TO BE ARGUED BY:
Matthew M. Piston, Esq.
(TIME REQUESTED: 10 MINUTES)

New York Court of Appeals No.: APL-2020-00151

New York State Court of Appeals

ERSIN KONKUR,

Plaintiff-Appellant

-against-

TURKISH CULTURAL CENTER AND HIGHWAY EDUCATION.

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS TURKISH CULTURAL CENTER AND HIGH WAY EDUCATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), High Way Education, Inc., d/b/a Turkish Cultural Center, hereby discloses that it does not have any corporate parents, subsidiaries or affiliates.

QUESTIONS PRESENTED

Question #1 Was the Fourth Department correct when it granted the Defendant the relief sought in its appeal and thereby granted the motion of the Defendant to dismiss the Third Cause of Action alleged in the Complaint pursuant to CPLR §3211(a)(7), which sought a judgment against the Defendant for alleged illegal kickbacks paid by the Plaintiff in violation of New York Labor Law §198-b?

Answer #1 Yes, New York Labor Law §198-b does not expressly or impliedly provide for a private cause of action.

STATEMENT OF CASE

Ersin Konkur (hereinafter referred to as "Plaintiff") commenced this action against High Way Education, Inc., doing business as (d/b/a) Turkish Cultural Center (hereinafter referred to as "Defendant"), on March 29, 2018, by filing a Summons and Verified Complaint, sworn to March 26, 2018 (hereinafter referred to as the "Complaint"), wherein a total of six (6) causes of action were plead against Defendant, all involving allegations related to payment of wages by Plaintiff's employer to the Plaintiff. By way of Notice of Motion dated June 28, 2018, the Defendant moved the New York State Supreme Court for the County of Oneida (Hon. David A. Murad, J.S.C.), for an Order of Dismissal of all causes of action plead against the Defendant in the Complaint pursuant to CPLR §3211(a)(7), for failure to state a cause of action.

By way of decision from the bench on September 26, 2018, and order dated October 17, 2018 (hereinafter collectively referred to as the "Order"), Justice Murad granted the Defendant's Motion to Dismiss five (5) of the six (6) causes of action plead against the Defendant, but erroneously denied the Defendant's motion to dismiss the Third Cause of Action plead against the Defendant which alleged violations of New York Labor Law §198-b, and, apparently, sought a judgment pursuant to Labor Law §198.

The relevant portions of Labor Law §198-b provide that:

> Whenever any employee who is engaged to perform labor shall be promised an agreed rate of wages for his or her services, be such promise in writing or oral, or shall be entitled to be paid or provided prevailing wages or supplements pursuant to article eight or nine of this chapter, it shall be unlawful for any person, either for that person or any other person, to request, demand, or receive, either before or after such employee is engaged, a return, donation or contribution of any part or all of said employee's wages, salary, supplements, or other thing of value, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such employee from procuring or retaining employment. Further, any person who directly or indirectly aids, requests or authorizes any other person to violate any of the provisions of this section shall be guilty of a violation of the provisions of this section. N.Y. Lab. Law § 198-b(2) (McKinney).

The sole remedy for the violation of §198-b is outlined by Labor Law §198-b (5), which requires that "5. A violation of the provisions of this section shall constitute a misdemeanor." N.Y. Lab. Law § 198-b(5) (McKinney); thus, there is no express authorization for a private cause of action under Labor Law §198-b.

As such, the Defendant appealed that part of the Order which denied the Defendant's motion to dismiss the Third Cause of Action in the Complaint to the New York State Supreme Court Appellate Division for the Fourth Department, and by way of Memorandum and Order dated March 13, 2020, the Fourth Department granted the Defendant's appeal (hereinafter referred to as the "Appellate Decision").

By way of the Appellate Decision, there are no longer any causes of action remaining against the Defendant.

The Plaintiff sought leave to appeal the Appellate Decision by motion to this Court, and that leave was granted by way of Decision and Order entered October 15, 2020.

PROCEEDINGS

The Plaintiff commenced this action by the filing of the Complaint on March 29, 2018. (The Record on Appeal shall be cited herein as "R.") (R. 36-43).

