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, et al.,	)	
	)	
Defendants.	)	

DENNIS M. GINGOLD'S REPLY
IN SUPPORT OF MOTION TO DISMISS

Defendant Dennis M. Gingold ("Gingold") respectfully submits this Reply in support of his Motion to Dismiss.

PRELIMINARY STATEMENT

John W. Boyd's ("Boyd") Response in Opposition to Gingold's Motion to Dismiss ("Opposition") fails to provide a legal basis for this Court to allow him to proceed against Gingold. The Opposition marshals no facts and cites no authority refuting Gingold's contention that Boyd lacks the requisite standing to pursue his claims. The Opposition similarly fails to articulate any legally cognizable reason why Boyd's claims for unjust enrichment, quantum meruit and breach of implied-in-fact contract should not be dismissed for failing to state a claim on which relief may be granted. The Motion to Dismiss should be construed as conceded and the underlying action against Gingold dismissed with prejudice.

ARGUMENT

I. Boyd Misconstrues the Law Governing Standing and the Procedural Posture of this Case.

The Motion to Dismiss demonstrates Boyd's lack of standing to bring this action. Rather

than repudiate Gingold's position, the Opposition sets forth a series of arguments reflecting Boyd's skewed understanding of Article III jurisdiction.

Boyd begins his Opposition with the argument, "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." *Id.* (emphasis added). If Gingold actually made that statement, Boyd would be correct. What the Motion to Dismiss actually states, however, is that, "[u]nder Rule 12(b)(1), the plaintiff bears the burden of establishing that the court *has jurisdiction*." Motion to Dismiss, at 3 (quoting *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F.Supp. 2d 9, 13 (D.D.C. 2001)). This is not the first instance where Boyd falsely attributes statements to Gingold. As demonstrated below, it is an unfortunate hallmark of his entire Opposition.

Boyd next argues, "it is Defendant Gingold's burden to establish that jurisdiction exists by showing that Plaintiff fraudulently joined Defendant Kilpatrick to the Superior Court action." Opposition, at 3. Boyd fails to appreciate that the motion before this Court is not one seeking remand but one asking for dismissal, where the burden of demonstrating subject-matter jurisdiction rests squarely with Boyd.

Boyd continues: "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." Opposition, at 5. He accuses Gingold of "giv[ing] this case the air of a federal question jurisdiction" by "citing cases[,] imposing standards reserved for actions implicating 'federal question jurisdiction,'" *id.*, and by referencing a "number of irrelevant federal question jurisdiction cases to support its argument." Opposition, at 6.

Boyd's argument, apparently intended to supplement his petition for remand, evinces a fundamentally flawed interpretation of the jurisdictional prerequisites underlying access to federal courts. While 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), a "showing of standing" is "an essential and unchanging predicate to *any* exercise of [federal] jurisdiction." *Id.* Moreover, "the irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), applies whether the case sounds in diversity or is rooted in federal question. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Gingold neither "muddies the water" nor does he suggest this Court "impos[e] standards reserved for actions implicating 'federal question jurisdiction.'" The standards articulated in the Motion to Dismiss are not of Gingold's creation; they are immutable propositions articulated by the Supreme Court that have been adopted universally throughout the federal system. They represent not the musings of counsel, but the threshold barriers Boyd must overcome if he is to press his case successfully before this Court.

II. The Opposition Fails to Rebut Gingold's Position that Boyd Lacks Standing and the Complaint Cannot Survive Dismissal under Rule 12(b)(1).

Boyd's flawed understanding of Article III jurisdiction, in general, and standing, in particular, informs his contention that, "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; 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." Opposition, at 6-7.

As discussed below, Boyd's assertions are nothing more than a fictionalized account of the actual arguments set forth in the Motion to Dismiss.

