

STATE OF NEW YORK

FIFTH JUDICIAL DISTRICT

SUPREME COURT

COUNTY OF ONEIDA

\* \* \* \* \*

ERSIN KONKUR,

\*

Plaintiff,

INDEX NO.:  
\* EFCA2018-000883

vs.

\*

RJI NO.:  
\* 32-18-0441

UTICA ACADEMY OF SCIENCE CHARTER  
SCHOOL, TURKISH CULTURAL CENTER,  
HIGHWAY EDUCATION,

\*

MOTION ARGUMENT  
\* & COURT DECISION

Defendants.

\*

\* \* \* \* \*

**HELD BEFORE:**

The HONORABLE DAVID A. MURAD,  
Judge of the Supreme Court, in and for the  
Fifth Judicial District, State of New York,  
held at the Oneida County Courthouse, Utica,  
New York, on September 26, 2018.

**APPEARANCES:**

DAVID GOLDBAS, ESQ.  
Attorney for Plaintiff

JAMES P. EVANS, ESQ.  
Attorney for Defendant Utica Academy  
of Science Charter School

MATTHEW PISTON, ESQ.  
Attorney for Defendants Turkish Cultural  
Center & Highway Education

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1 THE COURT: Konkur versus Utica Academy of  
2 Science? Can I have appearances for the record,  
3 please?

4 MR. GOLDBAS: David Goldbas for plaintiff.

5 MR. EVANS: James Evans, Barclay Damon, for  
6 defendant Utica Academy of Science Charter School.

7 MR. PISTON: Matthew Piston for Highway and  
8 the Turkish Cultural Center.

9 THE COURT: Okay. We have two motions. We  
10 have the Utica Academy of Science motion.

11 MR. EVANS: Yes, your Honor. I would just  
12 point out, Judge, that most of plaintiff's claims are  
13 obviously dismissible, ought to be dismissed out of  
14 hand. For example, he again reasserts a claim for  
15 overtime. It was by far established at the last go-  
16 round that, given the fact he was a teacher, he himself  
17 concedes he's an exempt employee, he's not entitled to  
18 any overtime pay, and I would point out that that is  
19 specifically noted in his contract of employment.

20 He brings a claim under Section 193 of the  
21 Labor Law alleging there were unauthorized deductions  
22 from his pay, but there is obviously no allegation to  
23 that effect. The documentary evidence plainly  
24 establishes it's not true. He claims, he asserts a  
25 claim under Section 195 of the Labor Law that he didn't

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1 receive notice of a change in his pay. Again, the  
2 documentary evidence establishes that claim is not  
3 true. I would note these claims are not even mentioned  
4 in his affidavit in opposition to the motion. He was  
5 provided with an amended contract to reflect the fact  
6 that his pay would be adjusted, given the fact he was  
7 relieved of the duties as testing coordinator. He  
8 refused to sign it, but that certainly doesn't mean he  
9 didn't have written notice of the change in pay.

10 All those claims, Judge, are dismissible out  
11 of hand and really shouldn't have been asserted in the  
12 first place. What the plaintiff is really arguing here  
13 is that, for inexplicable reasons, he was forced to  
14 make donations to defendant, Highway Education, or the  
15 Turkish Cultural Center. But again, these are  
16 conclusory allegations. The documentary evidence  
17 establishes he received all of the pay to which he was  
18 entitled. There's nothing other than those conclusory  
19 allegations he was forced to make contributions to  
20 support the claim.

21 Now, the Court takes well pled allegations as  
22 true on a motion to dismiss, but those are well pled  
23 allegations. And I would assert they haven't met that  
24 standard here.

25 One other point, Judge, then we'll rely on

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1           our papers. There is a affidavit from a translator  
2           provided by plaintiff in support of these translated  
3           documents. I don't think the affidavit of the  
4           translated documents are admissible. The translator  
5           obviously never listened to any audiotapes that were  
6           purportedly taken of meetings that Mr. Konkur purports  
7           to transcribe, and the transcriptions are replete with  
8           his personal observations and comments and  
9           interjections as to additional facts and  
10          supplementations. For the translator to just go ahead  
11          and say this is all good is unacceptable. I'm not even  
12          sure the translator meets the certification, meets the  
13          criteria or qualifications to serve as a translator.  
14          That's not what he does. He speaks Turkish and he's a  
15          professor. I don't think that's enough. But they're  
16          not reliable. He's not listened to the audiotapes.  
17          He's apparently taken whatever Mr. Konkur wrote out in  
18          Turkish and translated it to English. It's not  
19          reliable, it's not admissible.