By way of Notice of Motion dated and filed June 28, 2018, the Defendant sought an order pursuant to CPLR §3211(a)(7), dismissing all six (6) causes of action alleged in the Complaint. (R. 44-45).

In support of that Notice of Motion, the Defendant submitted an Affidavit of Jafer Yasar, sworn to June 28, 2018, along with Exhibits A and B annexed thereto (R. 160-178), and the Attorney Affirmation of Matthew M. Piston, Esq., dated June 28, 2018, along with Exhibits A and B annexed thereto (R. 46-159).

In opposition to the relief sought in the Defendant's Notice of Motion, the Plaintiff submitted the Affidavit of Ersin Konkur, sworn to September 11, 2018, along with Exhibits 1-11 annexed thereto (R. 179-226), Exhibit 3 being the Affidavit of Jaklin Kornfilt, sworn to September 11, 2018, along with Exhibits 3A-3G-1

annexed thereto (R. 192-215), and the Attorney Affirmation of David Goldbas, Esq. dated September 11, 2018 (R. 227-230). Plaintiff later filed what he referred to as a "corrected Exhibit 11" to his affidavit (R.231).

Finally, the Defendant submitted the Reply Attorney Affirmation of Matthew M. Piston, Esq., dated September 24, 2018 (R. 232-236), and the parties appeared in Supreme Court on September 26, 2018 for oral argument (R. 10-35).

By way of decision from the bench on September 26, 2018, and Order dated October 17, 2018, Justice Murad granted the Defendant's motion to dismiss as to the First, Second, Fourth, Fifth and Sixth Causes of Action, but denied the Defendant's motion as to the Third Cause of Action.

The Defendant appealed that part of Justice Murad's decision, which denied the Defendant's motion to dismiss as to the Third Cause of Action plead in the Complaint, and by way of the Appellate Decision, the Fourth Department reversed Justice Murad's Order and granted the Defendant the totality of the relief sought in its motion (R. i-ii).

FACTS

Defendant is a not for profit corporation formed under the laws of the State of New York (R. 37, 61, 160). Defendant does business as (d/b/a) the Turkish Cultural Center (hereinafter referred to as "TCC"), and TCC is not a separate entity from the

Defendant (R. 161, 179). Defendant supports educational programs in and around Rochester, New York by providing assistance to educational institutions, students, students' families, and a variety of other programs (R. 161). As a not for profit corporation, Defendant is duly authorized to receive donations from individuals and entities, and Defendant regularly receives such donations from a large variety of individuals and entities (R. 161).

Plaintiff is an individual who alleges to have been a teacher employed by Defendant Utica Academy of Science Charter School (hereinafter referred to as "UASCS") (R. 37, 38, 53, 180). Plaintiff alleges, in sum and substance, that Defendant and UASCS acted in concert with one another in an effort to force the Plaintiff to kickback a portion of his wages to Defendant and/or UASCS (R. 38). Plaintiff alludes to the motivation for these alleged actions by the two (2) defendants to be an affiliation with the "Gulen Movement" (R. 37, 54, 181). The Plaintiff alleges that the "Gulen Movement" is a "religious cult" that claims allegiance to Fetullah Gulen, a religious leader living in Saylorsburg, Pennsylvania (R. 37, 54).

Plaintiff claims that these kickbacks were required during the course of his employment with UASCS, which occurred from September 1, 2013 to November 4, 2014. The Plaintiff has further alleged that these kickbacks came in the form of donations to the Defendant in the cumulative sum of Six Thousand Six Hundred Forty Six and 81/100 Dollars ($6,646.81) (R. 38, 57, 185). Plaintiff has claimed that

he was coerced into making these kickbacks under threat of termination or demotion in employment (R. 38, 55-56, 182, 228).

Defendant has acknowledged that it received three (3) donations from Plaintiff in the cumulative sum of Two Thousand Seven Hundred Ninety Seven and 00/100 Dollars ($2,797.00) (R. 161, 177, 228). However, Defendant denies any affiliation or business relationship, formal or informal, with UASCS, denies that it worked in concert with UASCS to force the Plaintiff to make donations to the Defendant, and there are no officers or board members of Defendant which are also officers or board members of UASCS (R. 162).