A. Boyd Misrepresents Gingold's Position with Respect to Kilpatrick's Contacts with Boyd.

Boyd accuses Gingold of offering up the "specious statement" that "it was not Defendant Gingold, but Defendant Kilpatrick who contacted Mr. Boyd to solicit Mr. Boyd's services." Gingold made no such statement. Rather, in the Motion to Dismiss, Gingold asserted:

> In the first instance, Boyd has failed to allege that he was recruited by Gingold. The Complaint states that, "[O]n March 5, 2010, Mr. Boyd was contacted via telephone by John Loving, a senior government relations advisor with Defendant firm Kilpatrick Townsend," who "wasted no time and recruited Mr. Boyd to assist the Cobell litigation team secure passage of legislation to fund the Cobell settlement." Complaint, at ¶¶ 26 and 27. The only other reference remotely resembling a solicitation for services apparently took place "[o]n March 26, 2010 [when] Geoffrey Rempel, a member of the Cobell litigation team associated with Kilpatrick Townsend, requested that Mr. Boyd use his political contacts to work directly with the Cobell litigation team. Gingold is not mentioned once as having been a party to Boyd's alleged solicitation or retention.

Motion to Dismiss, at 8.

As this paragraph makes clear, Gingold is not shifting "blame" to Kilpatrick or anyone else. Nor can he do so, given that Boyd was never "engaged" to lobby on behalf of the *Cobell* plaintiffs. Rather, the Motion to Dismiss simply underscores the insufficiency of Boyd's Complaint and challenges the inferences Boyd draws from its conclusory pleadings. Nothing more.

B. Boyd Misinterprets Gingold's Reference to *Boyd v. Farrin*.

Boyd next takes offense at Gingold's reference to the decision rendered in Boyd's most recent lawsuit, *Boyd v. Farrin*, 958 F.Supp.2d 232 (D.D.C. 2013). He accuses Gingold of arguing that "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."

Boyd would be correct were his attribution a faithful rendition of Gingold's position. Boyd's description, however, does not accurately convey the arguments set out in the Motion to Dismiss.

According to Boyd, "[t]he *Farrin* case does not preclude Mr. Boyd's present claims under *res judicata*," Opposition, at 13, or under "collateral estoppel." *Id.*, at 16. Gingold agrees; neither doctrine applies. It is for that reason, Gingold advanced neither position in his Motion to Dismiss. Gingold argues, instead, that the rulings in *Boyd v. Farrin* are of compelling, not dispositive, application.

For example, in *Boyd v. Farrin*, the court found Boyd's "naked allegations of verbal promises" insufficient to demonstrate a "concrete and particularized" injury. *Boyd v. Farrin*, 958 F.Supp.2d 232, 241 (D.D.C. 2013). Gingold asserts Boyd's allegations in this action are similarly void of substance, equally "nebulous" and thus compel the same result.

Gingold similarly cites *Boyd v. Farrin* in support of the legal principle that, "[a]n action cannot constitute 'an invasion of a legally protected interest' if 'the action is of no legal significance.'" *Boyd v. Farrin*, 958 F.Supp.2d at 238. The court in *Boyd v. Farrin* applied this principle in denying a claim seeking payment from a statutory attorney's fee award. As detailed below, Gingold invokes this very principle, not for its preclusive effect but for its persuasive impact.

The Motion to Dismiss maintains that Boyd has no "legally protected interest" in any portion of the fees awarded by Judge Hogan on July 27, 2011 ("Fee Award"). Gingold argues that, absent such an "interest," Boyd lacks the requisite standing to pursue his claim.

Boyd rejoins that the law in this jurisdiction does not foreclose him from pursuing the Fee Award. Without citing any legal authority, he reasons that, "[o]nce 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." Opposition, at 8. Boyd's confusion about the rules and laws governing fee sharing in this jurisdiction renders his argument incapable of withstanding even the most superficial scrutiny.

The proscription against fee sharing is "motivated by a number of concerns, chiefly that nonlawyers might through such arrangements engage in the unauthorized practice of law, that client confidences might be compromised, and that nonlawyers might control the activities of lawyers and interfere with the lawyers' independent professional judgment." D.C. Bar Ethics Opinion No. 223 (citing Opinion No.146). No allowance is made for the particular account into which the funds are deposited.

