UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED WHOLESALE MORTGAGE, LLC d/b/a
UWM FINANCIAL SERVICES, LLC,
Respondent

and Case 07-CA-297897

CHRISTOPHER DENNIS, an Individual
Charging Party

Matthew Ritzman, Esq. and
Larry Smith, Esq.,
for the General Counsel.
Dean Pacific, Esq. and
DeAndre Harris, Esq.,
for the Respondent.
Matthew Clark, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

SUSANNAH MERRITT, Administrative Law Judge. I heard this case on August 15, 2023, in Detroit, Michigan. Based on charges filed by Christopher Dennis (Charging Party or Dennis) in the above captioned case, the Acting Regional Director for Region 7 issued a complaint on March 29, 2023. The General Counsel alleges that Respondent United Wholesale Mortgage, LLC (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining an employment agreement that contain multiple overly broad or otherwise unlawful rules and definitions as well as an unlawful arbitration clause. I find partial merit to the General Counsel's complaint as set forth in greater detail below.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs. On October 13, 2023, posthearing briefs were filed by the parties

and have been carefully considered.[1] Accordingly, based upon the entire record herein, including the posthearing briefs and my observations of the credibility of the witnesses, I make the following.

FINDINGS OF FACT

I. Jurisdiction

Respondent admits, and I find, that it is a limited liability company with an office and place of business in Pontiac, Michigan, and has been engaged in the operation of a mortgage lending business. In conducting its operations during the calendar year ending December 31, 2022, a representative period, Respondent derived gross revenues in excess of $500,000. During that same period of time, Respondent purchased and received at its Pontiac facility, goods valued in excess of $5000, directly from points outside of the State of Michigan. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based on the foregoing, I find that this dispute affects commerce and the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. The Alleged Unfair Labor Practices

Respondent owns and operates a mortgage company from its office in Pontiac, Michigan, where it employs approximately 6000 employees. Respondent requires all employees to sign an employment agreement (Employment Agreement) as a condition of their initial and ongoing employment. Employees are not permitted to alter the terms of the Employment Agreement before they sign it. (Tr. at 30.) Respondent's chief people officer, Laura Lawson (Lawson), also signs each agreement. (Tr. at 27–29, 30, 32; GC Exh. 2.) Upon termination of employment with Respondent, employees receive a form letter (Termination Letter) reminding them of certain provisions of the Employment Agreement that remain in effect even after the employee has left employment. (GC Exh. 3.)

The General Counsel alleges that the provisions involving Respondent's Proprietary and Confidential Information including: Company Financial Information; Personnel Information; Customer Inquiry Information; Company Business, Marketing and Advertising Information and Plans; Internal Company Communications; No Recording Rule; and numerous provisions otherwise incorporating Respondent's Proprietary and Confidential Information definition by reference are overly broad and violate Section 8(a)(1) of the Act. In addition, the General Counsel alleges that certain provisions contained in Respondent's Return of Company Property and Communications provisions are unlawfully overbroad and that its Arbitration provision would reasonably be read to restrict employee access to Board processes in violation of the Act.

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh. __" for General Counsel's Exhibit; "R. Exh. ___" for Respondent's Exhibit; "CP Exh. ___" for Charging Party's Exhibit.

Respondent contends that all of the challenged provisions are common, lawful, and protect legitimate business interests.

III. Analysis and Conclusions[2]

The Legal Standard

On August 2, 2023, after the complaint issued in this case but prior to the hearing, the Board issued its decision in *Stericycle, Inc. and Teamsters Local 628*, 72 NLRB No. 113 (2023), overruling *Boeing Co.*, 365 NLRB No. 154 (2017), as the standard to determine whether work rules that do not expressly restrict employees' protected concerted activity under Section 7 of the Act are "facially unlawful under Section 8(a)(1) of the Act." *Stericycle*, supra, slip op. at 1. In that decision, the Board explicitly directed that the *Stericycle* ruling be retroactively applied to all pending cases. Id. at 13. As such, I apply the new standard set forth in *Stericycle* here.

In *Stericycle*, the Board "builds on and revises" its earlier test in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). As under *Lutheran Heritage*, the new standard in *Stericycle* requires that the General Counsel prove that the challenged rule "has a reasonable tendency to interfere with, restrain, or coerce employees who contemplate engaging in protected activity." *Stericycle,* supra at 8. The Board also stressed that it would interpret the rule from the perspective of "the reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in." Id. at 9. Further, the Board endorsed that a "typical employee interprets work rules as a layperson rather than as a lawyer." Id. If an employee could reasonably interpret a rule to restrict or prohibit Section 7 activity, the General Counsel has satisfied her burden and demonstrated that the rule is presumptively unlawful. Id. That is so even if the rule could also be reasonably interpreted *not* to restrict Section 7 rights and even if the employer did not intend for its rule to restrict Section 7 rights. Id. at 9–10.

Once the General Counsel carries its burden of demonstrating that the rule is presumptively unlawful, an employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. Id. at 10. As explained in *Stericycle*, this approach does not change the General Counsel's burden of proving the unfair labor practice, "but rather extends to the employer something akin to an affirmative defense." Id. at 11.

The Board in *Stericycle* also made clear that in applying this case-by-case approach, the Board should examine "the specific wording of the rule, and the specific industry and workplace context in which it is maintained, the specific employer interests it may advance, and the specific statutory rights it may infringe." Id. at 13.

[2] I have based my credibility resolutions on consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence and witness demeanor while testifying.

1. Proprietary & Confidential Information

Attachment A to Respondent's Employment Agreement broadly defines "Proprietary & Confidential Information" as:

> (a) non-public information relating to or regarding the Company's business, personnel, Customers, operations or affairs; (b) non-public information which the Company labeled or treated as confidential, proprietary, secret or sensitive business information, or which Employee reasonably knows or should have known is or should be treated as confidential and/or proprietary information; (c) information that is not generally known to the public or others in the industry and gives the Company a competitive advantage; (d) information that is expensive and/or burdensome to compile or is compiled through proprietary methods, whether compiled by the Company or acquired as such; (e) all non-public Customer, applicant and prospect information; (f) Trade Secrets of the Company; (g) non-public information pertaining to the Company's Intellectual Property & Inventions; and (h) information that was otherwise Proprietary & Confidential Information of the Company but which was disclosed or disseminated in violation of this Agreement. (GC Exh. 2(r).)

