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 REPLY TO DEFENDANT GINGOLD'S OPPOSITION TO MOTION FOR REMAND

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

1. The Threshold Issue Before This Court Is Subject Matter Jurisdiction.

Defendant Gingold continues to ignore the essential issue before this Court—subject matter jurisdiction. Defendant Kilpatrick is a properly named defendant in this action, and as it shares state citizenship with Plaintiff, there is no subject matter jurisdiction. 28 U.S.C. §1332(a). *See Fortuin v. Milhorat,* 683 F.Supp. 1, 2 (D.D.C. 1998) (citing *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365) (1978). Defendant Gingold cannot simply invoke the jurisdiction of

this Court with a wave of his pen because he does not like the idea of litigating in D.C. Superior Court. No federal question, diversity, or jurisdiction exists in Mr. Boyd's legal action against Defendant Kilpatrick and Defendant Gingold. No agreement or stipulation between the Defendants Kilpatrick or Gingold can confer jurisdiction where there is none. *See Insurance Corp of Ireland, Ltd v. Compagnie Bauxites Guinee,* 456 U.S. 694, 702 (1984) (no action of the parties can confer subject-matter jurisdiction upon a federal court).

Both Defendants Gingold and Kilpatrick were fully aware that this Court did not have jurisdiction when Defendant Gingold filed the Notice of Removal with Defendant Kilpatrick's consent. Defendant Gingold filed the Notice of Removal in the desperate hope to stay out of D.C. Superior Court. Defendants Gingold and Kilpatrick wasted this Court's time and resources. Instead, Defendants Gingold and Kilpatrick caused Plaintiff needless delay and expense in defending this removal action and engaging in needless motions practice before this Court. Plaintiff trusts this Court will take Defendants Gingold's and Kilpatrick's shameful actions into consideration by awarding Plaintiff his just costs and attorney fees as allowed under 28 U.S.C. Sec. 1447(c).

2. Defendant Kilpatrick Is Not Fraudulently Joined.

A. <u>Standard For Proving Fraudulent Joinder</u>.

Defendant Gingold's only possible basis for establishing diversity jurisdiction in this Court is by alleging that Plaintiff Boyd fraudulently joined Defendant Kilpatrick to this action. *See Brown v. Brown & Williamson Tobacco Corp.*, 26 F.Supp.2d 74, 76-77 (D.D.C. 1998). Defendant Gingold did not allege fraud. Instead, Defendant Gingold contends that there is no possibility that Plaintiff would be able to maintain a cause of action against Defendant Kilpatrick in D.C. Superior Court. Defendant Gingold's Notice of Removal at 7. *Brown,* 26 F.Supp.2d at

77 (the removing party must show that the plaintiff has "*no possibility* of a right to relief.") (emphasis added). The burden to demonstrate that there is "no possibility" of a cause of action is squarely on Defendant Gingold as the removing party. *Walter E. Campbell Co. v. Hartford Fin. Servs. Grp., Inc.* 959 F.Supp.2d 116, 169 (D.D.C., 2013) ("The removing party bears the burden of showing that the federal court has subject matter jurisdiction over the action.")(*citing Wexler v. United Air Lines*, 496 F. Supp. 2d 150, 152 (D.D.C. 2007)).

As much as Defendant Gingold would like the Court to treat Plaintiff's Motion for Remand as a 12(b)(1) or 12(b)(6) motion, he cannot escape the fact that his burden of proving fraudulent joinder is the only point at issue for this Court to decide at this juncture. Defendant Gingold's burden is much heavier than under a motion to dismiss, as the Court must accept as true all of Plaintiff's factual allegations *and* must resolve all questions of state substantive law in Plaintiff's favor. *B., Inc. v. Miller Brewing Co.,* 663 F.2d 545, 549 (5th Cir. 1981)(district court must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff)."

This Court in *Brown* clearly defined how heavy Defendant Gingold's burden is:

> [I]f there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiff, then the federal court must find that the in-state defendant(s) have been properly joined, and that there is incomplete diversity, and that the case **must** be remanded to the state courts." *B. Inc.* at 550 [emphasis added]. Unless a state law claim is "wholly nonsensical," remand is the appropriate course of action. *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....") *Id*.

Brown at 77.

Where there is any question of state law involved in a claim of fraudulent joinder in a removal action, removal is appropriate as the state court is the proper tribunal to make decisions

on the merits of state claims, "not the federal removal court." *Pulse One Communications, Inc. v. Bell Atlantic Mobile Systems, Inc.*, 760 F.Supp. 82, 84 (D.Md.1991). If there is even some uncertainty as to the current state of controlling substantive law, the uncertainty must be resolved in favor of the Plaintiff. *B., Inc.* at 549.