To escape this principle's reach, Boyd accuses Gingold of "cit[ing] cases that only define restitution in a legal sense." Opposition, at 8. On that point, Gingold concedes. Given Boyd's decision to have his dispute resolved in a judicial forum, Gingold felt constrained to put forth only legal arguments.

Boyd next attempts to undermine Gingold's position by arguing, "Defendant Gingold further demonstrates the weakness of his arguments on this point by dredging up an unpublished *per curiam* opinion under Michigan law." Again, Gingold concedes; the Motion to Dismiss does, in fact, cite a *per curiam* unpublished opinion from Michigan. It also cites a plethora of cases, both published and unpublished, from this and other jurisdictions supporting Gingold's position. In direct contrast, Boyd cites no authority – published, unpublished, *per curiam* or *en banc* – supporting what he professes to be his legally sanctioned right to a share of the Fee Award. Instead, Boyd fashions an argument by misrepresenting the holdings of the cases cited by Gingold – all of which call his claim into question.

Boyd takes aim, for example, at Gingold's reference to *Bregman v. Perles*, 747 F.3d 873 (D.C .Cir. 2014). He insists *Bregman* "stands for the proposition that a non-lawyer can be compensated for his efforts in assisting a law firm realize its contingency." Opposition, at 9. Boyd arrives at his conclusion, reasoning that "[t]he D.C. Circuit only dismissed the claim because it was time barred, not because it failed to state a claim otherwise." *Id.* (citing *Bregman,* at 879).

Boyd not only misstates the context in which Gingold raises *Bregman,* but he expands the Circuit's holding beyond all permissible boundaries.

A plain reading of the Motion to Dismiss reveals that Gingold cited *Bregman* , not for the proposition that this Circuit endorses the sharing of fees between an attorney and nonlawyer, but in support of the principle that a claim for unjust enrichment accrues "only in the face of 'an unequivocal refusal of payment.'" Motion to Dismiss, at 15-16 (quoting *Bregman,* 747 F.3d at 877). Beyond this, *Bregman* is not persuasive, much less dispositive, of Boyd's claim to the Fee Award. The *Bregman* panel was not asked to balance the legal and ethical nuances of fee splitting between attorneys and nonlawyers. Rather, the appellate court was asked to determine when an action in unjust enrichment accrued and, concomitantly, when the statute of limitations is triggered. Boyd's attempt to exact from *Bregman* a rule of law condoning fee sharing between attorneys and non-lawyers is misplaced.

The Opposition then offers up the snide observation that "Defendant Gingold 'nobly' claims that by not paying Mr. Boyd, he will be safeguarding the legal profession." Opposition, at 9. Boyd insists that Ethics Opinion 351, referenced in the Motion to Dismiss, stands for a principle other than that asserted by Gingold, and "that Defendant Gingold quoted this ethics opinion without apparently reading the rest of it." *Id.*

Respectfully, Boyd's position might be more persuasive if he relied more on cogent analysis and less on invective.

Rule 5.4(a) of the D.C. Rules of Professional Conduct provides that "[a] lawyer or law firm shall not share legal fees with a nonlawyer." Ethics Opinion 351 ("Opinion") addressed two "scenarios" questioning the contours of that rule. In "Scenario One," the D.C. Bar was asked to advise whether a contingency fee agreement executed in advance of litigation permitted an attorney and client to share fees awarded pursuant to a fee-shifting statute. In Scenario Two, the D.C. Bar was asked to gauge the conduct of "a *pro bono* lawyer" who "has not made an advance commitment to pay [his client] the attorney fee or any other sum" yet "receives attorney fees under a fee-shifting statute and wants to give the awarded fees to his client."

In both instances, the D.C. Bar found that the conduct in question did not run afoul of Rule 5.4(a). Boyd insists these rulings are based, "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.'" Opposition, at 10 (quoting Opinion). Boyd's reading of the Opinion is at odds with its plain language.

