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 KILPATRICK'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 Kilpatrick Townsend & Stockton LLP's Opposition to Plaintiff's Motion for Remand ("Opposition"). In support of this Reply, Plaintiff submits the following points and authorities:

I. INTRODUCTION

Defendant Gingold unlawfully removed this case to federal court with Defendant Kilpatrick's consent. As a preliminary matter, Defendant Kilpatrick's Opposition should not be considered because this Court does not have jurisdiction over Defendant Kilpatrick and it wastes this Court's valuable resources to consider its Opposition. The unlawful removal is a desperate attempt to forum shop in an effort to avoid their just liability to Plaintiff under District of Columbia law. As the Court is well aware from the mountain of briefs already filed, this case was filed in the District of Columbia Superior Court for unjust enrichment, breach of implied-in-fact contract and *quantum meruit.* This case could not have been brought in any federal court

because Plaintiff brought state law claims against Defendant Kilpatrick, which shares Virginia citizenship with Plaintiff. Defendant Gingold with Defendant Kilpatrick's consent removed this case to federal court without regard to this Court's judicial resources and filed motions to dismiss that could and should have been filed in D.C. Superior Court. The unlawful removal resulted in additional cost to argue about subject matter jurisdiction and caused delay of the D.C. Superior Court litigation.

Defendants' intent in unlawfully removing this action is transparent. They hope this Court will dismiss Plaintiff's claims as they disingenuously characterize this case as somehow being related to *Boyd v. Farrin*, Case No. 12-01893 (D.D.C 2012), which they dishonestly mischaracterize as a case that was dismissed with prejudice as a result of this Court's decision. As this Court knows and Plaintiff already demonstrated in its Motion for Remand and in its numerous other briefs before this Court, these two cases are not based on the same set of facts and the *Farrin* case was dismissed by stipulation of the parties. Yet, Defendant Kilpatrick refuses to accept the truth and accuses Plaintiff's counsel of unprofessionalism for setting the record straight. Not only are Defendants Gingold and Kilpatrick blatantly engaged in forum shopping to avoid the District of Columbia Superior Court, they continue to make unsupported assertions regarding the allegations in Plaintiff's Complaint, the law, and this Court's disposition of *Farrin*.[1] While Defendant Kilpatrick attempts to confuse this Court with exaggerations that

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[1] Defendant Kilpatrick, in fn 5 to its Opposition to Remand, accuses Plaintiff's counsel of unprofessionalism in pointing out that the *Farrin* case was dismissed by stipulation of the parties, and then makes the completely unsupported assertion that the *Farrin* case must have been settled by a "small nuisance payment". Plaintiff merely pointed out the stipulation of dismissal, which is a publically accessible docket entry, to clear up any confusion Defendants may have had with respect to the resolution to the *Farrin* case. Plaintiff never alluded to the amount of any settlement, as Defendant Kilpatrick attempts to do. It is no stretch for any legal professional to conclude that a settlement was reached in a case where the parties stipulated to

stretch the truth and defy credulity, the bottom line is that the District of Columbia Superior Court is the only forum with jurisdiction for this case.

Defendant Kilpatrick argues the most inane theories to avoid paying Plaintiff just compensation such arguing that the very underpinnings of the democratic system will be destroyed if Plaintiff is compensated for his efforts on its behalf. Defendant Kilpatrick's Opposition to Motion for Remand at 4. This case does not implicate such dire consequences because Plaintiff's claims are valid under District of Columbia law. The only issue before this Court is to determine whether Defendant Kilpatrick was fraudulently joined. The Defendants' burden is extremely high as the legal standard requires this Court to accept all of Plaintiff's alleged facts as true and to resolve all questions of state law in Plaintiff's favor. Undoubtedly, Defendant Kilpatrick is every much a part of this case as is Defendant Gingold. Therefore, this case should be remanded without further delay. Plaintiff renews its Motion for Remand and for an award of his attorney fees and costs associated with Defendants' unlawful removal action as provided for under 28 U.S.C. § 1447(c).[2]

II. STANDARD FOR PROVING FRAUDULENT JOINDER

Plaintiff reiterates that Defendant Kilpatrick's Opposition to Plaintiff's Motion for Remand should not be considered because this Court does not have jurisdiction over Defendant

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dismissal with prejudice. Furthermore, the value of any previous settlement would be irrelevant to the present case, as the facts of the two cases are necessarily distinguishable.