Plaintiff does not dispute that federal courts sitting in diversity apply state substantive law under the *Erie* doctrine. See *Erie Co v. Tompkins*, 304 U.S. 64 (1938). However, in deciding whether a defendant has been fraudulently joined, questions or uncertainties regarding the application of state law should be decided by the state court. *Pulse One* at 84. Although Defendant Gingold wishes to limit *Pulse One*'s application to the unique procedural facts of that case, this Court in *Brown* cited its standard when adjudicating fraudulent joinder under different procedural circumstances.

Defendant Gingold's reliance on the standards under Rule 12(b)(1) and 12(b)(6) are misguided and irrelevant. Plaintiff pled cognizable claims under District of Columbia law for unjust enrichment, breach of implied contract and *quantum meruit* against Defendant Kilpatrick. Once this Court finds that all or any of these claims would state a cause of action in the D.C. Superior Court, even if in the Court's opinion only a mere possibility, then it follows that Defendant Kilpatrick is not fraudulently joined as a Defendant. At that point, this Court must remand Plaintiff's action against Defendants Gingold and Kilpatrick to D.C. Superior Court.

B. Plaintiff's Complaint Pleads Specific Facts Implicating Defendant Kilpatrick.

Defendant Kilpatrick is to every degree as involved in the fact pattern of the present case as is Defendant Gingold. Defendant Kilpatrick's individual actions and the actions it took in concert with Defendant Gingold as a leading member of the *Cobell* litigation team make Defendant Kilpatrick a proper defendant. As clearly pled in Plaintiff's Complaint, Defendant

Kilpatrick made the initial contact with Mr. Boyd, recruited Mr. Boyd, and encouraged Mr. Boyd to help Defendant Kilpatrick obtain funding from Congress, which led to Defendant Kilpatrick receiving an enormous fee award through Mr. Boyd's efforts. Complaint ¶¶ 26-28, 46-59, 60-82, 85-88.

Plaintiff's Complaint does not make bare allegations, but points to specific dates, times and conversations, which were documented by emails, to support Mr. Boyd's allegations. Over twenty-four (24) separate paragraphs detail the actions of the *Cobell* litigation team and their involvement with recruiting and directing Plaintiff's efforts to their mutual benefit. At least eight paragraphs specifically refer to Defendant Kilpatrick's individual involvement with Mr. Boyd.

- "…on March 5, 2010, Mr. Boyd was contacted via telephone by **John Loving**, a senior government relations advisor with Defendant firm Kilpatrick Townsend." Complaint ¶ 26. (emphasis added)

- "**Mr. Loving** wasted no time and recruited Mr. Boyd to assist the *Cobell* litigation team secure passage of legislation to fund the *Cobell* settlement. **Mr. Loving** specifically asked Mr. Boyd to use his extensive contacts in the House and Senate and elsewhere to drum up the necessary support for the *Cobell* settlement legislation…." Complaint ¶ 27. (emphasis added).

- "On March 26, 2010, Mr. Boyd was contacted again by the *Cobell* litigation team. In a phone conversation, 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 and to assist them in getting congressional approval of funding for the *Cobell* settlement. During the call, Mr. Rempel informed Mr. Boyd that he was on the *Cobell* litigation team and was attempting to lobby for funds in the *Cobell* settlement but "needed [Mr. Boyd's] help." Complaint ¶ 32.

- "On May 7, 2010, Mr. Rempel emailed Mr. Boyd and copied Defendant Gingold and Mr. Michael **Alexander Pearl, at the time an associate at Defendant Kilpatrick Stockton**, asking Mr. Boyd how his meeting with Senator Coburn went…." Complaint ¶ 38. (emphasis added).

- "On June 1, 2010, Mr. Boyd met for lunch with Mr. Rempel and Defendant Gingold, lead counsel on the *Cobell* litigation team, at the Laughing Man Tavern in Washington, D.C.

During lunch that day, Mr. Rempel and Defendant Gingold continued to recruit and engage Mr. Boyd to work more closely with the *Cobell* legal team…." Complaint ¶ 40.

- "…during the lunch, Mr. Boyd specifically told both Defendant Gingold and Mr. Rempel that he expected to be paid for his efforts to secure funding for the *Cobell* settlement. In response, Defendant Gingold encouraged Mr. Boyd to continue working with and for Defendants. Defendant Gingold never indicated to Mr. Boyd at any time at the restaurant, or at any subsequent time thereafter, that Mr. Boyd would not be compensated for his efforts. It never happened. In fact, just the opposite occurred…." Complaint ¶ 43.

- "On July 6, 2010, Mr. Boyd provided the *Cobell* litigation team members including Mr. Rempel, Defendant Gingold, **Mr. Loving and Mr. Pearl** with a list of the votes cast by members of the Senate on the House version of the CRA in May 2010…." Complaint ¶ 48. (emphasis added).

- "On the same day, Defendant Gingold and **Mr. Loving** each responded to Mr. Boyd's email with suggestions related to developing a political strategy for Mr. Boyd to implement. Defendant Gingold asked Mr. Boyd if he had "been able to engage the WH in the cause?" and further stated "This may sound silly, but it would be very helpful if staff and the president finally started to talk to members on both sides of the aisle." Mr. Boyd was again directed to make that decision happen. **Mr. Loving** responded with additional information to assist Mr. Boyd's efforts." Complaint ¶ 49. (emphasis added).