Provision 12(e) of the Employment Agreement requires that employees "shall take all necessary precautions to keep Proprietary & Confidential Information secret, private, concealed and protected from disclosure." (GC Exh. 2(d)-(e).) Additionally, Provision 12(b) of the agreement sets forth that the employee "shall not disclose, reveal, or display any Proprietary & Confidential Information to any person, business or entity; forward or disseminate such information to persons outside of the Company or to a personal or non-company e-mail account." (GC Exh. 2(e).) In addition, after leaving employment, Respondent routinely issues its Termination Letter to former employees stating that they have a "continuing obligation to keep confidential all Proprietary and Confidential Information." (GC Exh. 3(a); Tr. at 33.) (Emphasis in original).

In paragraph 5(e)of the complaint, the General Counsel contends that Respondent's Proprietary and Confidential Rules violate Section 8(a)(1) of the Act on a number of grounds. First, the General Counsel contends that the Respondent's definition of Proprietary and Confidential Information in Attachment A and Section 12 violates Section 8(a)(1) of the Act standing on its own. Subsequently, she addresses each separate provision that incorporates Proprietary and Confidential materials.

(a) Definition of Proprietary & Confidential Information

In this section, I will address the General Counsel's allegation that Respondent's Proprietary and Confidential definition and prohibitions set forth in Appendix A and Section 12 of the Employment Agreement violate the Act. (GC Exh. 2(r)-(t), 2(d)-(e).) With regard to this allegation, the General Counsel focuses on the first prong of the Employment Agreement's definition: "non-public information relating to or regarding the Company's business, personnel, Customers, operations or affairs." (GC Exh. 2(r).) The General Counsel correctly asserts that the provision would easily be read to implicate terms and conditions of employment that the Board has found to be protected by Section 7, such as: nonpublic salary information; disputes between Respondent and its employees regarding pay and other terms and conditions of

employment; employee work stoppages or other protests; yet-to-be reported unfair labor practice allegations; and/or any other sort of information about Section 7 activity that is outside the public sphere.

It is well established that rules prohibiting employees from disclosing personnel and policy and procedure manuals is unlawful. See *Quicken Loans, Inc.*, 361 NLRB 904 (2014) (prohibition on disclosing "personnel information" unlawful); *Caesars Entertainment*, 362 NLRB 1690, 1692 (2015) (finding rule prohibiting employees from sharing "any information about the Company which has not been shared by the Company with the general public" including "organizational charts, salary structures, policy and procedure manuals" to be unlawful); *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 72–74 (2014) (confidentiality rule requiring employees to keep "employee information secure," violates the Act); *Battle's Transportation, Inc.*, 362 NLRB 125, 126 (2015) (confidentiality agreement barring employees from discussing "human resources related information" overbroad); *Cintas Corp.*, 344 NLRB 943 (2005) (prohibition against releasing "any information" about employees unlawful), enfd. 482 F.3d 463 (D.C. Cir. 2007).

Respondent counters that it put these rules in place in order to prevent the unlawful disclosure of information that can impact the Company's traded stock and in order to protect non-public information regarding borrowers and brokers as a mortgage company. (R. Br. at 12.) Acknowledging that the provision covers certain information regarding employees, Respondent contends that such information may lawfully be included within the scope of a confidentiality agreement when the provision read as a whole objectively demonstrates that its purpose is to govern company information. Respondent goes on to cite several cases decided under *Boeing* that have been overruled by *Stericycle*,[3] but not a single case under *Stericycle* or *Lutheran Heritage* in support of its proposition.[4]

The first sentence of Respondent's definition of Proprietary & Confidential Information: "(a) non-public information relating to or regarding the Company's business, personnel, Customers, operations or affairs" is overly broad and is not narrowly tailored to protect Respondent's truly proprietary information. Respondent has not shown that it could not protect its truly proprietary information with a more narrowly tailored rule. As such, I find that Respondent's definition of Proprietary and Confidential information as set forth in Appendix A and Section 12 of the Employment Agreement violates Section 8(a)(1) of the Act.

[3] Specifically, Respondent cites to *Argos USA*, 369 NLRB No. 26, slip op. at 2 (2020); *Medic Ambulance*, 370 NLRB No. 65 (2021); and *Motor City Pawn Brokers, Inc.*, 369 NLRB No. 132 (2020), all of which used the categorical approach set forth in *Boeing* and all of which were explicitly overruled in *Stericycle*, supra, slip op. at 11.

[4] Respondent also contends that an employee would not interpret the provision to prohibit Sec. 7 activity as "the company's handbook makes clear that Team Members are permitted to publicly discuss their wages, hours, and terms and conditions of employment," however, although given the opportunity to do so, Respondent declined to introduce the company handbook into the record so there is no way to evaluate to evaluate the actual language included in the employee handbook. (Tr. at 117.)

(b) Company Financial Information

The "Proprietary & Confidential Information" definition requires employees to treat "Company Financial Information" which explicitly includes "compensation" as confidential. (GC Exh. 2(r)-(s).) This requirement to keep financial information confidential is also set forth in the Respondent's Termination Letter.[5] (GC Exh. 3(a).)