The Defendant denies that it was ever an employer of the Plaintiff, and the Plaintiff has not provided any allegation of fact which rebuts that denial (R. 161, 163). In other words, the Defendant is not, nor has it ever been, an employer of Plaintiff.

Defendant has denied all allegations of wrongdoing plead by the Plaintiff (R. 160-178).

LEGAL STANDARD IN MOTIONS TO DISMISS

In considering a motion to dismiss for failing to state a cause of action under CPLR §3211(a)(7), the Court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine

whether the facts, as alleged, fit within any cognizable legal theory. *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 20 (2010).

ARGUMENT

POINT I: THE FOURTH DEPARTMENT WAS CORRECT TO DISMISS THE THIRD CAUSE OF ACTION PREDICATED UPON NEW YORK LABOR LAW §198-b

"In the absence of an express private right of action, plaintiff can seek civil relief in a plenary action based on a violation of the statute only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history." *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 70 (2013).

The determination as to whether there was a legislative intent to create a private right of action is predicated upon three (3) factors (hereinafter referred to as the "*Cruz* Test"): "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." *Id.*

Finally, this Court has ruled that it has "declined to recognize a private right of action in instances where the Legislature specifically considered and expressly provided for enforcement mechanisms in the statute itself." *Id.* In referencing its decision in *Sheehy v. Big Flats Community Day* (73 N.Y.2d 629 (1989)), the Court

wrote that "[a]lthough plaintiff satisfied the first two prongs of the standard, it was evident from the statutory scheme that the Legislature had already considered the use of civil remedies to deter the sale of alcoholic beverages to those under the legal purchase age and expressly provided the remedies it determined were appropriate, which did not include a private suit against the seller." *Cruz* at 71 (Internal citations and quotations omitted).

This Court has already ruled that Labor Law §198-a does not provide for a private cause of action when the Court affirmed the decision of the Fourth Department, which ruled that it "agree[s] with the defendant that the complaint should be dismissed. We find nothing in section 198-a of the Labor Law, which provides only for penal sanctions against officers and agents of corporations, suggesting that the legislature intended that section should impose civil liability as well." *Stoganovic v. Dinolfo,* 92 A.D.2d 729, 729–30 (1983), aff'd, 61 N.Y.2d 812 (1984). In *Stoganovic*, the Fourth Department went on to opine, and this Court affirmed, that "[w]hether a private right of action should be implied from a statute which on its face provides only for penal sanctions depends upon the intent of the statute." *Id*. (Internal citations omitted).

Legislative Intent

Labor Law §198-b(2) provides that:

> Whenever any employee who is engaged to perform labor shall be promised an agreed rate of wages for his or her services, be such promise in writing or oral, or shall be entitled to be paid or provided prevailing wages or supplements pursuant to article eight or nine of this chapter, it shall be unlawful for any person, either for that person or any other person, to request, demand, or receive, either before or after such employee is engaged, a return, donation or contribution of any part or all of said employee's wages, salary, supplements, or other thing of value, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such employee from procuring or retaining employment. Further, any person who directly or indirectly aids, requests or authorizes any other person to violate any of the provisions of this section shall be guilty of a violation of the provisions of this section. N.Y. Lab. Law § 198-b (McKinney).

A Private Cause of Action is not Expressly Permitted by Labor Law §198-b

The sole remedy for the violation of §198-b is outlined by Labor Law §198-b(5), which requires that "5. A violation of the provisions of this section shall constitute a misdemeanor." N.Y. Lab. Law § 198-b(5) (McKinney); thus, there is no express authorization for a private cause of action under Labor Law §198-b.

The legislature has also mandated that "[t]he maxim *expressio unius est exclusio alterius* is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded". N.Y. Stat. Law §240 (McKinney).