- "On July 7 and 8, 2010, Mr. Boyd had numerous email communications with the *Cobell* litigation team, including Mr. Rempel, Defendant Gingold, **Mr. Loving and Mr. Pearl**, regarding political and public relation strategies. Mr. Rempel sent an email to Mr. Boyd and **Mr. Loving** directing them to leverage their contacts on the Hill. Mr. Boyd responded specifically to the directions of **Mr. Loving** and stated: "Yes. We have a full court press! I have called everyone in the black farmers area of influence … to help call on congress, and support us in the war bill."…" Complaint ¶ 50. (emphasis added).

- "On July 7, 2010, in an email from the *Cobell* litigation team, Mr. Rempel again directed Mr. Boyd to leverage his "attorney contacts on the Hill" to use their influence to push through the War Supplemental Bill with *Cobell* and *Pigford II* funding attached. Mr. Rempel believed this approach to be a good strategy as it was his understanding that "at least one of your attorneys may have clients with significant defense contracts…." Complaint ¶ 52.

- "On July 8, 2010, Mr. Boyd was on Capitol Hill discussing the *Cobell* and *Pigford II* amendment to the War Supplemental Bill with various congressional staffers. … Again, Mr. Boyd had numerous email communications with Mr. Rempel, **Mr. Loving**, and Defendant Gingold, providing them with up-to-the-minute Capitol Hill updates." Complaint ¶ 54. (emphasis added).

- Mr. Boyd specifically stated that "I pressed Reid's staff late Friday on War bill... I reached out to him again today...Waiting to hear back." **In response, Mr. Loving**

[Defendant Kilpatrick] directed Mr. Boyd to: "Keep on him [Sen. Reid's staff member] about it." Mr. Boyd then informed the *Cobell* team again, in particular Defendant Gingold, **Mr. Loving, Mr. Pearl [Defendant Kilpatrick],** and Mr. Rempel, that he was reaching out to Senators Hagan and Landrieu, sponsors of the Black Farmers Bill, to get the *Pigford II* and *Cobell* legislation added to the War Supplemental Bill. Defendants strongly encouraged Mr. Boyd to do so. On July 15, 2010, Defendant Gingold sent an email communication to Mr. Boyd and **Mr. Loving**, while copying **Mr. Pearl** and Mr. Rempel, directing them to have a conference call on Friday, July 16, 2010 to discuss strategy going forward. Rather than a conference call, Mr. Boyd, **Mr. Pearl** and Mr. Rempel all had various email communications with each other regarding the best strategy to pursue." Complaint ¶ 55. (emphases added).

- "During September and October 2010, Mr. Boyd continued to work very closely with lawmakers, including Senate Majority Leader Harry Reid, and also met with administration officials, including Secretary Vilsack. During this time, Mr. Boyd also continued to hold rallies, including a rally in Washington, D.C. on September 16, 2010. Mr. Boyd continued to report to and coordinated his activities with Defendants [Gingold and Kilpatrick]and members of the *Cobell* team." Complaint ¶ 64.

- "…on September 3, 2010, Mr. Boyd forwarded to Defendant Gingold an op-ed piece in the *Washington Post*, quoting Mr. Boyd, which highlighted the problems the plaintiffs in both *Cobell* and *Pigford II* were having in securing joint Congressional funding. … Defendant Gingold, pleased with the article, went on to comment that the article was: "…ok for us [*Cobell*]. We'll take it."" Complaint ¶ 66.

- "On September 7, 2010, Mr. Boyd emailed Defendant Gingold a long list of publicity efforts he made on behalf of the *Cobell* and *Pigford II* settlements. Again, Defendant Gingold lauded Mr. Boyd and stated that he was doing a "damn good job." Complaint ¶ 67.

- "On September 16, 2010, Defendant Gingold forwarded Mr. Boyd an email and attached an Associated Press story that detailed the White House's request for Congress to fund the *Cobell* settlement. In this email, Defendant Gingold gave Mr. Boyd the following instructions: "Now you must get to work on [Senator] Ried [*sic*] et al. Nothing else counts" (emphasis added)." Complaint ¶ 70.

- "On September 21, 2010, Defendant Gingold … directed Mr. Boyd to "light a fire under [Senator] Grassley re DOA assets." Complaint ¶ 72.

- "On September 23, 2010, Defendant Gingold directed Mr. Boyd again to contact Senator Grassley to help broker offsets in the *Cobell* settlement bill. Based on the influential capabilities of Mr. Boyd and his easy access to Senator Grassley and his office staff, Defendant Gingold told Mr. Boyd "GET TO GRASSLEY ASAP" (emphasis in original)." Complaint ¶ 75.

- "Later on the same day, on September 23, 2010, Defendant Gingold again directed Mr. Boyd to "do whatever you can" to get Senator Grassley to "push" Senator McConnell on the issue of *Cobell* and *Pigford II*." Complaint ¶ 76.