The General Counsel contends that this provision would lead an employee to believe that they could not discuss compensation information with other employees or a labor organization, which would be a violation of their Section 7 rights. It is well settled that an employer cannot bar employees from discussing their terms and conditions of employment, including wage and salary information, with each other and outside parties, such as labor organizations. As such, the Board has consistently held that rules or provisions which prohibit employees from discussing wages are unlawful. See *Victory II, LLC*, 363 NLRB 1578, 1580 (2016); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (confidentiality rule unlawful where it specifically defines confidential information to include wages); *Biggs Foods*, 347 NLRB 425, 425 fn.6 (2006) (finding confidentiality rule which prohibits disclosure of salaries to "anyone outside the company" unlawful); *Jeannette Corp.*, 217 NLRB 653, 656 (1975) (unqualified rule prohibiting employees from discussing wages with other employees is unlawful regardless of whether the rule is deemed a company policy or not); *First American Enterprises*, 369 NLRB No. 54 (2020) (finding even under the *Boeing* analysis, that a rule prohibiting employees from disclosing salary or wage information was unlawful.) Any reasonable employee would interpret this restriction on disclosing compensation to restrict them from disclosing wage information and therefore interfering with their Section 7 rights.

As the General Counsel has overcome her burden to show that the rule is presumptively unlawful, the burden shifts to Respondent to demonstrate a legitimate and substantial business interest that cannot be advanced with a more narrowly tailored rule. *Stericycle, Inc.*, supra, slip op. at 10. Respondent offers the same defense for each provision covered under the Proprietary and Confidential umbrella: that the provisions were generally implemented to prevent the unlawful disclosure of information that could impact the Company's traded stock and in order to protect non-public information regarding borrowers and brokers as a mortgage company. (R. Br. at 12.) As set forth above, Respondent refers only to cases decided under the *Boeing* analysis which has been explicitly overruled by *Stericycle*, in support of its defense.

Here, Respondent fails to specifically address the fact that it precludes employees from disclosing "compensation" information in its description of "Company Financial Information." Compensation is not qualified in any way in the provision to indicate that employee wages are not included in its definition. As such, Respondent failed to show that this portion of the provision advances a legitimate and substantial business interest and that it is unable to advance that interest with a more narrowly tailored rule. As such, Respondent has failed to overcome its

[5] Respondent's Termination Letter sets forth that employees have a "continuing obligation" to "keep confidential all Proprietary/Confidential Information" including "financial information." (GC Exh. 3(a).)

burden as set forth in *Stericycle* and I find that Respondent's Company Finance Information provision in its Employment Agreement is unlawfully overbroad.

(c) Personnel Information

The "Proprietary & Confidential Information" definition also requires that employees treat "Personnel Information" which it defines as including, but is not limited to "all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files; and personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses" as confidential. (GC Exh. 2(s).) Respondent's Termination Letter also specifies that employees are to keep "employee information" confidential. (GC Exh. 3(a).)

The General Counsel correctly asserts that employees have a Section 7 right to disclose personnel matters and terms and conditions of employment, which are often memorialized in employee handbooks, to outside parties such as labor organizations. I agree that an employee would read these restrictions to prohibit them from discussing the wages, benefits, handbook rules, personnel actions, names, addresses or telephone numbers of other employees with others, including their fellow employees or union representatives. The Board has a long line of cases finding that rules such as this one prohibiting employees from disclosing this type of personnel information violate Section 8(a)(1) of the Act. See *Quicken Loans, Inc.*, 359 NLRB 1201, 1204, 1202 fn. 3 (2013) (finding a rule prohibiting employees from disclosing "non-public information relating to or regarding . . . personnel" and "personnel lists, rosters, personal information of co-workers . . . handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses and email addresses" to be unlawful); *Flex Frac Logistics*, LLC, 358 NLRB No. 127, slip op. at 1–2 (2012); *Cintas Corp.*, 344 NLRB 943, 946 (2005) (finding unqualified prohibition of the release of "any information" regarding its employees to be unlawfully broad.) In addition, even under the *Boeing* analysis, the Board has found that it is unlawful for an employer to label an employee handbook confidential as employee handbooks contain terms and conditions of employment which employees have a right to share with outside parties, such as unions. See *Newmark Grubb Knight Frank*, 369 NLRB No. 121, slip op. at 6 (2020) (finding employer violated Section 8(a)(1) by including "Confidential—For Internal Use Only" in the footer of every page of the employee handbook).

As set forth above, Respondent provided only a general defense for all of its Proprietary and Confidential rules. Respondent has failed to show that it had a legitimate and substantial business interest that it was unable to advance with a more narrowly tailored rule. I therefore find that Respondent violated Section 8(a)(1) of the Act by designating "Personnel Information" as Proprietary and Confidential in its Employment Agreement.

(d) Customer and Applicant Information

Respondent's Employment Agreement also requires employees to keep customer and applicant information confidential, "including but not limited to: all Customer or applicant loan file information (including personal duplicate or shadow files), personal and/or financial information of Customers or applicants, including phone numbers, credit scores, financial information, appraisals, tax returns, cell phone numbers, home addresses, and email addresses;

all application information and loan approval/denial status; and all lists, data and compilations pertaining to Customers of the Company." (GC Exh. 2(s).) Respondent also includes language instructing employees to keep "client information" confidential in its Termination Letter. (GC Exh. 3(a); Tr. at 33.)

The General Counsel contends that the broad nature of Respondent's rule would reasonably be read to limit Section 7 activity as the rule requires employees to keep confidential personal customer contact information including phone numbers, cell phone numbers, home addresses, and email addresses. (GC Br. at 14.) In support of its position, the General Counsel cites cases where the Board has found that employees have a Section 7 right to concertedly appeal to third parties, including their employer's customers, for support in a labor dispute. See *Trinity Protection Services*, 357 NLRB 1382, 1383 (2011) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990); *Macy's, Inc.*, 365 NLRB No. 116, slip op. at 3 (2017); *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980). Thus, the General Counsel argues that the rule would hinder employees' ability to contact customers about issues with their terms and conditions of employment as they would not be able to share even publicly available customer contact information with other employees or labor organizations. (GC Br. at 14.)

The General Counsel, however, does not take into account that the Employment Agreement explicitly defines "Proprietary & Confidential Information" as "non-public information relating to . . . Customers." (GC Exh. 2(r).) Therefore, the General Counsel's contention that an employee could reasonably interpret the provision as blocking them from sharing even public contact information for customers, is not viable.