The full sentence of the Opinion from which Boyd excises his quotation states, "[f]inally, neither scenario *implicates Rule 1.8(d)'s prohibition* on advancing or guaranteeing financial assistance. This is 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." (Emphasis added.) The Opposition's representation notwithstanding, this statement does not address itself to an attorney's right to split fees with impunity. It speaks, instead, to the rule precluding attorneys from "from advancing or guaranteeing assistance" to their clients.

More telling than Boyd's curious spin on Ethics Opinion 351, is his attempt to obscure the actual reasons which informed the D.C. Bar's holdings. The conduct described in Scenario One was found not to offend the precepts of Rule 5.4(a) because "the 'fee' for purposes of Rule 5.4(a) is the amount agreed upon in advance," between the attorney and his client which, according to the D.C. Bar, "ensures that the proposed payment would not interfere with the lawyer's independence of judgment or contravene the other rationales for the prohibition." In support of its holding in Scenario Two, the Opinion relied on the fact that "the proposed payment is not the sharing of a fee but an *ex gratia* payment." Boyd references neither of these rationales in his Opposition for the simple reason they fail to support his claimed right of unfettered access to the Fee Award.

Finally, Boyd fails to consider the restrictive manner in which Ethics Opinion 351 construes the exceptions to the fee sharing prohibition enumerated in Rule 5.4(a)(1-5). Applying the "legal maxim," "*expressio unius est exclusio alterius* (i.e., the expression of one thing implies the exclusion of others)," the Opinion interprets the "limited express exception[s]" narrowly to mean "that other, similar potential exceptions are not granted." Boyd's claim for a share of the Fee Award fits within none of these "limited express exceptions" of Rule 5.4(a). As such, Boyd is barred by its prohibitions.

III. The Opposition Fails to Refute Gingold's Position Urging Dismissal of Boyd's Allegations of Enrichment, Breach of Implied-in-Fact Contract and Quantum Meruit.

(a) The Opposition Concedes that Boyd's Claim for Breach of Implied-in-Fact Contract Cannot Survive Dismissal under Rule 12(b)(6).

The Motion to Dismiss describes, in considerable detail, how the Complaint alleges none of the material terms necessary to sustain Boyd's claim for breach of implied-in-fact contract. Motion to Dismiss, at 24-27. Gingold explains that a contract implied-in-fact "is a

true contract, containing all the necessary elements of a binding agreement," *id.* at 24 (quoting *Vereen v. Clayborne*, 623 A.2d 1190, 1193 (D.C. 1993), that must contain an "agreement as to all material terms" and an "intention of the parties to be bound." *Id.* (quoting *New Economy Capital, LLC v. New Markets Capital Group*, 881 A.2d 1087, 1094 (D.C. 2005)). The Motion to Dismiss further clarifies that these "material terms," which may include "subject matter, price, payment terms, quantity, quality, and duration," must be articulated with sufficient clarity such "that the promises and performance to be rendered by each party are reasonably certain." *Id.*, at 25 (quoting *LanQuest Corp. v. McManus & Darden LLP*, 796 F.Supp.2d 98, 102 (D.D.C. 2011)). By way of example, the Motion to Dismiss cites *Steven R. Perles, P.C. v. Kagy*, 473 F.3d 1244 (D.C.Cir. 2007), where the Circuit found no legally enforceable oral contract where the parties "did not agree on two essential elements of a services contract – how long [plaintiff] would have to work on the case . . . and what kind of work she would have to do." Motion to Dismiss, at 25 (quoting *Perles*, 473 F3d. at 1249-50).

The Opposition fails to address, much less refute any of these arguments. Boyd neither denies failing to plead the material terms comprising his supposed "implied-in-fact contract," nor does he cite any authority rebutting the case law cited by Gingold.

Boyd's omissions are fatal to his claim.