20                        Beyond that, Judge, we rest on our papers.

21                        THE COURT: Thank you, Counsel.

22                        MR. GOLDBAS: If the Court please, the  
23          guiding principal here is, to amplify Counsel's  
24          comment, well pleaded paper, a well pleaded Complaint  
25          is the jurisprudence of the State of New York, which

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1 states that there should be a dismissal only if it's  
2 impossible under the law or the facts to have the  
3 plaintiff make out a claim. And I recall my law school  
4 days, we were taught that gone are the days when the  
5 slip of the tongue or the loss of one word would be  
6 fatal to a cause of action. Rather, it is the  
7 operative facts as pleaded which determine whether the  
8 plaintiff has a cause of action, not whether he has  
9 pleaded it in good form. And Counsel is attacking the  
10 form or the wording of the pleading and not the actual  
11 case, which we have amplified under the *Rovello* case  
12 and other cases, we've amplified with the  
13 plaintiff's affidavit. We submit that we didn't even  
14 have to provide the affidavit, but we gave it to  
15 elucidate the facts and explain the cause of action,  
16 which is uncommon and complicated, explain the cause of  
17 action to the Court. Plaintiff has done that in great  
18 detail. He has explained how, as a vulnerable  
19 individual with an H1 Visa, he was subject to  
20 deportation, essentially at the whim of the employer,  
21 if he did not follow every order that the employer  
22 gave, he could be terminated and then deported, and his  
23 family, likewise, would have to be uprooted and  
24 relocated. And so he worked, essentially, in fear  
25 throughout his two terms as a teacher. Now, that

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1           should be enough to show that he was subject to the  
2           whims and to the illegal unfair extortion requests of  
3           the two defendants. But he has explained how he was  
4           subjected to these demands. He has given your Honor  
5           details of at least four meetings in which, as soon as  
6           he made his wages, or as soon as he got any employment  
7           benefits, he had to kick them back to the defendants.  
8           And I say defendants. They worked in concert. They  
9           were conspiring together. And the supplemental -- or,  
10          the affidavit of the plaintiff explains how they worked  
11          together. And it's not only plaintiff's sworn  
12          statement, although we would submit that a sworn  
13          statement would be sufficient to create issues of fact  
14          and to survive, as this is a motion on the pleadings,  
15          it would be enough, but plaintiff actually has texts  
16          that have been transcribed from his telephone, he has  
17          given them in Turkish, to basically shift the burden to  
18          the other side. And as assistance to Counsel and to  
19          your Honor, he has had those translated by an  
20          independent third party who is expert in the two  
21          languages. She teaches linguistics at Syracuse  
22          University. I spoke with her, I learned her  
23          qualifications, she swore to them in an affidavit. She  
24          also swore to the fact that she reviewed, corrected,  
25          corroborated, translated all of the translations that

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1 are before your Honor. These meetings show a very  
2 sinister scheme for kickbacks that was perpetrated  
3 against my client throughout the two years. We have  
4 detailed them. Highway and the Academy, it is pleaded  
5 and also amplified here, demanded tax refunds. They  
6 had a meeting as to how to expand or increase the tax  
7 refunds. It's there in Turkish and in English. And  
8 your Honor, I think it's important to note that we have  
9 these documents here, the transcript and the  
10 translations, line by line, with my client identifying  
11 each speaker, as to the audio; and then identifying by  
12 telephone number and otherwise, the speakers in the  
13 text conversations. They are in Turkish. And  
14 defendants are Turkish, they speak that language. And  
15 if they disputed these transcripts, why are there not  
16 disputes of the authenticity of the papers? Why is  
17 there no dispute to Professor Kornfilt's translations?  
18 And at this stage, we are not in a jury trial, but at  
19 this stage, the plaintiff is entitled to the inference  
20 that he can make out this case to a jury. I will not  
21 go into the details. They are before your Honor as to  
22 why and how the kickbacks were pressed on my client.  
23 They're detailed in the affidavit.