In addition, the language of the provision itself when read in context makes clear that the Respondent here is focused on protecting the sensitive and private information of individuals applying for a mortgage.[6] There is nothing in the rule that bars employees from contacting customers about labor disputes or other issues with terms and conditions of employment, instead Respondent is protecting nonpublic contact information (and other sensitive financial information) of its customers.

For the reasons set forth above, I do not find that the restrictions Respondent places on disclosing private customer and applicant information violates the Act and I recommend dismissing this allegation.

(e) Company Business, Marketing and Advertising Information and Plans

Respondent's Employment Agreement also includes "Company Business, Marketing and Advertising Information and Plans" as falling under the "Proprietary & Confidential Information" definition. (GC Exh. 2(r).) "[M]arketing related intellectual property" is listed under this provision which is defined elsewhere in the Employment Agreement as including: "trademarks, logos, [and] trade names." (GC Exh. 2(s) and (q).) Provision 12(b) of the

[6] As the Board specifically acknowledged in *Stericycle*, the Board must take into account the specific industry and workplace context in which the rule is maintained. *Stericycle*, 372 NLRB No. 113, slip op. at 13 (2023).

Employment Agreement requires that employees "shall not disclose, reveal, or display any Proprietary & Confidential Information to any person, business or entity," or forward or disseminate such information to persons outside of the Company or to a personal or non-company email account, or allow others to have access to or the ability to view any Proprietary & Confidential Information." (GC Exh. 2(e)-12(b).) In addition, Provision 12(c) requires that employees "shall not use any Proprietary & Confidential Information for any purpose except as may be authorized by the Company in writing." (GC Exh. 2(e)-12(c).)

The General Counsel, citing well-settled Board law, alleges that Respondent's maintenance of this rule which broadly restricts employees' use of its logo and trade name, could be reasonably understood to limit employees, or a union, from publicizing a dispute with the Respondent by employing its logo in its distributed information, which infringes on employees' Section 7 rights. See *Macy's Inc.*, 365 NLRB No. 116, slip op. at 5, 54 (2016) (finding rule restricting use of the company logo to be unlawful); See also, *Boch Honda*, 362 NLRB 706, 707 (2015) (work rule prohibiting the use of employer's logo "in any manner" violated Section 8(a)(1)); *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1020 (1991) (finding rule prohibiting employees from wearing company logo while engaging in union activity to unlawfully interfere with the employee's Section 7 rights). In addition, work rules which prohibit employees' use of an employer's name without permission are unlawfully overbroad as "employees would reasonably construe" such a rule "to restrict expression of public statements protected by Section 7." *Schwan's Home Serv.*, 364 NLRB 170, 173 (2016).

I agree with the General Counsel that the rule at issue here is overbroad as it restricts employee use of Respondent's logos or trade names for any purpose and provides no exceptions or potential accommodations for employees' Section 7 rights.

As set forth above, Respondent provided only a general defense for all of its Proprietary and Confidential rules. By failing to address its need to restrict employee use of the company logo and trade name, Respondent failed to show that the rule advances a legitimate and substantial business interest that cannot be advanced with a more narrowly tailored rule. I therefore find that Respondent violated Section 8(a)(1) of the Act by designating its "logos" and "trade names" as Proprietary and Confidential in its Employment Agreement.

(f) Internal Company Communications

The Employee Agreement also requires employees to keep confidential, "[*a]ll* Internal Company Communications, including, but not limited to, memos, presentations, emails, voicemails, faxes, postings, instant messages, text messages, intranet website content, and web-casts." (GC Exh. 2(t).) (Emphasis added.)

The General Counsel contends that an employee reading this rule would reasonably interpret it to restrict or prohibit the employee from disclosing Respondent communications which could be used to document potential unfair labor practices. I agree that such a rule would be reasonably interpreted to restrict an employee from using Respondent emails, messages, memos, presentations, or website content to document terms and conditions of employment ranging from a change in personnel policy to a potentially unlawful disciplinary action or termination. The rule here is similar to the one the Board found unlawful in *Hyundai America*

Shipping Agency, 357 NLRB 860 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015). In that case, the Board found that a rule prohibiting employees from "disclosing information or messages from . . . email, instant messaging, and phone systems" to anyone other than "authorized persons" was unlawfully overbroad. Id. at 860. The Board adopted the Administrative Law Judge's rationale that the rule prohibited "employees' disclosure of any information on company email, instant messages, and phone systems, which could reasonably include discussions of wage and salary information, disciplinary actions, performance evaluations, and other kinds of information that are of common concern among employees, and which they are entitled to know and to discuss with each other." Id. at 871. In finding the rule to be overly broad, the Board adopted the rationale that the employer "failed to limit the prohibition on the disclosure of information to those matters that are truly 'confidential,' and which do not involve terms and conditions of employment." Id. at 860, 871. In the instant case, Respondent similarly does not narrow its description to truly confidential information that might be contained in emails, etc., but rather places a broad prohibition on disclosure of all such employer communications. I find that the prohibition in this rule is invalid as it is overly broad and ambiguous, and, as such, would reasonably be interpreted to chill employee Section 7 rights. *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 870 (2011).

As set forth above, Respondent provided only a general defense for all of its Proprietary and Confidential rules. By failing to address its need to restrict disclosure of "[*a]ll* Internal Company Communications, including, but not limited to, memos, presentations, emails, voicemails, faxes, postings, instant messages, text messages, intranet website content, and web-casts," without limitation, Respondent failed to show that the rule advances a legitimate and substantial business interest that cannot be advanced with a more narrowly tailored rule.

In light of all of the above, I find that this provision of the Employment Agreement violates Section 8(a)(1) of the Act.

(g) No-Recording Rule

Respondent's definition of Proprietary & Confidential Information includes a provision prohibiting photographing or recording "through any means the Company's operations, systems, presentations, communications, voicemails, personnel or meetings." (GC Exh. 2 (d)-(e).)

