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TO BE ARGUED BY:
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Appellate Division Docket No. CA 19-00730
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New York Supreme Court

Appellate Division-Fourth Department

ERSIN KONKUR,

Plaintiff-Respondent,

-against-

TURKISH CULTURAL CENTER AND
HIGHWAY EDUCATION.

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS TURKISH CULTURAL CENTER AND HIGH WAY EDUCATION

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QUESTIONS PRESENTED

Question #1 Did the Supreme Court err when it denied the motion of the Defendant to dismiss the third cause of action alleged in the Complaint pursuant to CPLR §3211(a)(7), which seeks 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 is criminal in nature and does not provide for a private cause of action.

Question #2 Did the Supreme Court err when it denied the motion of the Defendant to dismiss the third cause of action pursuant to CPLR §3211(a)(7), which seeks a judgment against the Defendant pursuant to Labor Law §198?

Answer #2 Yes, the relief afforded pursuant to New York Labor Law §198 is only available to employees against employers, after the employee has established a violation of another provision of Article 6 of the Labor Law. Plaintiff has not established a violation of any provision of Article 6 of the Labor Law, and Defendant has never been an employer of the Plaintiff; therefore, any relief afforded pursuant to New York Labor Law §198 is unavailable to the Plaintiff against the Defendant.

PRELIMINARY STATEMENT

The Plaintiff-Respondent Ersin Konkur (hereinafter "Plaintiff") has submitted his Respondent's Brief, wherein the Plaintiff has unsuccessfully argued that Labor Law §§198-b and 198 create causes of action which can be plead by the Plaintiff against the Defendant-Appellant High Way Education Inc. (d/b/a Turkish Cultural Center) (hereinafter "Defendant").

To that end, the Defendant's Appellant's Brief irrefutably establishes that the lower court erred in failing to dismiss the third cause of action plead against the Defendant in the Plaintiff's Complaint. In so establishing, the Defendant has relied upon the plain language of the statutes relevant to this action, the legislative histories of those statutes, and relevant legal precedent, including precedent of this Court.

ARGUMENT

POINT I: A PRIVATE CAUSE OF ACTION IS NEITHER EXPRESSLY NOR IMPLICITLY PERMITTED UNDER LABOR LAW §198-b

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

Both the Plaintiff and Defendant have cited to the Court of Appeal's decision in *Cruz v. TD Bank, N.A.* in their briefs for the holding by the Court of Appeals, which states that "[i]n 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).

To that end, citing to no legal authority, the Plaintiff argues that the word "further" in the language of Labor Law §198-b(2) expressly creates a private cause of action. Labor Law §198-b(2) fully states 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). (Emphasis added).

Contrary to the assertions of the Plaintiff, a logical reading of the plain language of Labor Law §198-b(2) cannot be read to expressly create a private cause of action. In fact, the exact sentence pointed to by the Plaintiff in support of this position states that such a "person" will be "guilty" of a violation of that section. To

be sure, the use of the word "further" appears to be simply a word used by the Legislature to transition to an additional group of individuals who could also be found guilty of a crime under this section of the law.

The Plaintiff's argument further fails when Labor Law §198-b(2) is read in conjunction with Labor Law §198-b(5), which states "[a] violation of the provisions of this section shall constitute a misdemeanor." N.Y. Lab. Law § 198-b (McKinney). As such, Labor Law §198-b does not expressly create a private cause of action, and in order to establish the right to a private cause of action pursuant to Labor Law §198-b, the Plaintiff must show that the legislature impliedly created a cause of action under Labor Law §198-b, which it has not and cannot accomplish.

<u>A Private Cause of Action is not Impliedly Permitted under Labor Law §198-b</u>

As stated above, the determination as to whether there was a legislative intent to create a private right of action is implied is predicated upon three (3) factors: "(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." *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 70 (2013). Also, the Court of Appeals 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.*

The Plaintiff has argued that because Article 6 of the Labor Law as a whole is intended to protect the wages of employees, then a private cause of action therefore fits within the legislative purpose and legislative scheme. This is contradictory to a prior ruling of this Court.

This Court has ruled that "we decline to imply a civil cause of action based on the Labor Law." *Stoganovic v. Dinolfo*, 92 A.D.2d 729 (4th Dept., 1983). In doing so, this Court cited to the legal maxim ***expressio unius est exclusio alterius***, and found that there is no private cause of action under either Labor Law §198-a nor Labor Law §198-c. It is worth noting that both Labor Law §198-a and Labor Law §198-c, like Labor Law §198-b, are statutes which impose criminal penalties for their violations, and this Court found that the "logical inference from [the] omission [of providing for civil actions under those statutes] is that the legislature did not intend that a civil action...should be implied." *Id.*

While it is recognized that in *Staganovic* this Court was not applying the test found in *Cruz* to Labor Law §198-b, the analysis of Labor Law §198-b is the exact same as the analysis for Labor Law §§ 198-a and 198-c, and the same outcome of that analysis should be reached.