24 With regard to the Reply, defendant Academy  
25 asserts that it is entitled to a dismissal because

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1           there is a prior dismissal. The law is to the  
2           contrary. A prior dismissal on a motion to dismiss is  
3           not on the merits. There is, in this record, no  
4           finding by your Honor as to the merits of the case of  
5           the prior action. There was a discussion from in this  
6           courtroom as to the use of the word "overtime," and I  
7           would concede to your Honor that a teacher cannot sue  
8           for overtime, but he can sue for his wages. And we  
9           explained that he had wages both from the contract and  
10          from the tutorials, also called Saturday pay, also  
11          called in the documents pay stubs, instructional pay,  
12          and it was instructional pay that he was required to  
13          kick back. Now, the operative facts are pleaded.  
14          Paragraphs 14 through 17 in the verified Complaint of  
15          the action here very clearly delineate and explain what  
16          Saturday pay, or tutorial pay, or instructional pay  
17          was. We made it clear. We made the mistake -- I made  
18          the mistake of using the word "overtime" in conjunction  
19          with his claim for wages as the claims are specified in  
20          the causes of action following the recitation of the  
21          operative facts. I submit that, in a liberal notice  
22          pleading state, which New York has, which New York  
23          requires, the notice and the liberal pleadings  
24          requirement has been met by the operative facts set out  
25          in the beginning of the Complaint. And when we asked

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1 for wages and overtime, we were asking in the  
2 alternative, because that is the form of all pleadings.  
3 Either there is overtime or there is wages or there is  
4 both. And this is what the plaintiff is seeking. I  
5 urge the Court to focus on the operative facts as they  
6 are stated in the beginning paragraphs, which are  
7 common to all causes of action, the beginning  
8 paragraphs that are verified by my client and also  
9 amplified here.

10 There is an argument raised by the Academy  
11 that the Academy is a political subdivision, is  
12 therefore not responsible for damages and retaliation.  
13 We have pleaded that, when my client finally  
14 established some independence, got his green card, he  
15 was able to say: No more. I am not paying these  
16 extortionate demands. It is at that point that he was  
17 demoted, he had a pay cut. We showed the pay cut. By  
18 the way, there is a supplemental exhibit to my papers.  
19 I gave defendants my papers earlier than the seven days  
20 required. We agreed that they would come in early. I  
21 did come in early. In my haste, I neglected Exhibit  
22 11. I corrected it the next day. Exhibit 11 says, on  
23 an ADP earning statement, paragraph 11 has a pay date  
24 of February 20, 2015, with clear, in capitals, message  
25 under the important notes section: Your salary rate

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1 has been changed from 2,086, dollars, I assume, to  
2 \$1,763. That's a violation of the statute, because it  
3 is a cut in pay that was done without notice to him.  
4 He was submarined. He didn't know where this came  
5 from. It was not set out in any prior notice. We  
6 submit that's a violation of the Labor Law. With  
7 respect to, your Honor, and I beg the indulgence, the  
8 patience of the Court, retaliation, defendant argues  
9 that we're a political subdivision, and therefore,  
10 exempt from the cause of action for retaliation. I  
11 would like to share with the Court just the excerpt of  
12 the statute which defendant cites and that statute is  
13 the Education Law. Education Law 2854 pertaining to  
14 charter schools, and under Subdivision Three of Section  
15 2854, entitled School Personnel: An employee of a  
16 charter school shall be an employee of the education  
17 corporation formed to operate the charter school and  
18 not an employee of the local school district in which  
19 the charter school is employed. An employee of a  
20 charter school shall be deemed a public employee solely  
21 for purposes of Article 14 of the Civil Service Law,  
22 except for Section 212 of such law, and for no other  
23 purposes. Unless specified in this article, board of  
24 trustees of the charter school shall constitute a board  
25 of education solely for purposes of Article 14 of the

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1 Civil Service Law, except for Section 212 of such law  
2 and for no other purpose. Clearly, the legislature is  
3 defining the charter school as independent from a  
4 school board, independent from a municipality,  
5 independent from a state government. The exemption  
6 does not apply.