[2] An award of attorney fees and costs under 28 U.S.C. § 1447(c) is not a sanction *per se,* and is proper even where Court finds underlying removal action does not rise to the level of sanctionable conduct under Rule 11(b) of the Federal Rules of Civil Procedure. *See Pulse One Communications Inc., v. Bell Atlantic Mobile Systems*, 760 F.Supp. 82, 85 (D. Md., 1991).

Kilpatrick, and this Court does not need to waste its valuable resources considering Defendant Kilpatrick's Opposition.

The only possible basis upon which Defendants Gingold and Kilpatrick can establish diversity jurisdiction in this Court is by alleging that Defendant Kilpatrick was fraudulently joined to this action. *See Brown v. Brown & Williamson Tobacco Corp.*, 26 F.Supp.2d 74, 76-77 (D.D.C. 1998). Neither Defendant Kilpatrick nor Defendant Gingold alleged fraud, but instead rely on the idea 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 Defendants Gingold and Kilpatrick as the removing parties. *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). Defendant Kilpatrick actually relies on the *Walter E. Campbell* case as stating the law of fraudulent joinder and specifically states that "defendants could not demonstrate that the plaintiff would be unable to prevail against the nondiverse defendant." Defendant Kilpatrick's Opposition at p. 9-10.

Defendant Gingold and Defendant Kilpatrick both fail to realize that the burden for proving fraudulent joinder is much heavier than under an ordinary motion to dismiss because this Court must accept as true all of Plaintiff's factual allegations and 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 burden on the removing party 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....").

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. These rulings are not meant to imply that federal courts sitting in diversity do not apply state law to substantive issues under the *Erie* doctrine. *See Erie Co v. Tompkins*, 304 U.S. 64 (1938). What these rulings mandate is that when a federal court is considering the issue of whether it has diversity jurisdiction, any question, uncertainty or debate over state substantive law is to be deferred to the state court, and remand is necessary. In other words, for the purpose of determining fraudulent joinder, disputes over state law are resolved in the Plaintiff's favor. *Pulse One* at 84.

Defendants Gingold and Kilpatrick must overcome this burden to avoid remand of this action. Defendant Kilpatrick's reliance on the standard under Rule 12(b)(6) is misguided and irrelevant. Plaintiff pled cognizable claims under District of Columbia law for unjust enrichment, breach of implied-in-fact contract and *quantum meruit* against Defendant Kilpatrick. Once this Court finds that all or any of these claims state a cause of action in the D.C. Superior Court, even if only a mere possibility in the Court's opinion, then Defendant Kilpatrick was not fraudulently joined and the case must be remanded to D.C. Superior Court.

III. PLAINTIFF'S CLAIMS ARE NOT BARRED BY DEFENSIVE COLLATERAL ESTOPPEL

Plaintiff reiterates that Defendant Kilpatrick's Opposition should not be considered because this Court does not have jurisdiction over Defendant Kilpatrick and this Court does not need to waste its valuable resources considering its Opposition.

Under District of Columbia law, collateral estoppel only applies "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Pipher v. Odell*, 672 A.2d 1092, 1095 (D.C. 1996) (quoting Restatement (Second) of Judgments § 27). An issue is "actually litigated" when it is (1) "properly raised, by pleadings or otherwise," (2) "submitted for determination," and (3) "determined." *Id. See also Carr v. Rose*, 701 A.2d 1065, 1077 (D.C. 1997) ("[P]reclusion applies only to issues actually litigated and determined, and not to matters which might have been raised in the first proceeding, but were not.") (*quoting Lebeau v. Lebeau*, 393 A.2d 480, 483-84 (Pa. Super. 1978).