- "On November 17, 2010, Defendant Gingold directed Mr. Boyd to meet with Congressman Clyburn (D-SC) if the CRA passed in the Senate that day. Defendant Gingold wanted Mr. Boyd to advise Congressman Clyburn to be prepared to move the Senate version with changes through the House review process. Mr. Boyd did what he was directed to do." Complaint ¶ 82.

- "… On November 19, 2010, Defendant Gingold directed Mr. Boyd, writing "You must get [Congressman] Clyburn firmly behind the effort" to pass the Senate CRA in the House." Complaint ¶ 85."

- "A few days later, on November 23, 2010, Defendant Gingold further pressed Mr. Boyd to step up his efforts to gain the support needed to pass the Joint Settlement Agreement through an email to Mr. Boyd, in which, Defendant Gingold told Mr. Boyd that Mr. Boyd's "enemy isn't Cobell" and directed Mr. Boyd that he "ha[d] work to do in the House." …" Complaint ¶ 86.

- "On November 24, 2010, Mr. Boyd per Defendant Gingold's instruction, emailed Congressman Clyburn to inform him that his telephone call with Barvetta Singletary, Clyburn's then Deputy Chief of Staff, went well and thanked Congressman Clyburn for his leadership. … Defendant Gingold emailed Mr. Boyd later in the day and directed him to "[k]eep your foot down on the accelerator." …" Complaint ¶ 87.

- "…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 "kudos to you."" Complaint ¶ 88.

These paragraphs alone constitute sufficient facts to support Plaintiff's claims. Defendant Kilpatrick recruited and directed Plaintiff's efforts for its own benefit. Defendant Kilpatrick knew of Plaintiff's efforts on its behalf, it knew of Plaintiff's desire to be paid, it knew that Plaintiff's requests for payment had not been refused, but simply put off his request until Plaintiff's efforts were no longer needed.

The facts indisputably show 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 in obtaining funding for the *Cobell* 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, which were encouraged by both Defendants, 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 of the District of Columbia.

Moreover, the *Cobell* litigation team in 2010 was of one mind and one purpose, to get the *Cobell* settlement funded, both individually and collectively. The complaint clearly refers Defendants Kilpatrick and Gingold as the *Cobell* litigation team and makes clear that its efforts were for a unified purpose and coordinated. For example:

- "Mr. Boyd agreed to and accepted work on behalf of Defendants and the ***Cobell* legal team**…." Complaint ¶ 6. (emphasis added).

- "Other attorneys and professionals at Kilpatrick Townsend represented the *Cobell* plaintiffs since at least March 1999, including **John Loving**, a non-lawyer, lobbyist and senior government relations advisor, who first approached Mr. Boyd about working for the ***Cobell* legal team** and advocating on behalf of the *Cobell* plaintiffs." Complaint ¶ 12. (emphasis added). *See also Id.* at ¶ 27.

- "The ***Cobell* team of lawyers, consultants and lobbyists** had no relationship with the White House or key congressional contacts, a critical weakness in their ability to obtain funding for their settlement and their legal fees." Complaint ¶ 26. (emphasis added).

The Complaint goes on to refer to the *Cobell* litigation team in Complaint ¶¶ 27-29, 33-33, 40-42, 46, 48-50, 52-53, 56, 64, 85, 89 and 92.

As more fully stated in Plaintiff's Motion for Remand, the idea that the *Cobell* attorneys operated as a team is not merely supposition. Motion for Remand at 13. Defendants Kilpatrick and Gingold held themselves out as a team to both Plaintiff and the court in the *Cobell* case. *See*

Affidavit of Geoffrey Rempel, Dec. 5, 2012, attached as Exhibit 3 to Plaintiff's Motion for Remand; *see also* Affidavit of Keith Harper, March 31, 2011, attached as Exhibit 4 to Plaintiff's Motion for Remand.

Defendant Kilpatrick benefitted from Plaintiff's diligent efforts and refused to pay Plaintiff just compensation in violation of District of Columbia law.

C. Defendant Kilpatrick Is Liable To Plaintiff For Unjust Enrichment.

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). The D.C. Circuit recognizes 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.