7 Lastly, I would like to address ultra vires  
8 which was raised as a defense in the motion to dismiss.  
9 By the way, there's no Answer. I don't have an  
10 affirmative defense. I simply have the  
11 Academy's assertion that the man we named school  
12 principal, he's actually called school director, my  
13 client's superior, Mr. Kadir Yavuz, participated in the  
14 kickbacks. Now, there's extensive --

15 THE COURT: You know how to spell that last  
16 name?

17 MR. GOLDBAS: Y-a-v-u-z, first name,  
18 K-a-d-i-r. The school has moved to dismiss on grounds  
19 that Mr. Yavuz had no part -- had no part of the  
20 school, and he acted ultra vires beyond the scope of  
21 his employment as set down by the board or by his  
22 superiors. This is not a defense to the kickback  
23 scheme. We've cited law that's from the Court of  
24 Appeals that says ultra vires is not a defense to a  
25 criminal act or to reckless conduct or to other

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1           damaging acts perpetrated by the employee of that  
2           corporation. And so the school would be liable for  
3           Yavuz alone, but not only is Yavuz one of the  
4           perpetrators or one of the conspirators, but we have  
5           named the school accountant, we've named the dean of  
6           academics, and we have deemed Mr. Tolga, T-o-l-g-a,  
7           Hayali, H-a-y-a-l-i, the superintendent of these  
8           charter schools, as participants in the kickback  
9           scheme, and the affidavit explains how they all  
10          participated. There was one particular egregious case  
11          where Mr. Yavuz was ordered because he missed a meeting  
12          with Highway, he was ordered to go out to Rochester to  
13          get his instructions. What were his instructions? A  
14          written note, translated before your Honor by Professor  
15          Kornfilt, the written note says: This is what you've  
16          got to pay us. Who are "us"? The service. My client  
17          explains that the service is Highway as operating on  
18          behalf of this cult movement; Highway, a nonprofit.  
19          And Highway is using the school, the school, to act as  
20          its collection agent, as its enforcer, as its  
21          coconspirator in getting the kickbacks. It is not only  
22          Mr. Yavuz, but it is also Mr. Dumas, the dean,  
23          Mr. Gunes, G-u-n-e-s, the school accountant. All of  
24          these people acting to collect and to give the amounts  
25          of demands and to collect, and then, we assume, to

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1 remit to Highway. By the way, Highway does admit that  
2 it received money, but it denies that they were  
3 kickbacks.

4 So your Honor, on all of these bases, these  
5 legal bases, we submit that the Complaint should not be  
6 dismissed, we should proceed to discovery, and if there  
7 are no questions of fact, we assume they are, then the  
8 school could renew its motion. But I stress that this  
9 is a 3211 motion, not a motion for summary judgment.  
10 It was never converted. And even if it were, we've  
11 raised questions of fact with regard to the school. I  
12 yield the floor to hear my colleague on the other  
13 motion.

14 MR. EVANS: May I just be heard?

15 THE COURT: Yes.

16 MR. EVANS: I appreciate Counsel's admission  
17 that he's not entitled to overtime. So the first two  
18 causes of action are to be dismissed, in any event.

19 The claim of legal deductions, Section 193 of  
20 the Labor Law, which is the fifth cause of action,  
21 completely silent on that and apparently concedes that  
22 that shouldn't have been filed either and ought to be  
23 dismissed. So my point to the Court is --

24 THE COURT: Fifth cause of action is what?

25 MR. EVANS: The fifth cause of action, Judge,

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1 I believe, is for illegal deductions or unauthorized  
2 deductions, in violation of Section 193 of the Labor  
3 Law.

4 THE COURT: Well, they've argued that, right?

5 MR. EVANS: I haven't heard it, Judge, and  
6 there were no -- I mean, we've provided pay stubs.  
7 There are no deductions from his pay. He doesn't  
8 allege any deductions in his affidavit or anywhere  
9 else. His entire argument here, as you've heard, is  
10 that, for reasons that are hard to imagine, he was  
11 forced to make contributions to Highway. And so I  
12 guess my only point to the Court is, at the very least,  
13 we ought to clean the Complaint up, if that's the only  
14 claim they're asserting, and that's the only claim that  
15 should be left.

16 THE COURT: Were there illegal deductions  
17 from the paycheck?

18 MR. GOLDBAS: The deductions were not legal  
19 because they did not specify the kickbacks which, with  
20 every pay period, my client was forced to make. I've  
21 specified those kickbacks.

22 THE COURT: Deductions on the paycheck?

23 MR. GOLDBAS: They're on the paycheck, except  
24 for -- They're on the paycheck.

25 THE COURT: As deductions?

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1 MR. GOLDBAS: As deductions.

2 THE COURT: For what?

3 MR. GOLDBAS: For, well, there are deductions  
4 for dental health, various other.

5 THE COURT: That's not illegal, right, the  
6 dental health?

7 MR. GOLDBAS: Not illegal, no. The  
8 deductions from pay are the pay cut which occurred in  
9 2015. That was illegal and in violation of the  
10 contract.