The General Counsel asserts that employees would reasonably understand the rule to prohibit them from documenting hazardous working conditions or unsafe equipment involving Respondent's operations or systems. In addition, General Counsel asserts that employees would reasonably understand the rule to prohibit recording or photographing written or verbal communications which document inconsistent application of Respondent's rules.

I agree that the rule prohibiting recording here is overly broad and infringes on employees Section 7 rights. The Board has established that "employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." *Caesar's Entertainment*, 362 NLRB No. 190, slip op. at 4–5 (2015). The Board in *Caesar's Entertainment* cited examples of types of protected conduct potentially affected by such a rule, such as employees recording and documenting employees picketing, unsafe work equipment or conditions, discussions about

terms and conditions of employment and discriminatory application of employer rules. Id., citing *Hyundai America Shipping Agency*, *Inc.,* 357 NLRB 860, 860, 871 (2011), enfd. in part and reversed in part, 805 F.3d 309 (D.C. Cir. 2015) (finding unlawful a rule barring employees from disclosing "information or messages" from company email, instant messaging, and phone systems, except to "authorized persons."). See also, *White Oak Manor*, 353 NLRB 795, 795 fn. 2, 798–799 (2009) (finding photography to be part of the "*res gestae* of employee's protected concerted activity in documenting inconsistent enforcement of employer dress code"), reaffirmed and incorporated by reference at 355 NLRB No. 211 (2010), enfd. 452 Fed.Appx. 374 (4th Cir. 2011).

Considering that the employer here is a mortgage company, documenting dangerous equipment would likely not be the leading concern for employees, but certainly employees would have a vested interest in documenting inconsistent application of employer rules or discussions about terms and conditions of employment which might take place during meetings or be provided in presentations. Respondent's rule here is overly broad and would have the tendency to infringe on employees Section 7 rights. See *Whole Foods Market, Inc.*, 363 NLRB 800, 802 (2015) (finding rules prohibiting the recording of conversations, phone calls, images, or company meetings without prior approval of management to be unlawfully overbroad).

As noted, Respondent provided only a general defense for all of its Proprietary and Confidential rules. By failing to address its need to restrict all photographing and recording of Company operations, systems, presentations, communications, voicemails, personnel or meetings," Respondent failed to show that the rule advances a legitimate and substantial business interest that cannot be advanced with a more narrowly tailored rule.

In light of the above, I find Respondent's no recording rule to be unlawful under Section 8(a)(1) of the Act.

(h) Rules incorporated in Respondent's definition of Proprietary & Confidential Information

In paragraph 5(f) of the complaint, the General Counsel also contends that due to the unlawful breadth of Respondent's Proprietary and Confidential definition, several other rules in the Employment Agreement are also unlawful inasmuch as they incorporate that definition.

Specifically, General Counsel sets forth the following provisions are unlawful due to their incorporation of Respondent's Proprietary & Confidential definition language:

5. Compliance with Applicable Laws, Regulations, Policies & Rules (GC Ex. 2(b).)
7. Full-Time & Outside Employment (GC Ex. 2(c).)
12. Proprietary & Confidential Information (GC Ex. 2(d)-(e).)
18. Maintaining Privacy, Confidentiality & Security of Customer & Company Information (GC Ex. 2(g)-(h).)
20. Liquidated Damages for Breach of Non-Competition Covenant (GC Ex. 2(h)-(i).)
22. Liquidated Damages for Solicitation of Company Personnel (GC Ex. 2(i)-(j).)
23. Non-Solicitation of Customers & Others (GC Ex. 2(j).)

To the extent that I have found Respondent's definition of Proprietary and Confidential Information to be overly broad, supra, I find that the incorporation of that definition in the above rules is overly broad and violates Section 8(a)(1) of the Act.

2. Return of Company Property & Information provision

In paragraph 5(a) of the complaint, the General Counsel alleges that several sections in Respondents Return of Company Property & Information provision violate Section 8(a)(1) of the Act. That provision requires that "all Company Records and Company Equipment are and shall remain the sole and exclusive property of the Company" and "are to be used solely and exclusively for Company business purposes and for no other purpose and will be monitored and inspected by the Company on a regular basis, and by signing this Agreement, Employee hereby consents to such monitoring and inspection." (GC Exh. 2(k).)

Respondent's definition of "Company Records" is incorporated into Respondent's Employment Agreement and covers:

> all documents, records, memos, e-mails, text messages, instant messages, chat, voicemails, faxes, rolodexes, planners, letters, reports, files (including, without limitation, copies of applications, appraisals, credit reports, loan documents, verifications of employment, and files maintained by Employee or by others in the Company), data, information, Proprietary & Confidential Information, compilations, books, manuals, handbooks, training materials, presentations, financial reports, loan production reports, quality control reports, customer relations complaint files, employee lists, client/customer lists, prospect lists, or reports received from, sent to or pertaining to the Company, the Company's Customers or containing Company information (irrespective of the form or medium in which such information is stored (including, but not limited to, hard-copies, electronic copies or files, text, audio, image, photos, and/or video files) and all originals and all copies thereof). (GC Ex. 2(q)).

Similarly, Respondent's definition of "Company Equipment" is incorporated into Respondent's Employment Agreement and covers:

> all offices, office space and office furniture, office supplies and equipment (including, but not limited to, pagers, phones, cell phones, voice mail systems and voice mails, fax machines and faxes, email systems and emails, copy machines and copiers, printers and documents printed, blackberries, personal data assistants, communication devices, keys, badges, credit cards, lists, computers, laptops, computer servers, computer diskettes, rolodexes, planners, calendars, automobiles, tapes, disks, compact disks, digital video disks, flash memory, computer parts, software, modems, telecommunication equipment, security tokens, and the like) and any related services or applications (including, but not limited to, voice or data phone service, internet service, text messaging service, email services, computer networks, cable services, and the like) directly or indirectly obtained by the Company for use by Employee or furnished to Employee by the Company.