Moreover, 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 a legal action alleging housing code violations against her Section 8 landlord. After Ms. Peart had done most all of the work to win this claim, the D.C. Housing Authority ("DCHA") intervened at the last moment and successfully asserted a right to all of the award. *Id.* at 816. The Court of Appeals recognized that Ms. Peart was acting in her own interest and that the DCHA 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 Gingold and Kilpatrick not only hitched their wagon to Mr. Boyd's horse (or rather his mule, *Struggle)*, rather Defendants Gingold and Kilpatrick rode the horse and actively directed it. After Defendants Gingold and Kilpatrick filled the wagon with $99 million dollars, they refused to give Mr. Boyd just compensation for his services or any water for his horse. 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. Complaint ¶¶ 46-59, 60-82. Defendants Gingold and Kilpatrick knew Mr. Boyd was helping the *Cobell* team's cause. The *Cobell* team, including Defendants Gingold and Kilpatrick, wanted Mr. Boyd to help their cause. The *Cobell* team including Defendants Gingold and Kilpatrick gave specific direction to Mr. Boyd to help their cause. And, the *Cobell* team including Defendants Gingold and Kilpatrick, knew Plaintiff did not expect to render his services as a gratuity. Complaint ¶¶ 40-45; 46-59, 60-82, and 85-88. Instead, the *Cobell* team strung Mr. Boyd along with promises of being taken care of just for so long as he was necessary. It was not until after Defendants Gingold and Kilpatrick received their attorney fee award on July 27, 2011, that it became clear to Plaintiff that Defendants Gingold and Kilpatrick were not going to compensate him for his efforts to help them realize that award.

In his opposition to remand, Defendant Gingold limited his argument to the idea that no claim for unjust enrichment was ripe against Defendant Kilpatrick because there was no

evidence that Defendant Kilpatrick ever unequivocally refused payment. Defendant Gingold completely mischaracterizes the cases he cites for this proposition. In both *News World Communications, Inc. v. Thompsen*, 878 A.2d 1218 (D.C. 2005) and *Bregman v. Perles*, 747 F.3d 873 (D.C. Cir. 2014), there were acts of unequivocal refusal of payment to a plaintiff claiming unjust enrichment. The courts in both cases decided that for statute of limitations purposes, the cases accrued from the date of these unequivocal refusals. Neither case stands for the proposition that an unjust enrichment claim is only ripe once there is an unequivocal refusal to pay. Defendant Gingold's illogical interpretation of these cases would mean that an unjust enrichment claim can *never* accrue without an unequivocal refusal of payment. In other words, under Defendant Gingold's misguided interpretation of the law, Defendant Kilpatrick could simply never respond, or just say "maybe" to Plaintiff's requests for payment for as long as it wants, and thus avoid an unjust enrichment claim altogether. No court would allow such a ridiculous outcome.

These cases hold that "a claim for unjust enrichment accrues only when the enrichment actually becomes unlawful*, i.e.,* where there has been a wrongful act giving rise to a duty of restitution." *Bregman* at 875 (quoting) *Thompsen*, 878 A.2d at 1225. Here, the earliest possible date where the enrichment could have become unlawful was July 27, 2011 when Defendants received their compensation and failed to pay Plaintiff.

As stated by the District of Columbia, when ruling on a statute of limitation pursuant to a contract case where there was no unequivocal refusal to pay:

> No statute or provision of the lease prevented [plaintiffs] from pursuing their right to sue once they had made the successive demands and received no payment from the [defendant]. [Plaintiff]'s contrary argument that she had no reason to assume a refusal to pay until she received the [defendant's] March 30, 1994, letter — fully fifteen months after she made the original demand — is untenable. *See* 51 AM.JUR.2D § 114 (Limitation of Actions) ("the courts may presume from the

> lapse of an unreasonable time that a demand was made and refused" (*emphasis added*)).

Bembery v. District of Columbia, 758 A.2d 518, 520 (D.C. 2000).

Neither Defendant Kilpatrick nor Defendant Gingold ever refused Plaintiff payment prior to receiving their attorney fees in July 2011. As stated in the Complaint, Plaintiff was strung along as long as he was necessary. Complaint ¶¶ 43-44. Despite Defendant Kilpatrick's enrichment in July 2011, it has not compensated Mr. Boyd, nor has it responded to Plaintiff's settlement overtures.[1] Defendant Kilpatrick's unlawful conduct is that it inured itself of the very enrichment which Plaintiff's efforts provided and then Defendant Kilpatrick failed to pay Plaintiff just compensation. The very fact that Mr. Boyd is still waiting with no word or indication from Defendant Kilpatrick regarding just compensation is sufficient for a claim of unjust enrichment to accrue under District of Columbia law, especially as he had been led to believe by the *Cobell* litigation team that his efforts would be compensated.

D. Defendant Kilpatrick Is Liable To Plaintiff 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). Under District of

[1] Defendant Gingold takes exception to Plaintiff's counsel referencing in its Motion for Remand a demand letter it sent to Defendant Kilpatrick on April 28, 2014, approximately one week before filing the Complaint. Defendant Kilpatrick did not dispute that it received the letter, nor has it made any response thereto. Regardless, the Court need not consider whether or not the letter was sent in order to rule that the claim for unjust enrichment against Defendant Kilpatrick was ripe.