11 THE COURT: Is that a deduction from pay?

12 MR. EVANS: It's not a deduction from pay,  
13 Judge. He was relieved of duties, and his pay was  
14 changed because of his only doing, essentially, two-  
15 thirds of the job that he had.

16 THE COURT: Is that a question of fact?

17 MR. EVANS: I don't think it's a question of  
18 fact as to deductions. Now, their argument is that  
19 this was retaliation because he was complaining about  
20 kickbacks and such. So if he's alleging this kickback  
21 thing and the Court thinks he's met sufficient  
22 allegation here to go forward, then we'll go forward on  
23 discovery on that. But my point is, we've got all  
24 kinds of claims in here that never should have been  
25 asserted in the first place; for overtime; I think the

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1 deduction piece; he's 198B, which I don't think is, it  
2 merely sets forth remedies. It does not provide a  
3 private cause of action. If he wants to go forward on  
4 the claims of kickback, let's go forward and do  
5 discovery on that issue. But I'm asking the Court to  
6 clean this Complaint up to what it should have been in  
7 the first instance, although I maintain that's not even  
8 properly alleged.

9 MR. GOLDBAS: The overtime is not properly  
10 stated. Counsel has educated me on the impropriety of  
11 the word overtime where it pertains to teachers. And  
12 to use Counsel's phrase, we can clean up the Complaint  
13 by omitting the word overtime, or stipulating that our  
14 claim is not for overtime, but rather, for benefits of  
15 other kinds, including tutorial pay, or Saturday pay,  
16 whatever word best suits the Court.

17 But with regard to the illegal deductions, my  
18 client was blindsided in February 2015 with a pay cut  
19 that was related to no job duty but only related --  
20 that is, no job performance, I beg your pardon -- but  
21 only related to the whim of the school administration.  
22 These are questions of fact. We ask that we be allowed  
23 to flesh them out and make our case.

24 MR. EVANS: Your Honor, if I might. The  
25 first cause is based, is expressly based on the Fair

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1 Labor Standards Act for overtime. The second cause of  
2 action plainly asserts, expressly asserts a claim for  
3 overtime based on the Labor Law. These aren't  
4 in-artfully stated. They asserted claims for overtime  
5 they shouldn't have asserted, and they ought to be  
6 dismissed. And I think, based on what we've heard here  
7 this morning, that's all the more true, all the more  
8 clear.

9 THE COURT: All right. Let me hear Highway  
10 Education's motion.

11 MR. PISTON: Thank you, your Honor. Each and  
12 every one of these causes of action pled against  
13 Highway is pled as a payment of wages. There has never  
14 been an allegation that Highway, who is doing business  
15 as the Turkish Cultural Center, is the employer of the  
16 plaintiff. So all of the causes of action pled against  
17 Highway must be dismissed. We're not responsible for  
18 payment of wages, hiring, firing, retaliation.  
19 Anything that's been pled against Highway is predicated  
20 upon an employer and employee relationship, which does  
21 not exist and has not been pled.

22 THE COURT: What about the third cause of  
23 action for the kickback?

24 MR. PISTON: Your Honor, that's, 198B is  
25 purely a criminal statute. It uses the word "guilty."

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1           The fifth subsection of that says a violation of this  
2           shall be a misdemeanor. It is previously found under  
3           the Penal Law, and it was moved over to the Labor Law.  
4           This is purely a criminal statute. It does not impart  
5           a private cause of action.

6                        THE COURT: What about the case of *Martinez*  
7           *versus Alubon*, holding that a private right of action  
8           does exist?

9                        MR. PISTON: Was that the Second Department  
10          case, your Honor?

11                       THE COURT: That is the First Department.

12                       MR. PISTON: I believe that that is a case  
13          that cited a Southern District of New York case which I  
14          cited that was from 2000, I believe, '13. I'm going on  
15          memory.

16                       THE COURT: Right, 2013.

17                       MR. PISTON: There was a August 30th, 2018,  
18          case out of the Southern District of New York which I  
19          cited in my Memo of Law which essentially overturned  
20          that ruling that everything was based upon. So the  
21          First Department cited the Southern District of New  
22          York, and now the Southern District of New York has  
23          gone back and said: We understand that we ruled this  
24          previously, but we're not ruling that now. So there's,  
25          besides that one case out of the First Department,

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1           there is no case law in New York State that I have  
2           found that states that there is a private cause of  
3           action.

