correct copy of *Defendant Dennis M. Gingold's Opposition to Plaintiff's Motion for Remand* was served via electronic transmission through the Court's electronic filing system on:

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