Columbia law, a contract must be sufficiently definite as to its material terms, subject matter, price, payment terms, quantity, quality, and duration that the promises and performance to be rendered by each party are reasonably certain. *See Rosenthal v. Nat'l Produce Co.*, 573 A.2d 365, 370 (D.C.1990)). However, all the terms contemplated by the agreement need not be "fixed with complete and perfect certainty for a contract to [be enforceable])." *Id.*

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, Plaintiff pled facts that satisfy the District of Columbia's standards for establishing an implied-in-fact contract and *quantum meruit*. Plaintiff's Complaint alleges that valuable services were rendered. Complaint ¶¶ 1, 20, 25, 33, 39, 52, 59, and 93. Plaintiff's Complaint alleges that Plaintiff's services were provided for the benefit of the *Cobell* litigation team including Defendants Gingold and Defendant Kilpatrick with their full knowledge, direction, and acceptance. Complaint ¶¶ 26, 40, and 41. Plaintiff's Complaint clearly alleges that Mr. Boyd expressed to the *Cobell* litigation team including Defendant's Gingold and Kilpatrick that he expected to be paid. Complaint ¶¶ 40-43.

The following is a non-exhaustive list of the allegations in the Complaint that demonstrate the value of Plaintiff's services specifically for the *Cobell* litigation team:

- "…Mr. Boyd has a sterling reputation in the legislative community and beyond and uses this reputation, as well as his considerable experience and extensive contacts, to bring to light, years of injustice suffered by minority farmers and to advance their rights…."

Complaint ¶ 1

- "Mr. Boyd's remarkable efforts in helping the Late Filers included meeting with congressional leaders and their staffs to encourage investigations and legislation, some of which he helped draft. Over the years, he worked with Senators including Charles Grassley (R-IA), George Allen (R-VA), Joe Biden (D-DE), Barack Obama (D-IL), Ted Kennedy (D-MA) and Congresspersons including Bennie Thompson (D-MI), Max Burns (R-GA), Steven Chabot (R-OH), John Conyers (D-MI), Artur Davis (D-AL), Bobby Scott (D-VA), James Sensenbrenner (R-WI), and Maxine Waters (D-CA) on behalf of the Late Filers [under *Pigford II*]." Complaint ¶ 20.

- "…Now that Defendants knew that both the *Pigford II* and *Cobell* cases were to be joined for congressional funding purposes, Mr. Boyd was essential to Defendants realizing their goals." Complaint ¶ 25.

- *Cobell's* counsel on their own failed to develop any of the political or media contacts that Mr. Boyd established during his time working on the *Pigford II* and *Cobell* appropriations negotiations. Defendants realized, more than ever, they needed Mr. Boyd on their team and aggressively recruited Mr. Boyd. In fact, Mr. Rempel's telephone conversation with Mr. Boyd was designed to convince Mr. Boyd to work more closely with the *Cobell* team because of his relationships with specific members of the 111th Congress and the White House and the goodwill he developed over many years of advocacy on behalf of black farmers and other minorities in the United States. Complaint ¶ 33.

- Throughout the spring and summer of 2010, Mr. Boyd worked with the following lawmakers to fund the *Pigford II* and *Cobell* settlements and pass the CRA in the Senate and the House: Senate Majority Leader Harry Reid, Speaker of the House Nancy Pelosi, Senator Thad Cochran, Senator James Webb, Senator Charles Grassley, Senator Mary Landrieu, Senator Kay Hagan, Senator Blanche Lincoln, Senator Tom Harkin, Senator Mark Warner, Senator Coburn, Rep. James Clyburn (Majority Whip), Rep. John Conyers, Rep. Maxine Waters, Rep. Bennie Thompson, Rep. Bobby Scott, and others. Complaint ¶ 39

- On December 27, 2010, *the Richmond Times Dispatch* profiled Mr. Boyd, hailing his work on behalf of the late filers and *Cobell* litigants. In that article, Mr. Boyd's work was acknowledged as "vital" to getting the funds appropriated for the Joint Settlement Agreement. *Faces of 2010: John W. Boyd, Jr.,* Richmond Times Dispatch, Dec. 27, 2010." Complaint ¶ 93.

- On July 7, 2010, in an email from the *Cobell* litigation team, Mr. Rempel again directed Mr. Boyd to leverage his "attorney contacts on the Hill" to use their influence to push through the War Supplemental Bill with *Cobell* and *Pigford II* funding attached. Mr. Rempel believed this approach to be a good strategy as it was his understanding that "at least one of your attorneys may have clients with significant defense contracts."…"

Complaint ¶ 52.

- On August 4, 2010, Senator Mark Warner, speaking on the floor of the Senate, urged the Senate to approve funding for the *Cobell*/*Pigford II* Joint Settlement Agreement. Senator Warner acknowledged Mr. Boyd in his remarks, stating "this issue was first brought to my attention by John Boyd. . . " 156 Cong. Rec. 117, S6715 (Aug. 4, 2010) (Statement of Senator Mark Warner). Complaint ¶ 59.

Defendants Gingold and Kilpatrick expected Plaintiff to advocate for Congressional funding for the *Cobell* settlement, specifically on behalf of the *Cobell* litigation team for the stated purpose of realizing their attorney fees to the maximum extent possible.