Defendant Kilpatrick contends that defensive collateral estoppels bars Mr. Boyd's claims against it, however, its arguments fail because no issues decided in *Farrin* are related to Mr.

Boyd's action against Defendant Kilpatrick. Opposition at 11-12. Moreover, Mr. Boyd's claims of breach of implied-in-fact contract and unjust enrichment against Defendant Kilpatrick were not part of Mr. Boyd's complaint against Farrin and Mr. Boyd's *quantum meruit* claim was not dismissed with prejudice meaning Mr. Boyd could have amended his complaint. Therefore, defensive collateral estoppel does not bar Mr. Boyd's claims.

Moreover, Defendant Kilpatrick states, collateral estoppel renders conclusive "an issue of fact or law that was actually litigated and necessarily decided . . . in a subsequent action between the same parties or their privies." *Brodie v. Dep't of Health & Human Servs.*, 951 F. Supp. 2d 108, 117 (D.D.C. 2013), *aff'd*, No. 13-5227, 2014 WL 21222 (D.C. Cir. Jan. 10, 2014). Defendant Kilpatrick's Motion to Dismiss at 8. Here, no issue of fact or law was actually decided in a previous action between the same parties.

Defendant Kilpatrick also cites *Mead v. Lindlaw*, 839 F. Supp. 2d 66, 72 (D.D.C. 2012), for the proposition that collateral estoppel can be applied against different defendants involved in the same nucleus of facts. Opposition at 11. Defendant Kilpatrick further claims that the rulings this Court made with respect to breach of contract and *quantum meruit* claims in *Farrin*, which were claims made against a different set of defendants, should be applied to this case, even though the factual allegations are completely different. In *Farrin*, these claims were dismissed under F.R.C.P. 12(b)(6) for failure to plead sufficient facts to support the underlying claims.[3] There is no such deficiency of pleading in the present action.

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[3] Defendant Kilpatrick again misrepresents the *Farrin* dismissal order. Defendant Kilpatrick's Opposition to Remand at 11. ("Boyd's breach of contract and *quantum meruit* claims…were decided in a dispositive fashion against him."). This Court is well aware that the only claims dismissed with prejudice in the *Farrin* decision were to the extent that the claims "revolve around the assertion, express or implicit, that defendants injured them by failing to request compensation from the *Pigford II* Court." *Boyd v. Farrin*, Case No. 12- 01893*7 (D.D.C 2012).

Defendant Kilpatrick's reliance on these cases is misguided. Plaintiff's Complaint against Defendants Kilpatrick and Gingold include factual allegations that are completely different from *Farrin*. *Farrin* relates to Mr. Boyd's relationship with class counsel involved in the *Pigford II* litigation. *Pigford II* counsel has no relationship with *Cobell* counsel. Mr. Boyd's communications with *Pigford II* counsel and with *Cobell* counsel have no relationship with each other at all. Whether Mr. Boyd entered or failed to enter into a contract with *Pigford II* counsel has no bearing on whether Mr. Boyd properly alleged a breach of implied-in-fact contract or *quantum meruit* claim against Defendant Kilpatrick. Plaintiff's claims against Defendants are distinct from those brought in *Farrin*. Plaintiff's claims against Defendant Kilpatrick are based only on Mr. Boyd's relationship with Defendant Kilpatrick and Defendant Gingold during that period of time in which Defendants sought Congressional funding for the *Cobell* settlement. Mr. Boyd had no involvement in the underlying *Cobell* litigation. Mr. Boyd is not claiming compensation for anything done to achieve the *Cobell* settlement.