The ruling of this Court is not unique to *Staganovic*. This Court has also ruled that "[b]ecause Retirement and Social Security Law § 74 provides the exclusive remedy for the alleged wrongful act asserted in plaintiff's third cause of action, the court erred in recognizing a separate, private right of action inconsistent with the legislative scheme. *Lyndaker v. Bd. of Educ. of W. Canada Valley Cent. Sch. Dist.*, 129 A.D.3d 1561, 1563 (4th Dept. 2015); citing generally *McLean v. City of New York*, 12 N.Y.3d 194, 200–201 (2009); and *Negrin v. Norwest Mtge.,* 263 A.D.2d 39, 47 (2nd Dept. 1999). It is noteworthy that in *Negrin*, the Second Department ruled that there was an express cause of action under Real Property Law §274-a, because it states, *inter alia*, "[i]f the mortgagee fails to deliver the mortgage-related documents, the mortgagee shall be liable for the actual damages to the mortgagor by reason of such failure." See N.Y. Real Prop. Law § 274-a (McKinney); and *Negrin* at 46. Thus, in order for a statute to expressly authorize a private right of action, it must actually expressly authorize it; Labor Law §198-b does not do so.

The Court of Appeals has held that "[i]n assessing whether a private right of action can be implied, we have acknowledged that 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 or with

some other aspect of the over-all statutory scheme." *Hammer v. American Kennel Club*, 1 N.Y.3d 294, 299 (2003).

The enforcement mechanism of Labor Law §198-b is reflected in the plain language of that statute, that statute's Bill Jackets, and other statutes within Article 6 of the Labor Law. First, and again, Labor Law §198-b(5) states that "[a] violation of the provisions of this section shall constitute a misdemeanor." N.Y. Lab. Law § 198-b (McKinney). The enforcement mechanism chosen by the Legislature in enacting this law is criminal prosecution.

Furthermore, when this statute was migrated from the Penal Law to the Labor Law, the Department of Labor noted that when this migration occurred, the violations of this provision, which were previously prosecuted by a district attorney, would now be prosecuted by the Attorney General, because the Attorney General prosecutes "*mallum prohibitum*" (*sic*) violations of the Labor Law. *See* Bill Jacket, L. 1965, ch. 1030, p. 30.

The Bill Jacket for the 1989 amendment to Labor Law §198-b contains a Memorandum from New York State Senator James J. Lack to the counsel for the governor asking the governor to sign the amendment into law. In this Memorandum, Senator Lack states that he "introduced [the bill] at the request of the Department of Labor." *See* Bill Jacket, L. 1989, ch. 177, p. 7. Additionally, the Department of Labor wrote that this amendment was a "Departmental initiative which would

authorize the Commissioner of Labor to assess a civil penalty of up to five thousand dollars against any person demanding or receiving kickbacks of employee wages, salary, supplements or other things of value." *See* Bill Jacket, L. 1989, ch. 177, p. 9.

The Department of Labor goes on to state that "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. 10.

The entirety of the Bill Jacket for the 1989 amendment to Labor Law §198-b is devoid of any reference to a private cause of action. The Legislature enacted and amended Labor Law 198-b to provide criminal penalties prosecuted by the Attorney General and civil penalties handed down by the Department of Labor. It did not create the enforcement mechanism of permitting a private cause of action. Had the Legislature intended to create a private cause of action, it could have expressly done so, but it did not.

Finally, Labor Law §196, entitled Powers of the Commissioner, states that "1. In addition to the powers of the commissioner specified in other sections of this chapter, the commissioner shall have the following duties, powers and authority: c. He or she may institute proceedings on account of any criminal violation of any

provision of this article, or article five, seven, nineteen or nineteen-A of this chapter." N.Y. Lab. Law §196 (McKinney).

This reasoning is directly on point with the Court of Appeals decision in *Hammer v. American Kennel Club*. In that matter, the plaintiff attempted, in sum and substance, to use New York Agriculture and Markets Law (hereinafter "AML") §353 to create a private cause of action against the American Kennel Club, to permit the plaintiff to enter into a dog show without "docking" his dog's tail. AML §353 is a penal statue prohibiting animal cruelty. The Court ruled that AML §353 did not create a private right of action.