In other words, Labor Law §198-b expressly states that the criminal penalty of a misdemeanor shall be applied to the violations of Labor Law §198-b, and states no other ramifications for violations of that statute. Under *expressio unius est exclusio alterius*, the inference must be drawn that the legislature intended to omit a private right of action.

When applying the doctrine of *expressio unius est exclusio alterius* to the Labor Law, specifically Labor Law §198-b, it is very telling that the legislature has, in other provisions of Article 6 of the Labor Law, expressly established a private cause of action for certain violations of the Labor Law. By way of example, Labor Law §198(b-1) states:

> If any employee is not provided within ten business days of his or her first day of employment a notice as required by subdivision one of section one hundred ninety-five of this article, he or she may recover in a civil action damages of fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars, together with costs and reasonable attorney's fees. The court may also award other relief, including injunctive and declaratory relief, that the court in its discretion deems necessary or appropriate. N.Y. Lab. Law § 198 (McKinney). (Emphasis added).

Thus, again, given that the legislature has expressly authorized private causes of action under certain provisions of the Labor Law, the only logical inference that must be drawn is that had the legislature intended to create a private right of action pursuant to Labor Law §198-b, it would have expressly done so as it did in Labor

Law §198(b-1). There is no express private right of action within Labor Law §198-b, and thus, none exists. See, *Stoganovic* at 729.

A Private Cause of Action is not Impliedly Permitted by Labor Law §198-b

As Labor Law §198-b does not expressly permit a private cause of action, such a private cause of action is only available to the Defendant if the legislature impliedly permitted a cause of action in the legislative history.

To that end, Labor Law §198-b was first established in 1934 in the Penal Law as NY Penal Law §962. *See* Bill Jacket, L. 1934 Ch. 171, pp. 4-5. A review of the legislative history of NY Penal Law §962 evidences that this statute was purely intended to be an amendment to the Penal Law, and further to that point, there was no mention within the legislative history of a private cause of action. *See* Bill Jacket, L. 1934, ch. 171. In fact, in its endorsement of the bill, the Associated General Contractors of America, Inc. wrote that "We respectfully request your approval to Assemblyman Lappano's Bill Introductory 710-Print 1798 which amends the Penal Law by making refunds of wages a Misdemeanor. We have not heard of a single objection to this bill and we sincerely hope that it will receive your approval." *Id* at p.9.

The Plaintiff's Brief alludes to the fact that Labor Law §198-b is "promulgated not in the Penal Law, but in the Labor Law" (See P. 12 of the Plaintiff's Brief) is

determinative to the Plaintiff's position that Labor Law §198-b impliedly creates a private cause of action; this is a red herring. As more fully stated below, Labor Law §198-b was, in fact, first passed as Penal Law §962, and the language of Penal Law §962 remained largely unaltered from its original drafting when the legislature reorganized the Penal Law and moved Penal Law §962 into the Labor Law as Labor Law §199-c. This, of course, was all prior to the statute's ultimate placement as Labor Law §198-b.

To that end, the first revision of Labor Law §198-b came in 1939, when §962 of the Penal Law was amended to broaden its application from applying only to the agreement for the payment of prevailing wages on public works contracts, to the agreement for the payment of any wages. *See* Bill Jacket, L. 1939, ch. 851, p.7. Again, a review of the entirety of the legislative history evidences that it is devoid of any intention to create a private cause of action. *See* Bill Jacket, L. 1939, ch. 851.

In 1965, Penal Law §962 was migrated by the legislature to the Labor Law and appeared as Labor Law §199-c. This appeared to occur at a time when significant revisions were made to the then existing Penal Law. The legislative history tells us "[t]he bill was prepared by the Temporary Commission on Revision of the Penal Law, and distributes over 300 sections of the old Penal Law to more appropriate chapters of the Consolidated and Unconsolidated Laws." *See* Bill Jacket, L. 1965, ch. 1030, p.5.