The *Cobell* settlement was worthless until Congress funded it. Defendants Kilpatrick and Gingold made no progress towards the goal of obtaining Congressional funding for their settlement agreement, as there had not been a single Congressional vote on the matter prior to their enlistment of Mr. Boyd to champion their cause. Mr. Boyd has never denied or attempted to hide the fact that he was working to achieve funding for the *Pigford II* decision simultaneously, but *Cobell* added to his burden, and in fact hindered the progress of gaining funding for the *Pigford II* settlement. Complaint ¶ 86. The *Cobell* litigation team, which was

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In the present case, Plaintiff has not made any allegation that he is entitled to a share of the settlement proceeds in the *Cobell* litigation, nor has he alleged that either Defendant was obligated to request compensation from the *Cobell* court.

led by Defendants Kilpatrick and Gingold, was unpopular in Congress, and their attorney fee demands were seen as excessive. Complaint ¶ 40. Defendant Kilpatrick and Defendant Gingold happily used Mr. Boyd and exploited his zeal and dedication for the cause of black farmers to obtain their own objectives. Plaintiff's Complaint clearly states facts showing how Defendant Kilpatrick specifically and directly instructed Mr. Boyd's efforts, even reassuring him that the *Cobell* litigation team was not his "enemy" and that he should continue his advocacy on their behalf even while the *Pigford II* funding was being needlessly delayed because of Congressional distaste for the *Cobell* attorney's fee demands. The Complaint also details how Plaintiff relayed to both Defendants his desire and expectation to be remunerated for his efforts.

Because Plaintiff's Complaint relates to causes of actions brought against different defendants, a completely different set of factual allegations related to breach of implied-in-fact contract and *quantum meruit* claims, and at least one different legal claim related to unjust enrichment, which was not even a claim in *Farrin* or considered by this Court, defensive collateral estoppel cannot and does not apply. Under Defendant Kilpatrick's twisted logic, a plaintiff could never bring a breach of implied-in-fact contract claim against a different defendant under a completely different set of facts, if the plaintiff ever brought and lost a breach of contract claim in another proceeding.

Accordingly, collateral estoppel does not bar Plaintiff's claims for breach of implied-in-fact contract, *quantum meruit*, and unjust enrichment.

IV. DEFENDANT KILPATRICK IS LIABLE TO PLAINTIFF FOR UNJUST ENRICHMENT

Plaintiff reiterates that Defendant Kilpatrick's Opposition should not be considered because this Court does not have jurisdiction over Defendant Kilpatrick and this Court does not need to waste its valuable resources considering its Opposition. That being said, Defendant

Kilpatrick's argument that Plaintiff failed to sufficiently plead an unjust enrichment claim under District of Columbia law is misplaced.

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). Plaintiff's claim meets each of these three elements. Defendant Kilpatrick states that a plaintiff must "of course, prove that the defendant's enrichment is unjust," *i.e.* that there has been a "wrongful act giving rise to a duty of restitution." *News World Commc'ns, Inc. v. Thompsen*, 878 A.2d 1218, 1225 (D.C. 2005); Defendant Kilpatrick's Opposition, at 13.

Defendant Kilpatrick contends that Plaintiff failed to state a claim for unjust enrichment because Plaintiff failed to allege a wrongful act; Defendant Kilpatrick cannot be unjustly enriched by the court's order of attorney fees; Plaintiff freely gave his services to Defendant Kilpatrick; and Plaintiff's unjust enrichment theory has ridiculous implications. Defendant Kilpatrick's Opposition, 13-14. None of Defendant Kilpatrick's contentions have any merit.

