

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

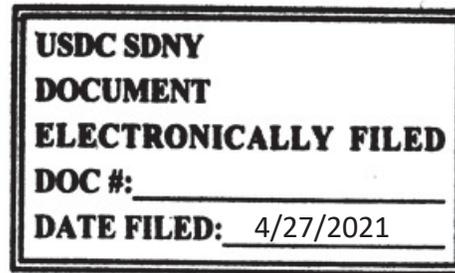
Lambert Grant,

Plaintiff,

-against-

Elmax Builders Supply, LLC,

Defendant.



1:20-cv-02353 (SDA)

ORDER

**STEWART D. AARON, United States Magistrate Judge:**

Before the Court is the parties' joint letter, dated April 23, 2021 (ECF No. 28), seeking approval of their proposed Settlement Agreement & Release (the "Agreement") (ECF No. 28-1).

For the reasons set forth below, the Court cannot approve the Agreement as written.

Paragraph 7 of the Agreement provides that Plaintiff "expressly agrees to refrain from disparaging, defaming, or criticizing the Released Parties, including, without limitation, making any statement, oral or written, which portrays Elmax, its affiliates, owners, officers, agents, representatives and management employees or any of the Released Parties in an unfavorable light or subjects any of them to scorn, obloquy or ridicule." (Agmt. ¶ 7.) While the Agreement does contain a similar non-disparagement clause by Defendants (*see* Agmt. ¶ 8), it does not include a carve-out for truthful statements about Plaintiff's experience litigating his case. *See Mendoza v. Kidz Korner of New Rochelle Inc.*, No. 20-CV-05761 (JLC), 2021 WL 738840, at \*1 (S.D.N.Y. Feb. 24, 2021) (non-disparagement provision must be mutual and include carve-out for truthfulness). Without such a carve-out, the "provision contravenes the remedial purposes of the [Fair Labor Standards Act] and is not fair and reasonable." *Howard v. Don Coleman Advert. Inc.*,

No. 16-CV-5060 (JLC), 2017 WL 773695, at \*2 (S.D.N.Y. Feb. 28, 2017) (internal citations and alterations omitted).

Accordingly, no later than May 11, 2021, the parties shall either: (a) file a revised settlement agreement with a mutual non-disparagement clause that provides for the required carve out or (b) file a joint letter withdrawing their motion for settlement approval and stating their intent to proceed with litigation.

**SO ORDERED.**

DATED: New York, New York  
April 27, 2021



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STEWART D. AARON  
United States Magistrate Judge