The Court in *Hammer* stated that "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 or with some other aspect of the overall statutory scheme." *Hammer v. American Kennel Club*, 1 N.Y.3d 294, 299 (2003); citing *Sheey v. Big Flats Community Day*, 73 NY2d 629 (1989). The Court went on to point to two (2) separate enforcement provisions of violations of AML §353 found within the AML, being police enforcement authority and humane society enforcement authority. *Id* at 300.

Finally, the Court in *Hammer* found that AML §353 "does not, either expressly or impliedly, incorporate a method for private citizens to obtain civil relief. In light of the comprehensive statutory enforcement scheme, recognition of a private

civil right of action is incompatible with the mechanisms chosen by the Legislature." *Id.*

Like AML §353, Labor Law §198-b is a penal statute, and in fact, is a law that formerly was found in the Penal Law. Also like AML §353, the Legislature has chosen enforcement mechanisms for violations of Labor Law §198-b, *to wit*: being convicted of a misdemeanor and/or being imposed a civil penalty by the Department of Labor; thus, a private right of action should not be judicially sanctioned, as it is incompatible with the legislative purpose, legislative scheme, and the enforcement mechanisms already chosen by the Legislature.

POINT II: LABOR LAW §198 DOES NOT CREATE A SEPARATE CAUSE OF ACTION AND CANNOT BE USED AGAINST THE DEFENDANT

The Plaintiff's Responding Brief does not clarify whether or not the Plaintiff is attempting to create a separate cause of action against the Defendant pursuant to Labor Law §198. To the extent that the Plaintiff is asserting a separate cause of action against the Defendant pursuant to Labor Law §198, it is respectfully submitted that based upon the authority cited in the Appellant's Brief, that there cannot be a separate cause of action plead under Labor Law §198, as it is affords "only a damage remedy" against "employers". See *Slotnick v. RBL Agency Ltd.*, 217 A.D.2d 365 (1st Dept. 2000) and *Perry v. Town of Huntington*, 60 Misc.3d 45, 48 (App. Term 2018).

The only authority cited by the Plaintiff in the Responding Brief is the Court of Appeals decision in *Gottlieb v. Kenneth D. Laub & Co.*, and cited this decision not to dispute that the Defendant's argument that no separate cause of action is created by Labor Law §198, but to dispute the Defendant's argument that the relief afforded by Labor Law §198 cannot be applied to the Defendant in this matter as the Defendant has never been an employer of the Plaintiff. The Plaintiff's argument and reliance upon *Gottlieb* is misguided.

The Court in *Gottlieb* clearly outlines the legislative history of Labor Law §198, and details that "the State Industrial Commissioner's sponsoring memorandum to the bill which became Labor Law §198(1-a) states as the *sole* purpose of the bill: 'To assist the *enforcement of the wage payment* and minimum wage payment *laws* by imposing greater sanctions on **employers** *for violations of those laws*." *Gottlieb v. Kenneith D. Laub & Co.*, 82 N.Y.2d 457, 463 (1993). (Emphasis of the word "employers" added).

Furthermore, the plain language of Labor Law §198 clearly states that it allows an "...employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules..." N.Y. Lab. Law §198 (McKinney). Labor Law §190 defines "Employee" to be "any person employed for hire by an employer in any employment" and "Employer includes any person, corporation, limited liability

company, or association employing any individual in any occupation, industry, trade business or service." *Id.*

Thus, even if Labor Law §198 creates a separate cause of action, which it does not, the relief afforded by Labor Law §198 cannot be levied against the Defendant, as the Defendant has never been the employer of the Plaintiff. The Plaintiff has cited no law to the contrary.

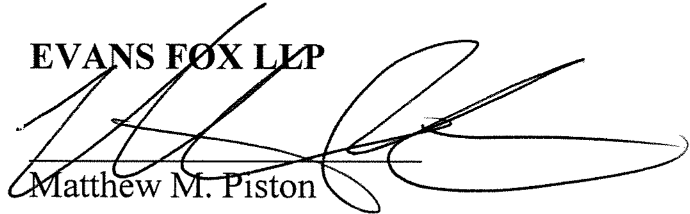
CONCLUSION

For each and every reason stated in the Appellant's Brief and herein, the Supreme Court erred in denying the Defendant's Motion to Dismiss the cause of action plead against the Defendant for a violation of New York Labor Law §§198-b and 198. It is respectfully requested that this Court reverse the Order of the Supreme Court (Hon. David A. Murad, J.S.C.) and grant the Defendant's motion by dismissing the remaining Third Cause of Action plead by the Plaintiff against the Defendant.

Dated: Rochester, New York
October 18, 2019

Respectfully Submitted,

EVANS FOX LLP

By: 

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