First, Plaintiff properly alleged why Defendant Kilpatrick is liable for the unjust enrichment claim and specifically alleged the wrongful act giving rise to a duty of restitution. Defendant's wrongful acts include simply failing to fairly compensate Plaintiff for his efforts on its behalf. *See Brown v. Brown*, 524 A.2d 1184, 1186 (D.C. 1987) (a promise to pay will be implied in law when one party renders valuable services that the other party knowingly and voluntarily accepts"). Indeed, Defendant Kilpatrick not only knew of Mr. Boyd's efforts, but actively took advantage of Mr. Boyd's relationship with the *Pigford II* settlement to get Mr. Boyd to advocate on behalf of the *Cobell* team. Complaint ¶ 25. Defendant Kilpatrick made the

initial contact to Mr. Boyd and Defendant Kilpatrick actively recruited him and solicited his services to help the *Cobell* team. Complaint at ¶¶ 26-28. Paragraph 29 of Plaintiff's Complaint describes just how difficult Mr. Boyd's task was in advocating for the *Cobell* team, as the *Cobell* team hardly made any inroads in bringing the *Cobell* funding issue to members of Congress. Paragraph 33 of Plaintiff's Complaint describes Defendant Kilpatrick's direct efforts, and the efforts of the *Cobell* team, to take advantage of Mr. Boyd's advocacy skills and to direct and control his efforts. Paragraphs 48-50 and 52-55 of Plaintiff's Complaint detail emails from the *Cobell* team, including Defendant Kilpatrick, directing Mr. Boyd to use his contacts at a local law firm with government contracts to steer support for the *Cobell* funding and to continue his efforts with Congress. Paragraph 55 of Plaintiff's Complaint demonstrates that Defendant Kilpatrick directed Mr. Boyd to continue his efforts:

> 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).

Paragraphs 56-64 of Plaintiff's Complaint detail Mr. Boyd's interactions with the press and members of Congress on behalf of the *Cobell* team. Paragraphs 65-68 of Plaintiff's

Complaint detail Mr. Boyd's interaction with the Washington Post and other media outlets at the direction and with the approval of the *Cobell* team. Paragraphs 86-87 of Plaintiff's Complaint demonstrate that the *Cobell* team knew and acknowledged that Mr. Boyd's role as an advocator for *Cobell* was negatively impacting Mr. Boyd's advocating efforts for *Pigford II* funding, but the *Cobell* team insisted that he keep advocating for *Cobell.*

Paragraphs 89-93 of the Complaint describe how Mr. Boyd's efforts were ultimately successful and of great benefit to the *Cobell* team, and how he was publicly acknowledged by the press and Congress as playing a key role in the passage of the CRA that funded the *Cobell* settlement.

The facts indisputably find that Defendant Kilpatrick and Defendant Gingold engaged in numerous wrongful acts by expending enormous energy in their attempts to micromanage Mr. Boyd's actions in helping the CRA get passed while at the same time making sure that the *Cobell* litigation team and Defendant Kilpatrick could maximize their attorney fees. Defendant Kilpatrick's refusal to pay just compensation for Mr. Boyd's efforts, efforts from which Defendant Kilpatrick 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.

Second, Plaintiff is not alleging that there is anything unjust about the award of attorneys fees to either Defendant Kilpatrick or Defendant Gingold, so Defendant Kilpatrick's contention is a mischaracterization of Plaintiff's Complaint. Nowhere in the Complaint does Plaintiff assert that he is entitled to share in the settlement proceeds under the *Cobell* ruling as either a party or an attorney. Defendant Gingold correctly states that Plaintiff "seeks full restitution of all amounts in which Defendants, including Defendant Gingold have been unjustly enriched at Mr.

Boyd's expense". Complaint ¶ 102. What Plaintiff claims is restitution for his efforts to achieve *funding* for the settlement Defendants Gingold and Kilpatrick reached in the *Cobell* settlement. Plaintiff makes no allegation whatsoever that he participated in the underlying litigation, or had any part reaching the *Cobell* settlement. The problem for Defendants Gingold and Kilpatrick is that *Cobell* settled much earlier on December 7, 2009. Defendant Kilpatrick did not approach Mr. Boyd for his help for another 15 months. When John Loving finally called Mr. Boyd in March 2011, Defendants Gingold and Kilpatrick had been sitting on this settlement for over a year without so much as a single vote in Congress to fund the *Cobell* settlement, and little prospect of one. For Defendants Gingold and Kilpatrick to now allege that Mr. Boyd's efforts were of no value to them, and for that matter to their clients, is disingenuous. Without question, Defendant Kilpatrick was enriched by Mr. Boyd's efforts that led to Defendant Kilpatrick's actually realizing its attorney fees.