(a) Company Records

The General Counsel contends that the portion of this provision that mandates that "Company Records" (defined as, inter alia, "all documents, records, memos, e-mails, text messages, instant messages, [and] chat") must be used "solely and exclusively for Company purposes and for no other purpose," is unlawfully overbroad as it would reasonably be understood by employees to mean they cannot disclose emails or other messages to others, including labor organizations. I agree that such a rule would be reasonably interpreted to restrict an employee from using Respondent memos, e-mails, text messages, instant messages, or "chats" to document terms and conditions of employment ranging from a change in personnel policy to a potentially unlawful disciplinary action or termination. The rule here is similar to the one the Board found unlawful in *Hyundai America Shipping Agency*, 357 NLRB 860 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015). In that case, the Board found that a rule prohibiting employees from "disclosing information or messages from . . . email, instant messaging, and phone systems" to anyone other than "authorized persons" was unlawfully overbroad. Id. at 860. The issues here are almost identical to those addressed in section 1(f), supra, concerning Respondent's Internal Company Communications. For the reasons set forth above as well as the reasons set forth in section 1(f), I find that the rule would have the tendency to chill employees from engaging in Section 7 activity.

Respondent, citing *Caesar's Entertainment*, contends that employees' section 7 rights must yield to the property rights of employers to control the use of equipment where such rules are facially neutral. *Caesars Entertainment*, 368 NLRB No. 143 (2019). However, *Caesars Entertainment*, addresses the use of company equipment and not company records, which are at issue here and Respondent fails to show that this portion of the provision advances a legitimate and substantial business interest and that it is unable to advance that interest with a more narrowly tailored rule.

For the reasons set forth above, I find that this portion of Respondent's Return of Company Property and Equipment provision is unlawfully overbroad.[7]

(b) Office Equipment Rule Regarding the use of Offices and Office Space

Respondent's Employment Agreement lists "all offices" and "office space" as Company Equipment and requires that all Company equipment is to be used "solely and exclusively for Company business purposes and for no other purpose." (GC Exh. 2(k).) The provision also requires that employees agree that during their use of Company equipment,

[7] Focusing on the "Company Equipment" section of this provision, the General Counsel also contends that this rule restricts employees use of company IT equipment, including email, for non-business purposes, including Section 7 activities. (GC Br. at 21.) Acknowledging that such restrictions are lawful under *Caesars Entertainment*, supra, where there are other reasonable means for employees to communicate with each other, the General Counsel requests that the Board overrule *Caesars Entertainment*, and expand the holding in *Purple Communications*, 361 NLRB 1050 (2014), to allow employees to use other forms of electronic information technology besides employer's email systems for non-business purposes. (GC Br. at 22.) As I am bound by current Board law, I am constrained to recommend that this allegation be dismissed.

including all offices and office space, they "will be monitored and inspected by the Company on a regular basis." (GC Exh. 2(k).)

The General Counsel contends that this provision would lead a reasonable employee to assume that any Section 7 activity they participate in while in Respondent's offices or other office spaces, during work time or nonwork time, would be subject to monitoring. As such, the General Counsel contends that the rule would create an impression of surveillance, which would chill employees' engagement in Section 7 activity while employees speak with other employees during nonwork times or when using their personal communication devices during non-work time. (GC Br. at 30.) The General Counsel cites traditional impression of surveillance cases in support of this contention. Although I agree with the General Counsel that the rule regarding "offices" and "office space" here is unlawful, I do not rely on surveillance analysis in doing so.

Instead, I find that the rule regarding offices and office space is unlawful because Respondent cannot lawfully restrict the use of its offices or office spaces "solely and exclusively for Company business purposes and for no other purpose," because the provision does not limit this restriction to working time, but rather offers this broad restriction without limitation. As such, the provision runs afoul of well-established Board law that employees have a right to orally solicit other employees during nonworking time, while on the employer's property. *Republic Aviation*, 324 U.S. 793, 797–798 (1945); *Caesars Entertainment*, 368 NLRB No. 143, slip op. at 1 (2019).

Respondent contends that this provision is lawful under *Caesars Entertainment*, 368 NLRB No. 143 (2019), as the Act does not restrict an employer's right to the use of equipment. However, although this argument may be true under current Board law with regard to equipment, offices and office space are fundamentally different as they constitute work-space rather than equipment. On this issue, the Board law is well-settled and unambiguous and explicitly recognized in *Caesars Entertainment* itself.[8] By restricting employee use of offices and office space "solely and exclusively for Company business purposes and for no other purpose," Respondent is barring employees from discussing union and protected concerted activity regardless of whether the employees are on working or non-working time.

Thus, I find that this provision is unlawful with regard to its reference to offices and office space.

(c) Provision Requiring Employees to Return all Employee Compilations

[8] "The Board has long held that with regard to oral solicitation during nonworking time and the distribution of literature during nonworking time in nonworking areas, the Act does limit and employer's property right to control the use of its premises." *Caesars Entertainment*, 368 NLRB No. 143, slip op. at 1 (2019).

Respondent's Return of Company Property & Information provision also requires that "[u]pon the termination, resignation, or separation of employment for any reason, Employee shall immediately return and deliver to the Company all Company records and Company Equipment in his or her possession, custody or control without demand from the Company (and even if Employee placed such Company Records and/or Company Equipment in the possession of others)." The provision also requires that employees return "all lists, compilations and/or documents containing information pertaining to the Company's past or current Customers, the Company's prospective customers, and the Company's employees (irrespective of the form or medium in which such information is stored)," even when such information "is compiled or originated by the Employee." (GC Exh. 2(k).)