- "The *Cobell* team of lawyers, consultants and lobbyists had no relationship with the White House or key congressional contacts, a critical weakness in their ability to obtain funding for their settlement and their legal fees. Indeed, the legal fee issue was of particular interest to Defendants and, more importantly, it was an ongoing, troubling concern for Defendant Gingold who throughout the litigation insisted on receiving the maximum fee possible. As all knew, Mr. Boyd had an ongoing knowledge of and familiarity with key White House officials and congressional contacts because of his previous work. So, on March 5, 2010, Mr. Boyd was contacted via telephone by John Loving, a senior government relations advisor with Defendant firm Kilpatrick Townsend." Complaint ¶ 26.

- "…The White House found it difficult to work with the *Cobell* team because the *Cobell* team was inexperienced and focused primarily on the issue of excessive legal fees. Specifically, Defendants refused to lower their fee request of $223 million. Even in the face of mounting opposition to the CRA, Defendants were intransigent on the fee issue, insisting on and defending their right to legal fees that exceeded $223 million. Mr. Boyd advised Defendants that compromise on the fee issue was essential if the CRA was to be funded and move forward." Complaint ¶ 40.

- "…Mr. Boyd told Mr. Rempel and Defendant Gingold at the June lunch, as well as the *Cobell* team on many other occasions, that attention needed to be refocused to the issue of securing funds for the *Cobell* settlement, in order to alleviate bad faith and hostility toward the White House. Focus could not remain on the demand for $223 million in legal fees. Now more than ever, Mr. Boyd was needed by Defendants to enhance their credibility with the White House and obtain the Administration's support to recover reasonable attorney fees." Complaint ¶ 41.

Plaintiff's Complaint alleges that Defendant Kilpatrick not only knew of and accepted Plaintiff's services on its behalf, but that it actively participated in directing Plaintiff's services

so as to achieve maximum benefit for itself and the *Cobell* litigation team. Complaint ¶¶ 6, 26-27, 32, 38, 40, 43, 48-50, 52, 54-55, 64, 66-67, 70, 72, 75, 82, 85-88.

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. As alleged in the Complaint ¶¶ 40-43, Mr. Boyd expressly told Defendant Gingold, who was representing the *Cobell* litigation team 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. As alleged in Plaintiff's Complaint, Defendants Kilpatrick and Gingold did not refuse to pay him at that time or any time after that meeting. Complaint ¶¶ 43, 44, and 86. Rather, the *Cobell* team prodded and encouraged Mr. Boyd to help them obtain the necessary funding that would allow Defendant Kilpatrick and Defendant Gingold to get paid handsomely. Complaint at ¶¶ 43, 44, and 86. Defendants Kilpatrick and Gingold merely put him off with assurances of payment and then instructed Mr. Boyd to continue to work.

In summary, Plaintiff pled facts to establish implied-in-fact contract and *quantum meruit* claims under the laws of the District of Columbia. Plaintiff's Complaint alleges that Mr. Boyd was expected to use his experience, contacts, and expertise to provide valuable services to the *Cobell* litigation team including Defendants Gingold and Kilpatrick to help them realize their attorney fees. Complaint ¶¶ 1, 20, 25, 33, 39, 52, 59, and 93. Plaintiff's Complaint alleges that Plaintiff's services were provided for the benefit of the *Cobell* litigation team including Defendants Gingold and Defendant Kilpatrick with their full knowledge, direction, and acceptance. Complaint ¶¶ 26, 40, and 41. Plaintiff's Complaint alleges that Mr. Boyd expressed to the Cobell litigation team including Defendant's Gingold and Kilpatrick that he expected to be

paid. Complaint ¶¶ 40-43. The *Cobell* litigation team put him off with promises of payment, but never refused to pay him. [complaint ¶43] Accordingly, Plaintiff's Complaint sufficiently pled all of the elements of the implied-in-fact contract and *quantum meruit* claims.

3. Plaintiff Has Standing To Bring Claims Against Defendant Kilpatrick.

It is axiomatic that Plaintiff Boyd has standing to bring claims against Defendant Kilpatrick. Defendant Gingold attempts to mislead this Court by raising standing as an issue when none exists -- clearly, his arguments are without merit. Just as Defendant Gingold misread this Court's Order Granting Plaintiff Leave to File Oppositions to Motions to Dismiss Out of Time and Stay Disposition of Defendants' Motions to Dismiss Until the Issue of Remand is Decided, Defendant Gingold misreads this Court's decision in *Boyd v. Farrin*, Case No. 12-01893 (D.D.C 2012) where this Court stated:

> "Several of plaintiffs' claims revolve around the assertion, express or implicit, that defendants injured them by failing to request compensation from the *Pigford II* Court. To the extent plaintiffs bring claims based upon this assertion, they lack standing to do so."

Id at 7.

These two simple sentences regarding unrelated claims against different defendants have spawned a mountain of unnecessary legal memoranda before this Court.