Defendant Kilpatrick's third and fourth reasons for why Plaintiff failed to plead an unjust enrichment claim nonsensical and are merely attempts to mislead this Court with regards to the law. Defendant Kilpatrick claims that Plaintiff Boyd was providing it free service because Mr. Boyd was advocating for the benefit of black farmers as well so Defendant Kilpatrick does not have to pay Plaintiff Boyd. Defendant Kilpatrick also contends that if Plaintiff were paid for all of his efforts that enriched Defendant Kilpatrick that it would somehow lead to ridiculous implications. Both of Defendant Kilpatrick's arguments are absurd, illogical, and preposterous. Defendant Kilpatrick's reasoning to not pay Mr. Boyd for his efforts that unjustly enriched Defendant Kilpatrick are in direct contradiction of District of Columbia law.

Even though Defendant Kilpatrick attempts to minimize their effect,[4] there are two recent District of Columbia cases directly on point regarding the issue of an unjust enrichment claim brought by a non-lawyer against a lawyer. The D.C. Court of Appeals held that the equitable doctrine of unjust enrichment entitled a plaintiff to compensation even when the plaintiff acted in her own interest and not to further the defendant's interest where the defendant took proactive steps to benefit from the plaintiff's efforts. *Peart v. District of Columbia Housing Auth.*, 972 A.2d 810 (D.C. 2009).

In *Peart*, Ms. Peart brought an action alleging housing code violations against her Section 8 landlord. Ms. Peart had gone to the expense and trouble of achieving rent abatement from her landlord, which the D.C. Housing Authority ("DCHA") took for itself after swooping in at the last moment to avail itself of the benefit of Ms. Peart's efforts. *Id.* The Court of Appeals recognized that Ms. Peart was acting in her own interest to bring the case against her landlord and that the DCHA intervened and captured the benefit of Ms. Peart's services. *Id.* at 816. The Court of Appeals held that Ms. Peart was not precluded from recovering under an unjust enrichment claim even though she was acting in her own interest because the DCHA was not merely the incidental beneficiary of her efforts. *Id.* The DCHA adopted a posture calculated to ensure maximal recovery with minimal effort, resulting in the DCHA obtaining a recovery on Ms. Peart's success. *Id.* Basically, the DCHA, without communicating directly with Ms. Peart on litigation strategy, "hitched its wagon to Ms. Peart's horse". *Id.* For this reason, the Court of

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[4] Defendant Kilpatrick devotes one short paragraph to distinguish *Bregman* on the premise that the non-lawyer plaintiff had been offered a bonus by the defendant law firm if the contingency fee were realized, and a single footnote to say that the *Peart* court did not consider the issue of whether the plaintiff had volunteered her services. Neither argument diminishes the application of these cases to the present facts.

Appeals found that it would be inequitable under the circumstances to permit DCHA to retain the benefit of her services without paying Ms. Peart.[5] *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.

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[5] The court in *Peart* found a cause of action for unjust enrichment was proper even where the DCHA argued precedent that held that because rent abatements were "public funds" that the DCHA had a superior claim to the rent abatement over a tenant such as Ms. Peart. *Peart* at 813.

Moreover, the D.C. Circuit recognized that a non-lawyer can have an unjust enrichment claim against lawyers involved in a contingency fee award. *Bregman v. Perles*, 747 F.3d 873 (D.C. Cir. 2014). 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.

Both *Bregman* and *Peart* are of direct application to the present circumstances. Mr. Boyd is a non-lawyer who gave valuable assistance to both Defendants to achieve their attorney fees.