In this Circuit, when "a plaintiff fails to respond to a motion to dismiss or files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." *Ali v. D.C. Court Services*, 538 F.Supp.2d 157, 161 (D.D.C. 2008). Coupled with the facial invalidity of his claim, Boyd's failure to respond to the Motion to Dismiss in any substantive fashion constitutes a

concession, as a matter of law. Accordingly, Gingold respectfully requests that this Court dismiss Boyd's claim sounding in breach of an implied-in-fact contract with prejudice.

(b) The Opposition Concedes that Boyd's Claim for Unjust Enrichment must be Dismissed.

The Motion to Dismiss articulates several reasons why Boyd's claim that Gingold was unjustly enriched cannot withstand scrutiny. The first centers on Boyd's lack of a legally protected interest to pursue his claim.

The Motion to Dismiss sets out the principle of law stating that "[r]estitutionary recoveries are based on the defendant's gain, not on the plaintiff's loss." Motion to Dismiss, at 6 (quoting 3 D. Dobbs, LAW OF REMEDIES § 12.1(1), at 9 (2d ed. 1993)). It goes on to note that such a recovery "requir[es] the defendant to disgorge funds wrongfully withheld from the plaintiff." *Id.* (quoting *Curtis v. Loether*, 415 U.S. 189, 197 (1974)). Finally, the Motion to Dismiss argues that, as an action whose remedy lies in disgorgement, Boyd has no legally protected interest in, or right to, the Fee Award from which he seeks "full restitution." Complaint, at ¶ 102. And absent such an interest, Boyd lacks the requisite standing to prosecute his claim against Gingold.

Beyond lacking the jurisdictional prerequisites to press this action, Boyd's claim for unjust enrichment is independently infirm as it fails to "state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, and with sufficient particularity that would "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The Motion to Dismiss details those shortcomings, focusing particularly on the absence of any allegation supporting the proposition that Gingold's retention of his portion of the Fee Award was "unjust" or that Gingold committed "some wrongful act." *News World Comms., Inc. v. Thompsen*, 878 A.2d 1218, 1225 (D.C. 2005). The Motion to Dismiss

explains that, to demonstrate a "wrongful act" requires Boyd to allege that he demanded payment from Gingold and that Gingold "unequivocally refused" his demand. *Bregman*, 747 F.3d at 879. Boyd has done neither; his omission of these key allegations forecloses his entitlement to seek a remedy in unjust enrichment.

Boyd, rather than confront these arguments, chooses to ignore them. He neither disputes his failure to plead a "demand for payment" nor contests the absence of any allusion in the Complaint to Gingold's "unequivocal refusal." Boyd similarly cites no legal authority compelling conclusions contrary to those cases cited in the Motion to Dismiss. The ramifications flowing from his failure to respond are dire, allowing a court to "treat those arguments that the plaintiff failed to address as conceded," *Ali v. D.C. Court Services*, 538 F.Supp.2d 157, 161 (D.D.C. 2008), Gingold respectfully requests that this Court dismiss Boyd's claim sounding in unjust enrichment with prejudice.

(c) The Opposition Concedes that Boyd's Claim for Quantum Meruit must be Dismissed.

The Motion to Dismiss articulates the reasons Boyd's claim under a theory of quantum meruit cannot succeed. In the District of Columbia, a request for quantum meruit "encompasses both implied-in-law obligations ('quasi-contracts') as well as implied-in-fact contracts." Motion to Dismiss, at 27 (citing *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 176 (D.C. 1996)). As discussed in the Motion to Dismiss, and as summarized below, Boyd's claim cannot withstand scrutiny under either theory. Motion to Dismiss, at 28.

As a contract implied-in-fact, Boyd's agreement must "contain[] all the required elements of a binding agreement." *Id.* (citing *Vereen v. Clayborne*, 623 A.2d 1190, 1193 (D.C. 1993)). Here, the Complaint pleads none of the material terms necessary to sustain an enforceable contract. Boyd does not argue otherwise.