4                         THE COURT: You're talking about *Chan versus*  
5           *Big Geyser*?

6                         MR. PISTON: Yes.

7                         THE COURT: You're telling me that overruled  
8           Martinez?

9                         MR. PISTON: Well, it overruled the case that  
10          Martinez relied upon. So Martinez relied upon a  
11          Southern District of New York case.

12                        THE COURT: You're saying *Chan* does not say a  
13          private right of action exists? Or it says a private  
14          right of action does not exist?

15                        MR. PISTON: I'm saying that it's based --  
16          that the only thing that it cites in making that ruling  
17          is a Southern District of New York case that has now  
18          been overruled. So there's bookends, or there's steps  
19          in the ladder that have now been pulled out.

20                        THE COURT: I don't know that to be the case.  
21          Go ahead.

22                        MR. PISTON: Judge, I think it's very  
23          important for the remainder of the cause of action to  
24          see that it is clear that an employer/employee  
25          relationship needs to exist, and it doesn't. They've

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1 skirted around the issue of coconspirator, but they  
2 have not pled a civil conspiracy, a sufficient civil  
3 conspiracy. They've mentioned alter ego but certainly  
4 have not pled that sufficiently nor explained it. So  
5 there is nothing here which should be sufficient enough  
6 to bring or keep Highway in this and we would ask for  
7 it to be dismissed.

8 THE COURT: Thank you. Counsel?

9 MR. GOLDBAS: My learned friend has cited the  
10 state of the law, but I submit that it is not settled  
11 in favor of employers on the kickback statute. In  
12 fact, the law is to the contrary, allowing causes of  
13 action by private parties for kickbacks. The law is  
14 remedial, it should be read in a liberal fashion, as  
15 broadly as possible, to allow the remedies and the  
16 public purposes established by the legislature. It's  
17 clear the legislature abhors kickbacks by any person.  
18 And I stress this, the statute says a kickback is  
19 outlawed, it's criminal, it's both criminal and the  
20 basis of a civil action if it is perpetrated by any  
21 person, not just the employer. I've explained that in  
22 my papers. I would cite to your Honor -- your Honor  
23 mentioned a *Martinez* case from the Bench -- I have it  
24 as *Salazar Martinez versus Fowler, F-o-w-l-e-r,*  
25 *Brothers*. It is a Western District of New York case

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1 from 2011. To my knowledge, it has not been  
2 overturned, and it does allow the private cause of  
3 action for kickbacks, among other things, because  
4 there, too, immigrants were exploited by employers who  
5 used -- mandated that the immigrants pay for certain  
6 recruiting and relocation expenses. The Court allowed  
7 that cause of action to go forward and it allowed the  
8 plaintiffs to continue to plead and to sustain, to  
9 continue with their case on kickbacks. The *Salazar*  
10 *Martinez* case is cited at 781 F sup 2d 183. It is a  
11 Western District of New York federal case from the year  
12 2011. And I don't believe Counsel has shown that this  
13 state of the law is to the contrary.

14 The moving party on summary judgment has a  
15 high burden. It has to show that there is absolutely  
16 no possible way that the plaintiff could prevail, and  
17 it has to show this despite the entire record. We've  
18 produced a record which is, again, I say this in all  
19 modesty, quite extensive. My client worked hard to  
20 show your Honor the details of his experience with  
21 Highway, to show how Highway worked in conjunction with  
22 Utica Academy to extort the kickbacks. That is a  
23 violation of law, it is the basis of damage. We submit  
24 that summary judgment cannot be sustained on this  
25 record. The defendant has said that we were not

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1 specific with our threats. We submit our papers show  
2 to the contrary. He had to follow orders, and he was  
3 given orders by both Highway and the Academy. They  
4 worked together. We have those papers. We have  
5 various texts where Highway is not only acknowledging  
6 that they've collected \$2,797, but our papers show that  
7 they collected more than that, and we have the  
8 documents before your Honor. We submit the transcripts  
9 at this stage are admissible to defeat summary  
10 judgment. Thank you.

11 MR. PISTON: Just briefly, you can't construe  
12 a statute to read something that isn't there. And in  
13 that statute, again, reading the entirety of the  
14 statute, it is clear that it is solely a criminal  
15 statute.