That Defendants were in dire need of this help is evidenced by the fact that they had made no progress or achieving funding for the *Cobell* settlement for well over a year by the time that Defendant Kilpatrick reached out to Plaintiff in March 2010. It is also evidenced by the fact that Defendants efforts to prior to Plaintiff's involvement had been so anemic that the White House felt it necessary to tie their claims to *Pigford II*, which was already well on its way to achieving Congressional funding, and was only delayed because of the *Cobell* issue and the necessity of overcoming the overwhelmingly negative relationships the *Cobell* litigation team had fostered with the White House and members of Congress prior to Mr. Boyd's involvement. *See inter alia* Complaint ¶¶ 40-41. As in *Peart*, Mr. Boyd began working on Defendants' behalf before they first contacted him. But whereas the defendant in *Peart* was content to just sit back and reap the rewards of Ms. Peart's efforts, Defendants Gingold and Kilpatrick stepped in to make sure that Mr. Boyd was working to get them the maximum amount of legal fees possible. That was the primary issue holding up the *Cobell* funding--the *Cobell* litigation team's intransigent and exorbitant demand for legal fees. The 3.4 billion allotted for the deserving Native American class plaintiffs was never in any real dispute.

V. DEFENDANT KILPATRICK IS LIABLE TO PLAINTIFF FOR BREACH OF IMPLIED-IN-FACT CONTRACT AND *QUANTUM MERUIT*

Plaintiff reiterates that Defendant Kilpatrick's Opposition should not be considered because this Court does not have jurisdiction over Defendant Kilpatrick and this Court does not need to waste its valuable resources considering this Opposition.

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 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 claiming *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 both 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 Defendants 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.

Defendant Kilpatrick tries to escape liability by citing *Geier v. Conway, Homer & Chin-Caplan, P.C.* 2013 WL 471663 (D.D.C. 2013) for the idea that one law firm cannot bind another merely because they are both members of a court-appointed steering committee. In *Geier,* the defendant law firms were involuntary members of a steering committee created by the court for the purpose of court efficiency. *Id.* at *17. However, in the present case, and as argued more fully in Plaintiff's Motion for Remand, the *Cobell* litigation team was no court creation, and Defendant Kilpatrick was by no means an involuntary member. *See* Plaintiff's Motion for Remand at 13-17 (Docket No. 12). By its own admission, in the form of affidavit to the *Cobell* court, Defendant Kilpatrick was a leading member of the *Cobell* litigation team, actively involved in and controlling all phases of the litigation. Affidavit of Keith Harper, March 31, 2011, Plaintiff's Motion for Remand (Docket #12) Exhibit 4. This team was not created by the Court but was a joint venture created by Defendants Kilpatrick and Gingold for the purpose of pressing their litigation and for their mutual benefit and profit. Defendants worked from the

same office and approved of litigation and hiring decisions jointly. This assertion is not mere speculation, but fact as testified to by the members of the *Cobell* litigation team. *See also* Affidavit of Geoffrey Rempel, Dec. 5, 2012, Plaintiff's Motion for Remand (Docket No. 12) Exhibit 3. It should come as no surprise that Defendant Kilpatrick had no problem admitting its leadership role to the *Cobell* court when its purpose was to deny a share of the attorney fees to another member of the team who did not follow orders. *See* Harper Affidavit ¶ 1-2, 5.

Even the *Geier* holding acknowledged that its ruling may have been different if the nature of the relationship between the law firms was a joint venture, for the mutual benefit and profit of the law firms, as is the case here. *Geier* at * 17. Under District of Columbia law a joint venture is:

> an association of persons with intent, by way of express or implied contract, to engage in and carry out a single business venture for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, without creating a partnership or a corporation, pursuant to an agreement that there shall be a community of interest among them as to the purpose of the undertaking, and that each participant shall stand in the relation of principal as well as agent as to each of the other coadventurers, with an equal right of control of the means employed to carry out the common purpose of the venture.