As a contract implied-in-law, any agreement between Boyd and Gingold "is not a contract at all, but a duty thrust under certain conditions upon one party to requite another in order to avoid the former's unjust enrichment." Motion to Dismiss, at 28 (quoting *King & King, Chartered v. Harbert Intern., Inc.*, 436 F.Supp.2d 3, 13 (D.D.C. 2006)). It is a claim seeking restitution, the purpose of which "is to require a person who has been unjustly enriched at another's expense to compensate the other party for the amount of enrichment, restoring the other to the position he formerly occupied either by the return of something [that the other party] formerly had or by the [transfer] of its equivalent in money." *Id.* (citing C.J.S. IMPLIED CONTRACTS § 6 (2005)).

For the reasons already discussed, Boyd lacks a "legally protected interest" in the Fee Award which divests him of the requisite standing to pursue this claim. Boyd's claim similarly is unable to survive a challenge brought under Rule 12(b)(6), given the absence of any allegation indicating that a payment for services was demanded and that the demand was unequivocally refused.

Once again, the Opposition marshals no facts and cites no law compelling a different conclusion. Gingold maintains these omissions are fatal to Boyd's claim and respectfully requests that this Court dismiss Boyd's claim under the theory of quantum meruit with prejudice.

(d) Boyd Fails to Demonstrate Gingold's Liability.

Rather than respond directly to the arguments set out in the Motion to Dismiss, Boyd directs the majority of his efforts demonstrating that "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." Opposition, at 10. Boyd's efforts are unavailing.

With respect to Boyd's claim that Gingold is "directly liable," the Motion to Dismiss carefully delineates how the Complaint is silent with respect to Gingold's "solicitation" efforts and how the Complaint attributes no specific acts or omissions to Gingold which might implicate him as a party from whom a legal obligation flowed. The Motion to Dismiss further explains how the Complaint fails to describe the services Boyd was allegedly "solicited" to perform; the rate Boyd charged for those services; the duration of his services; whether his demand for payment reflected an hourly rate, a flat rate or a contingency fee; the terms of the payment; who assumed responsibility for payment; and what, if any, *pro rata* share of the payment Gingold was to assume. Finally, the Motion to Dismiss demonstrates how the parties never even discussed, much less agreed to, these or any other terms.

The Motion to Dismiss not only highlights how the Complaint lacks the indicia necessary to survive a motion to dismiss, it also underscores how the Complaint is populated solely with "naked allegations of verbal promises," which, as a matter of law, cannot sustain any of his claims. Motion to Dismiss, at 9.

Boyd not only fails to refute these arguments, he undermines his own position by resting his Opposition on nothing more than unsupported allegations.

For example, the Opposition maintains:

- "Defendant Kilpatrick and Defendant Gingold were directly involved in engaging Mr. Boyd, directing his work, and refusing him remuneration." Opposition, at 11 (citing 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." *Id.* (citing 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. *Id.* (citing Complaint ¶ 40); and

- 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. *Id.* (citing Complaint ¶¶ 41-45).

According to Boyd, "[t]hese facts make Defendant Gingold directly liable to Mr. Boyd for all claims." Boyd is mistaken.

Even accepting these characterizations as accurate, there are no allegations in the Complaint describing the terms of Boyd's "engagement" or specifying the amount he was to be "remunerated." Gingold's "participat[ion] in numerous meetings, phone calls and e-mails," without more, takes on no legal significance – even if those communications took place "throughout all relevant times." Similarly, the lack of any specificity describing the respective rights and obligations of the parties adds no gravitas to Boyd's statement that he, Gingold and Rempel "discussed Mr. Boyd's desire to be paid for his services." Finally, Boyd's assertion that Gingold, "as a member of the Cobell team did not refuse payment at this meeting," is not the legal equivalent of an allegation that Gingold affirmatively agreed to pay Boyd. It certainly does not specify what "payment" Gingold "did not refuse."

Nor is Boyd's cause advanced by self-serving statements such as "[t]he *Cobell* team, including Defendants Gingold and Kilpatrick . . . kn[ew] Plaintiff did not expect to render his services as a gratuity"; or that "Mr. Boyd was strung along with promises of being taken care of just for so long as he was necessary to Defendants." Opposition, at 22.