16 As it relates to the kickbacks and the  
17 threats, I would second all of the arguments by the  
18 codefendant's counsel as it relates to the  
19 admissibility and the authenticity of the conversation  
20 transcripts and text messages and whether they're even  
21 admissible. But even if they are, there's no proof  
22 before this Court, no document, nothing to be relied  
23 upon that says: Either pay us or you'll get fired.  
24 And there's nothing within there that says that Highway  
25 even had the authority to do that. So Judge, there's

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1 just nothing here to keep Highway or the Turkish  
2 Cultural Center in this lawsuit.

3 THE COURT: All right. Thank you. As to  
4 both motions, a movant seeking dismissal under CPLR  
5 3211 must show that the documentary evidence resolves  
6 all factual issues as a matter of law and conclusively  
7 disposes of the plaintiff's claim. To be documentary,  
8 evidence must be unambiguous and of undisputed  
9 authenticity. A defendant's dismissal motion under  
10 3211 requires determining whether the plaintiff has  
11 stated a cause of action, but if the Court considers  
12 evidentiary material, the criterion then becomes  
13 whether the proponent of the pleading has a cause of  
14 action. Dismissal results only if the movant  
15 demonstrates conclusively that the plaintiff has no  
16 cause of action or that a material fact as claimed by a  
17 pleader to be one is not a fact at all. A court  
18 considering a dismissal motion on the basis of failing  
19 to state a claim generally must accept the facts  
20 alleged in the Complaint as true and make any possible  
21 favorable inferences for the plaintiff.

22 On the Academy motion, the Court declines to  
23 convert the motion to one for summary judgment. The  
24 Court grants the Utica Academy Charter School's CPLR  
25 3211(A)(7) motion to dismiss to the extent of

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1 plaintiff's first and second cause of action as a  
 2 matter of law, with prejudice, because plaintiff is not  
 3 entitled to overtime pay. The Court also grants the  
 4 school's motion to dismiss plaintiff's sixth cause of  
 5 action for discriminatory penalty or discharge as a  
 6 matter of law, with prejudice, because of the two-year  
 7 statute of limitations. The school's motion to dismiss  
 8 is denied as to plaintiff's third, fourth and  
 9 fifth causes of action against it, as these are  
 10 sufficiently pled to withstand the motion. Defendant  
 11 Utica Academy of Science Charter School shall interpose  
 12 its Answer within 30 days of service, with notice of  
 13 entry of the Order deciding this motion. That's  
 14 plaintiff's Order.

15 On the Highway motion, the Court declines to  
 16 convert the motion for one of summary judgment. The  
 17 Court grants the motion of Highway Education to the  
 18 extent of dismissing the Complaint against it, with  
 19 prejudice, as to plaintiff's first, second, fourth,  
 20 fifth and sixth causes of action because plaintiff is  
 21 not eligible for overtime payments, and to the extent  
 22 pled against it, Highway's relationship with plaintiff  
 23 is not sufficient to be charged with the alleged  
 24 violations of Labor Law except the kickback statute.  
 25 The Court denies the motion of Highway to the extent of

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1 plaintiff's third cause of action based upon Labor Law  
2 Section 198B. The current status of the law is not  
3 settled, and the Court, we have case law that provides  
4 a private right of action does exist on kickbacks.  
5 Defendant Highway Education shall interpose its Answer  
6 within 30 days of service, with a notice of entry of  
7 the Order deciding the motion. And that's  
8 plaintiff's Order, also. Thank you.

9 MR. EVANS: Do you want me to submit the  
10 Order, Judge?

11 THE COURT: Please.

12 MR. GOLDBAS: I didn't hear Counsel.

13 MR. EVANS: I'm going to submit the Order.

14 MR. GOLDBAS: That's fine.

15 MR. EVANS: I'll pass it along.

16 (Lines left intentionally blank.)  
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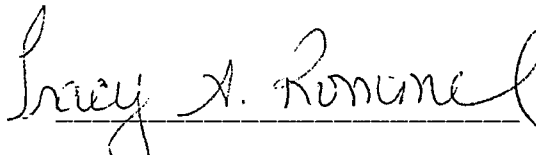
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THE COURT: Okay. Thanks.  
MR. EVANS: Thank you, Judge.  
MR. PISTON: Thank you, your Honor.  
(Whereupon, the proceeding was  
concluded.)

C E R T I F I C A T E

I, Tracy A. Rommel, DO HEREBY CERTIFY that the  
foregoing is a true and accurate transcript from my  
stenographic notes taken in the above-entitled matter.

December 2, 2018

  
Official Court Reporter

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