It is noteworthy that in its recommendation for the passing of the 1965 revisions, the Department of Labor wrote:

> *Mallum prohibitum* violations of the Penal Law are prosecuted by [the] District Attorneys, usually after a complaint. Violations of the Labor Law are usually prosecuted by the Attorney General, usually upon referral by the Department of Labor. Prior to referring a violation for prosecution the [L]abor Department conducts a thorough investigation. The transfer of prohibitory sections from the Penal Law to the Labor Law will, therefore, increase the workload of the Department of Labor. *See* Bill Jacket, L. 1965, ch. 1030, p.30.

Furthermore, regarding the 1965 revisions, the Department of Labor wrote:

> This bill transfers provisions from the Penal Law to the Labor Law directly without considering the difference in the style and language of the two chapters. Typically, a Penal Law section provides that the prohibited action is a crime to be punished as specified in the section. The Labor Law, on the other hand, normally prohibits certain types of conduct and reserves the punishment provisions for old Penal Law sections 1272 and 1275 (These would become sections 209-a and 213 of the Labor Law pursuant to this bill). While transferring the several sections to the Labor Law, the drafters of this bill have retained the Penal Law format. *Id*.

In 1967, there was an administrative amendment to Labor Law §199-c, wherein the legislature moved this statute to Labor Law §198-b. There was no substantive change to this provision of the law in the 1967 revision. *See* Bill Jacket, L. 1967, ch. 390.

The final revision to Labor Law §198-b came in 1989, wherein the legislature clarified the statute as it related to the payment of prevailing wages under Articles 8 and 9 of the Labor Law. This 1989 revision also added Labor Law §198-b to the list of violations for which the Department of Labor could seek a civil penalty and order repayment of any wages unlawfully demanded by the employer pursuant to Labor Law §218. *See* Bill Jacket, L. 1989, ch. 177. (Emphasis added). Yet again, nothing within the legislative history for this final revision of Labor Law §198-b evidences, let alone mentions, the availability of a private cause of action.

More specifically to this point, the legislative history for the 1989 amendment evidences that the revision was introduced by Senator James J. Lack, at the request of the Department of Labor, because the prior version of Labor Law §198-b simply contained criminal penalties, which were prosecuted by the Attorney General, and the Department of Labor requested that the Commissioner be permitted to impose civil penalties as a further deterrent to the violation of Labor Law §198-b. *See* Bill Jacket, L. 1989, ch. 177, p7. Furthermore, the Department of Labor wrote that:

> Currently, Labor Law Section 198-b makes it a criminal misdemeanor to demand or receive the kickback of wages. The provisions contained under this section inadequately deter employers from violation the law, particularly in the public work area. Recent amendments to the Labor Law have significantly facilitated the Department's enforcement authority concerning the widespread prevailing wage violations and consequently, the number of investigations and the amount of restitution for underpayments have steadily increased. However,

> kickback demands by employers have increased at the same time that the Department has increased its enforcement of other provisions of the prevailing wage law…The civil penalty authorized by this legislation, assessed after giving due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation and the history of previous violations, will additionally serve as a significant deterrent. *See* Bill Jacket, L. 1989, ch. 177, p. 9-10.

Based upon the above, it is clear and unequivocal that the legislature never implied the availability of a private cause of action for violations of Labor Law §198-b, but instead the legislature intended the ramifications for the violation of Labor Law §198-b to be a conviction of a misdemeanor after criminal proceedings which are commenced by the Attorney General, and/or the imposition of civil penalties handed down by the Department of Labor.

Cruz Test Analysis

Stated again, prior to permitting a private cause of action based upon a statute that is criminal in nature, which does not expressly permit a private cause of action (such as Labor Law §198-b), a court is required to apply the *Cruz* Test, which requires a court to determine: (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme.

While it may be that the Plaintiff is able to satisfy the first prong of the *Cruz* Test, in that the Plaintiff was an employee in New York State and generally an employee working in the State of New York is one of the class for whose particular benefit the statute was enacted, the Plaintiff has not and cannot establish the existence of the other two (2) *Cruz* prongs.