I agree with the General Counsel that this provision regarding lists and compilations of customers and employees, even when the information was compiled or originated by the employees themselves, would reasonably be construed by employees to mean that they must provide Respondent with materials made in furtherance of Section 7 activity, such as employee lists compiled for union organizing purposes or customer lists compiled by the employee for the purpose of taking their complaints over working conditions to the employer's customers.[9] This would have the effect of requiring employees to disclose their intent to engage in protected concerted activity, which would infringe on their Section 7 rights. *Casino San Pablo*, 361 NLRB No. 148, slip op. at 4 fn. 6 (2014) (unlawful to require employees to disclose their intent to engage in protected activity due to its chilling effect on Section 7 activities).

In addition, by requiring employees to return all such compilations and lists "even if Employee placed such Company Records and/or Company Equipment in the possession of others," an employee could reasonably understand this provision to require them to disclose their Section 7 activity and provide Respondent with, for example, a list of employees which it provided to a union for the purposes of originating a union organizing campaign.

Under the broadly drafted rule, the employee could understand that they must retrieve the list they had provided to the union in order to return it to Respondent. In so doing, the employee would be revealing their protected activity.

Respondent generally contends that this provision was drafted to protect its property from destruction and misappropriation and that under current Board law as set forth in *Caesars Entertainment*, 368 NLRB No. 143 (2019), employees' Section 7 rights must yield to the

[9] As set forth in more detail above, employees cannot be barred from making disclosures regarding personnel and customers. *Quicken Loans*, 361 NLRB 904 fn.1 (2014) (rule restricting employees from disclosing personnel information unlawful); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990) (finding prohibitions regarding the disclosure of personnel and customer information to third parties unlawful); *Trinity Protection Services*, 357 NLRB 1382, 1383 (2011) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978))(right to communicate with employer customers regarding concerns about terms and conditions of employment protected by the Act).

property rights of employers to control the use of their equipment where such rules are facially neutral. (R. Br. at 6–7.)

While under current Board law, employers have a property right to restrict use of company equipment to company business only, that right does not extend beyond the use of company equipment. Thus, insofar as the provision includes information compiled or originated by an employee, regardless of the form or medium in which the information is stored, including the employee's personal computer or other non-company device, the rule is overly broad as an employee would reasonably interpret the rule to include lists of employees (or customers) that the employee compiled on their own time using their own equipment (whether it be pen and paper or personal computer) in furtherance of Section 7 activity. As such the rule is unlawfully overbroad and Respondent has not shown that it could not protect its property rights with a more restrictive rule.

In light of the above, I find that this provision is unlawfully overly broad in violation of Section 8(a)(1) of the Act.[10]

3. Communications Rules

The complaint alleges that Respondent violated Section 8(a)(1) by maintaining and enforcing its overly broad Communications policy. General Counsel alleges that three provisions in Respondent's Communications Policy are unlawfully overbroad. These are: the Media & Press Inquiry provision, Non-Disparagement provision, and Social Media Provision. I will address each provision below.

(a) Media & Press Inquiries Provision

In paragraph 5(b) of the complaint, the General Counsel alleges that Respondent's Media & Press Inquiries provision violates Section 8(a)(1) of the Act. That provision of Respondents Employment Agreement sets forth:

> All news, media and press inquiries pertaining to the internal business affairs of the Company or any of the Company's leaders shall be treated as Proprietary & Confidential Information and all such inquiries shall be directed to the Company's CEO. Employee is not permitted to make any public statement on behalf of the Company, or to express the views or opinions of the Company in any public statement, without the express written permission of the Company. (GC Exh. 2(k).)

[10] The General Counsel also contends that this rule is unlawful as it also contains the following clause: "[a]ny Company Records or Company information/data stored on Employee's personal computer (or any other non-company device) remains the Company's property and is subject to inspection and retrieval by the Company, and shall be returned to the Company in the event Employee is no longer employed by the Company for any reason." (GC Exh. 2(k).) For the reasons set forth in this section, I find that this clause of Respondent's provision is also unlawfully overly broad.

The General Counsel contends that the Media & Press Inquiries provision is unlawful because it prohibits employees from communicating with the media concerning their terms and conditions of employment. Specifically, General Counsel alleges that the first sentence of the rule requiring that employees refer all news, media and press inquiries pertaining to the internal business affairs of the Company or any of the Company's leaders to Respondent's CEO, is overly broad and ambiguous. General Counsel contends that "internal business affairs" is not otherwise defined and could be read as including employee disputes with Respondent, employee efforts to organize a union, employee discussion or protest of wages, unfair labor practice allegations or employee efforts to address working conditions in a concerted manner. Given this reasonable interpretation of the phrase, an employee would understand that if the press were to make an inquiry to an employee about any of those topics, the employee would be required to direct the inquiry to the CEO and not provide a response to the press. By the same token, the inquiries about any of the "Company's leaders" could be interpreted to cover an employee's opinion about working conditions and/or other concerted complaints about a supervisor. Thus, an employee would understand that these inquiries could not be responded to by the employee, but again would have to be referred to the CEO. I agree that the language of the first sentence of the rule is overly broad and could be interpreted to prohibit employees' ability to discuss these topics with the media. See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291, 292 (1999) (finding rule directing that questions or calls from news media be immediately transferred and responded to by the marketing department or the president of the hotel and barring employees from discussing hotel operations with the media to be unlawfully overly broad). The Board has repeatedly found concerted employee complaints about supervisors to be protected by the Act." See, *Trompler, Inc.*, 335 NLRB 478, 479 (2001) (Section 7 protects employees' concerted complaints about their supervisors); *Walmart Stores*, 341 NLRB 796, 804 (2004) (employee complaints about their supervisor's behavior can be conduct protected by Section 7 of the Act); *Astro Tool & Die Corp.*, 320 NLRB 1157, 1162 (1996) ("Board precedent firmly establishes that complaints about the quality of supervision . . . are directly related to working conditions.")