Defendant Gingold is so desperate to have this Court hear this matter that he completely ignores the law of subject matter and diversity jurisdiction. Defendant Gingold spends the first 10 pages of his brief arguing standing while ignoring the fact that in the *Farrin* opinion, this Court did not dismiss Mr. Boyd's claims of fiduciary duty, breach of contract, or *quantum meruit* for lack of standing. *Id.* at 10. Defendant Gingold ignores the fact that the present case includes a claim for unjust enrichment, which was not at issue under the *Farrin* decision. Defendant Gingold also ignores the fact that nowhere in Plaintiff's Complaint does Plaintiff claim to have

an interest in compensation from the *Cobell* settlement funds or to a share of the *Cobell* legal fees that were awarded to the *Cobell* litigation team.

In *Farrin,* Mr. Boyd's relationship with the defendant attorneys was not limited to merely advocating for Congressional funding for the *Pigford II* settlement. The relationship went back years. Mr. Boyd actually was instrumental in getting the legislation passed that made the *Pigford II* litigation possible, even before the *Pigford II* attorneys became involved. Mr. Boyd worked with the attorneys and the class plaintiffs throughout the *Pigford II* litigation, and generally had a much deeper involvement with the underlying *Pigford II* litigation. Because of this relationship, Mr. Boyd's claims brought in the *Farrin* case were necessarily different than those brought in the present action.

"To establish the 'irreducible constitutional minimum' for Article III standing, a party must show that it has suffered an injury in fact, that there exists a causal link between that injury and the conduct complained of, and that a favorable decision on the merits will likely redress the injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560. Injury in fact is an "invasion of a legally protected interest which is (a) concrete and particularized …and (b) actual or imminent, not conjectural or hypothetical." *Id.*

In the present case Plaintiff suffered an injury in fact. Under District of Columbia law, Plaintiff's legally protected interest in being fairly compensated for his work on behalf of Defendants Kilpatrick and Gingold was violated. The cause of this injury is specifically related to Defendants Kilpatrick and Gingold's failure and refusal to compensate Plaintiff after enjoying the benefit of Plaintiff's efforts. A favorable decision on the merits of Plaintiff's claims will afford him the compensation he deserves for his efforts. Plaintiff sufficiently pled the elements of unjust enrichment, breach of implied-in-fact contract and *quantum meruit* under District of

Columbia law.

4. Plaintiff's Claims Do Not Seek "Unlawful Disgorgement" Of Court-Awarded Fees.

Defendant Gingold claims that Plaintiff is asking for a direct share of the $99 million attorneys' fee awarded by Judge Hogan on July 27, 2011, and suggests that restitution to Mr. Boyd could come in no other form. This suggestion is patently false, and materially misrepresents the allegations in Plaintiff's Complaint.

As discussed in section 2(C) of this Reply, District of Columbia law clearly allows a cause of action for a non-lawyer against a law firm where he alleges that he has not been compensated for his efforts in assisting the law firm achieve a contingency fee award. *See Bregman v. Perles*, 747 F.3d 873 (D.C. Cir. 2014). In *Bregman,* the D.C. Superior Court 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. *Id.* at 875.

As in *Bregman*, Plaintiff's Complaint seeks restitution for his efforts to achieve funding for the *Cobell* settlement, which in turn led to Defendants Gingold and Kilpatrick realizing their attorney fees for the *Cobell* litigation. Plaintiff makes no allegation whatsoever that he participated in the underlying litigation or had any part in reaching the *Cobell* settlement. The *Cobell* litigation settled on December 7, 2009. Defendant Kilpatrick did not approach Mr. Boyd to seek 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.

Furthermore, Mr. Boyd has not made any claim regarding the underlying *Cobell* settlement proceeds. Mr. Boyd has not filed an injunction or claim with the *Cobell* court claiming a share of the attorney fee award. Mr. Boyd does 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 plaintiff's award.

Furthermore, Defendant Gingold's suggestion that Plaintiff should not be compensated for his efforts because it would amount to fee sharing between a lawyer and non-lawyer is equally without merit. The District of Columbia bar issued an opinion allowing an attorney to "share" fees with non-lawyers in circumstances where "there is no indication … that the lawyer promised, let alone made or guaranteed, any such payment while the litigation was pending." Ethics Opinion 351 of the D.C. Bar. Mr. Boyd had no control over or involvement with the *Cobell* litigation while it was pending, 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 charge. Accordingly, Mr. Boyd is not seeking the unlawful disgorgement of court awarded attorney fees, rather he is seeking compensation for his efforts to achieve funding for the *Cobell* settlement that led to Defendants Gingold and Kilpatrick to be unjustly enriched at his expense. This is a valid claim under District of Columbia law.

CONCLUSION

Plaintiff requests this Court to GRANT its Motion to Remand this action 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 engaging in unnecessary motions practice in this Court.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of July, 2014, I electronically filed the foregoing *Plaintiff's Reply to Defendant Gingold's Opposition to Motion for Remand* with the Clerk of the Court using the CM/ECF system, and by the same means served the following parties:

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