With regard to the second prong of the *Cruz* Test, while the legislative purpose of Article 6 is to protect the wages of employees, it should not be lost that the Plaintiff was never an employee of the Defendant (R. 161, 163), and thus the Defendant was not tasked with the payment of wages to the Plaintiff. It is clear that the legislative purpose of Article 6 as a whole does not protect the Plaintiff against actions by non-employers. Furthermore, the legislative purpose of Labor Law §198-b specifically, pursuant to the express language of the statute as well as the legislative history, is to criminally prosecute those who accept or demand kickbacks of wages.

There is nothing within the express language of Article 6 of the Labor Law (including Labor Law §198-b) which suggests that an individual will have a private cause of action against a third party for any alleged acceptance of a kickback of wages. While the Plaintiff may be able to satisfy the second prong of the *Cruz* Test if the Defendant were an employer of the Plaintiff, it cannot do so in this case.

With regard to the third prong of the *Cruz* Test, which requires the Court to find that creation of such a right would be consistent with the legislative scheme, it

is quite apparent that the legislative intent was to provide two (2) enforcement mechanisms for violations of Labor Law §198-b; the first being criminal prosecution for which the punishment will be a misdemeanor (Labor Law §198-b), and the second being the investigatory authority of the Department of Labor with the ability to assess a civil penalty at the conclusion of that investigation (Labor Law §218).

This Court has "repeatedly recognized the third [prong] as the most important because the Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves. Thus, regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature." *Cruz* at 70.

As such, the fact that the legislature specifically and expressly authorized two (2) enforcement mechanisms for violations of Labor Law §198-b, coupled with the fact that the statutory text and legislative history of Labor Law §198-b is devoid of any reference or implication of a private cause of action, leaves no question that there was never an implied intent of the legislature to create such a private cause of action. Furthermore, to subject an individual and/or entity who has allegedly violated Labor Law §198-b to criminal sanctions, a civil penalty from the Department of Labor, and a private cause of action, would be unduly harsh, and thus

a private cause of action is incompatible with the enforcement mechanisms chosen by the legislature for Labor Law §198-b.

Prior Litigation

Until the Fourth Department's decision in this matter, the question as to whether Labor Law §198-b allows for a private cause of action does not appear to be an issue which has been specifically litigated in the New York State Courts, at least at an appellate level. The federal court, specifically the Southern District of New York, previously ruled that a private cause of action did exist under Labor Law §198-b, but in doing so, the court recognized that there "are no cases that directly deal with the question whether…§198-b give[s] rise to a private right of action." *Chu Chung v. New Silver Palace Restaurants, Inc.*, 272 F. Supp.2d 314, 316 (S.N.D.Y. 2003).

The court in *Chu Chung* recognized the Fourth Department's decision in *Stoganovic v. Dinolfo* (which was affirmed by this Court), but incorrectly determined that it only dealt with the narrow issue of whether a private right of action could be implied as available against corporate officers and agents under Labor Law §198-a. It is respectfully suggested that the Southern District of New York's interpretation of *Stoganovic*, as outlined in *Chu Chung*, missed the mark and ignores the reasoning utilized by the Fourth Department when it came to its decision; that

reasoning is that a private right of action should only be implied from a statute which on its face provides only for penal sanctions when it is the legislative intent to so imply.

In *Martinez v. Alubon, LTD*, the First Department relied upon *Chu Chung* when it ruled in a conclusory fashion that the plaintiff had "stated a cause of action under Labor Law §198-b." *Martinez v. Alubon, LTD*, 111 A.D.3d. 500, 501 (1st Dept. 2013). In *Martinez*, the First Department did not appear to undertake any consideration as to whether a cause of action actually exists under Labor Law §198-b, but simply and summarily cited *Chu Chung* when it ruled a cause of action had been stated.