Id. at *16 (quoting *United States ex rel. Miller v. Bill Harbert Int'l Const., Inc.*, 505 F. Supp. 2d 20, 30 (D.D.C. 2007).

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 Defendants 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.

VI. PLAINTIFF'S CLAIMS ARE NOT TIME-BARRED

Plaintiff reiterates that Defendant Kilpatrick's Opposition should not be considered because this Court does not have jurisdiction over Defendant Kilpatrick and this Court does not need to waste its valuable resources considering its Opposition. That being said, Defendant Kilpatrick's argument that Plaintiff's claims are time barred is meritless.

Defendant Kilpatrick asserts that Plaintiff's claims are time barred. Defendant Kilpatrick's Opposition 19-20. The assertion is perplexing because Defendant Kilpatrick consented to Defendant Gingold's Notice of Removal, which clearly states that Defendant Kilpatrick never refused to pay Plaintiff. Defendant Gingold's Notice of Removal, at 17. Defendant Kilpatrick cannot have it both ways. Moreover, nothing in Plaintiff's Complaint suggests that Plaintiff's claims are time-barred. Indeed, Plaintiff was led to believe that he would be compensated after Defendant Kilpatrick received the benefit of Mr. Boyd's services and were awarded $99 million in legal fees on July 27, 2011. Complaint ¶ 94.

Defendant Kilpatrick goes on to state that "D.C. Code § 12-301 sets forth a three-year statute of limitations for both tort and contract claims . . . ." *Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1201 (D.C. 1984). Defendant Kilpatrick also cites to the D.C. Circuit's opinion in *Bregman v. Perles*, 747 F.3d 873, 876 (D.C. Cir. 2014), which makes clear that a claim for unjust enrichment can only accrue in the face of "an unequivocal refusal of payment." *Id*.

As enumerated in Plaintiff's Complaint, Mr. Boyd made clear to Defendant Kilpatrick and its agents that he expected compensation for his efforts on their behalf. Complaint ¶¶ 43, 44, 86. Defendant Kilpatrick made the initial contact with Mr. Boyd, recruited Mr. Boyd, and encouraged Mr. Boyd to help obtain funding, which led to Defendant Kilpatrick receiving an enormous fee award through Mr. Boyd's efforts. Complaint ¶¶ 26-28, 46-59, 60-82, 85-88. After being awarded its legal fees on July 27, 2011, Defendant Kilpatrick failed to pay or even communicate with Mr. Boyd because it no longer needed his services. But, as Defendant Gingold points out Defendant Kilpatrick never refused payment. Notice of Removal, at 17. In fact, other than its filings in this Court which it knows to have no subject matter jurisdiction, Defendant Kilpatrick has not responded to or made payment to Plaintiff pursuant to his lawful demand for compensation.

In the absence of an unequivocal refusal, Plaintiff's claim accrues once the enrichment occurred and an unreasonable amount of time has passed with no payment. 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).

Defendant Kilpatrick was awarded its attorney fees on July 27, 2011. Because of Plaintiff's clearly communicated expectation of payment, and Defendant Kilpatrick's and the *Cobell* litigation team's assurances, Mr. Boyd had every reason to believe that he would be

compensated within a reasonable time after that date. As there was no unequivocal refusal of payment prior to July 27, 2011, Mr. Boyd's claims could not have accrued until an unreasonable amount of time had elapsed after July 27, 2011 with no compensation forthcoming. Mr. Boyd filed his Complaint May 6, 2014, well within the three years statute of limitation under District of Columbia law. Accordingly, Defendant Kilpatrick's contention that Plaintiff's claims are barred by the statute of limitations is without merit.

CONCLUSION

WHEREFORE Plaintiff renews its request that this Court to GRANT its Motion to Remand this action to the District of Columbia Superior Court Case No. 2014 CA 002782 without further delay, 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 21st day of July, 2014, I electronically filed the foregoing *Plaintiff's Reply to Defendant Kilpatrick'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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