In this Circuit, a court is under no duty to accept allegations of a party as true for the purposes of a motion to dismiss for want of subject matter jurisdiction or for failure to state a claim, especially when such allegations are sweeping and conclusory in nature. While this Court may treat Boyd's allegations as true, and draw all reasonable inferences in his favor, *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C.Cir.2003), it is not obliged to

accept asserted inferences or conclusory allegations that are unsupported by facts set forth in the Complaint. *Iqbal*, 556 U.S. at 677. *See Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (a court is "not bound to accept as true a legal conclusion couched as a factual allegation" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements").

In short, Boyd's attempt to conjure a nexus between Gingold's actions and the injury he purportedly suffered is unpersuasive and, thus, insufficient to avoid dismissal with prejudice.

Boyd, unable to support his claim for "direct liability," seeks to escape the insufficiency of his pleadings by pressing the alternative theory that Gingold is "vicariously liable" for the actions of "the team." Opposition, at 10-13. Boyd bolsters his thesis, not with reference to any legal authority, but with two affidavits attached to the Opposition. Boyd cites to the first affidavit, executed by Geoffrey Rempel, as proof of the existence of a *Cobell* "team," quoting Mr. Rempel as saying he was "engaged as a member of [*Cobell's*] litigation team." Boyd characterizes the second, an affidavit from Keith Harper, "as "describing the litigation team, and how he and Defendant Gingold controlled the operations of the team." Opposition, at 10-11 (citing Attachment 3).

Once again, Boyd conflates fact and fiction. The Harper Affidavit contains no statement which identifies the "team" or one that remotely can be construed as describing how "he and Defendant Gingold controlled the operations of the team." Contrary to Boyd's representation, the Harper Affidavit focused exclusively on Mr. Harper's concern over the actions of an attorney formerly affiliated with the *Cobell* litigation. Nothing more.

Beyond Boyd's expansive interpretation of the Harper Affidavit and despite the strained emphasis he places on Rempel's singular use of the word "team," Boyd's theory of "vicariously

liability" is without all basis in law and should be given no consideration.

Vicarious liability is a "concept used to transfer liability from an agent to a principal." *Convit v Wilson*, 980 A.2d 1104, 1114 (D.C. 2009). It is a theory applicable to those situations where, "the responsibility of an agent for his own legally careless action is imputed to the principal." *Id.* Whether an agency relationship exists depends on the particular facts of each case, *District of Columbia v. Hampton*, 666 A.2d 30, 38 (D.C. 1995), and is informed by factors such as: "(1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is part of the regular business of the employer." *Judah v. Reiner*, 744 A.2d 1037, 1040 (D.C. 2000) (citations omitted).

The Opposition fails to enunciate, much less balance, these factors in support of Boyd's newly minted theory that Gingold is vicariously liable for the actions of the "team." And aside from its curious attributions to Mr. Rempel and Mr. Harper, the Opposition refers to no allegations in the Complaint from which an agency-principal relationship can be inferred. Boyd's attempt to belatedly amend his Complaint, at this juncture, is entitled to no consideration and is foreclosed by the "axiom" that "a complaint may not be amended by the briefs in opposition to a motion to dismiss." *Arbitraje Casa de Cambio, S.A. de C.V. v. U.S. Postal Serv.*, 297 F.Supp.2d 165, 170 (D.D.C. 2003) (citations and internal quotation marks omitted).

CONCLUSION

The Opposition fails in every respect to refute any of the positions put forward in the Motion to Dismiss. Boyd not only fails to repudiate Gingold's arguments, which call into question the viability of his claims, but his Opposition rests on a deeply flawed interpretation of Article III jurisprudence. The Opposition should be given no credence.

For the foregoing reasons, defendant Dennis M. Gingold respectfully requests that this Court dismiss all claims against him in their entirety and with prejudice.

Date: July 14, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 14th day of July 2014, a true and correct copy of *Defendant Dennis M. Gingold's Reply in Support of Motion to Dismiss* was served via electronic transmission through the Court's electronic filing system on:

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