In *Chan v. Big Geyser, Inc.*, the Southern District of New York again ruled on the issue as to whether a private cause of action exists under Labor Law §198-b, and this time disagreed with both *Chu Chung* and *Martinez*. The Southern District of New York held that:

> As Defendants acknowledge, one court in this District inferred a private right of action under § 198-b. *Chu Chung*, 272 F. Supp. 2d at 316-17. Acknowledging that "no cases" directly addressed the question, the Court held that restaurant employees were in the class for whose benefit the statute was enacted; the remedies provided by Article VI "suggest a legislative intention in favor of a civil remedy against employers;" and "the New York Labor Law reflects a strong legislative policy aimed at redressing the power imbalance between employer and employee." *Id* at 316-17. Additionally, while not explicitly addressing this question, the First Department cited to the

> portion of *Chu Chung* that inferred a private cause of action as it allowed a § 198-b claim to proceed. *Martinez v. Alubon, Ltd.*, 111 A.D.3d 500, 500 (N.Y. 1st Dep't 2013).
>
> Defendants contend that *Chu Chung* was misguided. They provide an accounting of §198-b's legislative history, emphasizing that §198-b was originally part of the penal law and that "for almost 80 years after [the statute] was first enacted," no court inferred a state law cause of action. Defendants note that, since *Chu Chung*, the New York legislature explicitly created private rights of action for some, but not all, violations of the Labor Law.
>
> Whether § 198-b contains a private right of action is unclear. For the reasons articulated above, the Court declines to infer a private right of action here. *Chan v. Big Geyser, Inc.*, 2018 WL 4168967, at *7 (S.D.N.Y. 2018).

Recently, in *Kloppel v. HomeDeliveryLink, Inc.* the United States District Court for the Western District of New York undertook its own analysis with regard to whether Labor Law §198-b permits a private cause of action to individuals. That analysis of the WDNY lead that court to conclude that:

> This Court is inclined to agree with *Chan*'s analysis. In recent amendments, the Legislature carved out express private rights of action for many provisions of the NYLL, but not § 198-b, suggesting that the Legislature did not intend to do so. *See, e.g.*, N.Y. Lab. Law § 195(1), (3). Additionally, § 198-b *does* contain an enforcement mechanism, albeit a criminal one. It provides that a violation of § 198-b is a misdemeanor. New York courts have routinely declined to recognize a private right of action in instances where, as here, the legislature specifically considered and expressly provided for

> enforcement mechanisms" in the statute itself. Finally, that some courts have assumed that § 198-b contains a private right of action does not make it so. Indeed, *Chu Chung*'s analysis focuses on § 198, entitled costs, remedies, rather than § 198-b—a distinct subsection—entitled "Kick-back" of wages prohibited." In doing so, *Chu Chung* ignored § 198-b's unique and express language, which suggests that a private right of action does not exist. Therefore, Plaintiff's NYLL § 198-b claim is dismissed. *Kloppel v. HomeDeliveryLink, Inc.*, No. 17-CV-6296-FPG-MJP, 2019 WL 6111523, at *3 (W.D.N.Y. Nov. 18, 2019) (Internal citations and quotations omitted).

The Fourth Department in this matter and the District Courts in *Chan* and *Kloppel*, undertook an analysis of Labor Law §198-b, including the legislative history of that statute, which does not appear to have been considered by the First Department in *Martinez*. To be sure, it is respectfully suggested to this Court, and with all due respect to the First Department, that the First Department's ruling in *Martinez* appears to have been reached by simply assuming that a private cause of action existed under Labor Law §198-b, without undertaking a review of that issue. For that reason, it is requested that this Court affirm the Fourth Department's Appellate Decision, and decline to accept the First Department's decision in *Martinez*.

Based upon the plain language of New York Labor Law §198-b, and that statute's Legislative history, the Plaintiff does not have a private right of action against the Defendant for a violation of that statute. As such, the Plaintiff has failed

to state a cause of action against the Defendant for a violation of New York Labor Law §198-b, and the Fourth Department was correct in dismissing that cause of action plead in the Complaint against the Defendant.

CONCLUSION

For each and every reason stated herein, the Fourth Department was correct in granting the Defendant's Motion to Dismiss the Complaint's Third Cause of Action plead against the Defendant which was founded upon a violation of New York Labor Law §198-b. It is respectfully requested that this Court affirm the Memorandum and Order of the Fourth Department and deny the Plaintiff's application to reverse the Appellate Decision.

Dated: Rochester, New York
February 26, 2021

Respectfully Submitted,

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