As General Counsel has overcome her burden to show that the first sentence of the rule could reasonably be interpreted as infringing on employees' Section 7 activity, the burden shifts to the Respondent to show that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. *Stericycle*, 372 NLRB No. 113, slip op. at 10 (2023). Respondent contends that the purpose of the rule is to prevent employees from holding themselves out as spokespersons of Respondent and publicly disseminating inaccurate information concerning its operations. (R. Br. at 7; Tr. at 97.) While the second sentence of the rule unambiguously addresses this concern, the first sentence of the rule does not. I agree with the General Counsel that the rule's first sentence could reasonably be construed as prohibiting employee's from responding to a press inquiry regarding a labor dispute. At the very least, the first sentence's parameters are ambiguous, and as such it is susceptible to the reasonable interpretation that it bars Section 7 activity. *Stericycle*, 372 NLRB No. 113 slip op. at 9 (the Board construes ambiguity in a work rule against the employer as the drafter of the rule.) Because it is facially overbroad, the Respondent's maintenance of the Media & Press Inquiries rule violates Section 8(a)(1). See *Trump Marina Assocs.*, 354 NLRB 1027, 1027 fn. 2 (2009) (finding rule unlawful, under *Lutheran Heritage* analysis, that stated only certain company officials were "authorized to speak with the media"), incorporated by reference, 355 NLRB 585 (2010), enforced mem., 435 F. App'x 1 (D.C. Cir. 2011); *Crowne Plaza Hotel*, 352 NLRB 382 (2008) (finding a rule setting forth that "*Under no circumstances* will statements

or information be supplied [to the media] by [anyone other than the General Manager or his designated representative]" to violate the Act.); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) ("Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. This includes communications about labor disputes to newspaper reporters.")

In light of all of the above, I find that Respondent's Media and Press Inquiry rule is unlawfully overly broad in violation of Section 8(a)(1) of the Act.

(b) Non-Disparagement Provision

In paragraph 5(c) of the Act, the General Counsel alleges that Respondent's Non-Disparagement provision violates Section 8(a)(1) of the Act. That provision of Respondent's Employment Agreement sets forth:

> The Company has internal procedures for complaints and disputes to be addressed and resolved. Employees will not (nor will Employee cause or cooperate with others to) publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, owners, or employees, with or through any written or oral statement of image (including, but not limited to, any statements made via websites, blogs, postings to the internet, or emails and whether or not they are made anonymously or through pseudonym). Employee agrees to provide full cooperation and assistance in assisting the Company to investigate such statements if the Company reasonably believes that Employee is a source of or has information pertaining to such statements. The foregoing does not apply to legally privileged statements made to governmental or law enforcement agencies. (GC Exh. 2(l).)

Prior to the ruling in *Boeing*,[11] the Board has consistently found unlawful rules that could be reasonably construed to prohibit expression of concerns over working conditions. *Quicken Loans, Inc.*, 359 NLRB 1201 (2013) (finding provision that employees will not '. . . publicly criticize, ridicule, disparage or defame the Company or its products, service, policies . . . through any written or oral statement . . .' to be unlawfully overly broad); *Lafayette Park Hotel*, 326 NLRB 824 (1998) (rule prohibiting "[m]aking false, vicious, profane or malicious statements toward or concerning the [employer] of any of its employees" unlawful); *Claremont Resort & Spa*, 344 NLRB 832, 836 (2005) (finding rule prohibiting "negative conversations" about managers, without any additional clarifications, unlawful.) *Cincinnati Suburban Press*, 289 NLRB 975 (1988) (rule prohibiting employees from "making false, vicious or malicious statements concerning any employee, supervisor, the Company, or its product" unlawful.) In this line of cases, the Board found that the rules were overly broad and failed to define terms of impermissible speech leading employees to refrain from engaging in protected activities.

Here the same is true. Initially, the rule prohibits employees from publicly criticizing or disparaging the Company, its policies, directors, or employees. The rule on its face could cover any public statement or protest by employees that criticize company imposed working conditions (such as pay, hiring, promotional practices, or even workplace safety conditions) or that criticizes

[11] *Boeing Co.*, 365 NLRB No. 154 (2017).

the workplace conduct of company employees who are managers or supervisors (such as discrimination, harassment, or arbitrary treatment of employees).[12]

The Board has long held that Section 7 activity includes employees voicing their concerns about working conditions to the public. The concern is more egregious here as the rule itself explicitly prohibits employees from "caus[ing] or cooperat[ing] with others to" make these critical comments to the public. This language encompasses protected concerted activity.

As the rule is presumptively unlawful, the burden shifts to Respondent to demonstrate a legitimate and substantial business interest.

Respondent asserts that the rule was put in place to avoid impaired business operations that may come in the form of a hostile work environment. (Tr. at 100; R. Br. at 9.) In support of its contention, Respondent cites cases that have been overruled by the *Stericycle*[13] decision. *Stericycle*, 372 NLRB No. 113, slip op. at 11 (2023). The rule at issue here goes far beyond protecting employees and operations from a hostile work environment as its focus is on employee complaints to the public about the Company and its policies. Moreover, the Respondent failed to show that it is unable to advance those interests with a "more narrowly tailored rule."

In these circumstances, the Respondent's maintenance of its Non-Disparagement rule violates Section 8(a)(1) of the Act.

(c) Social Media Provision

In paragraph 5(d) of the complaint, the General Counsel alleges that Respondent's Social Media provision violates Section 8(a)(1) of the Act. That provision of Respondents Employment Agreement sets forth:

> In the event that Employee is provided access by the Company to any social media outlet, including but not limited to Facebook, Twitter, and/or any blogs, through Company Equipment, Employee agrees that he or she shall: (a) be responsible for all content posted to such social media outlet; (b) not post any financial, confidential, sensitive or proprietary information about USFS or any USFS's clients in such social media outlet; (c) not infringe on any copyrights or trademarks through use of such social media outlet; (d) preface all opinions posted on such social media outlet as not being representative of the opinions of USFS; and (e) not post any inappropriate language or material of any kind on such social media outlet.

General Counsel alleges that Respondent's Social Media rule violates the Act on several grounds. Initially, the General Counsel contends that the Social Media provision bars employees from posting any financial information about the Respondent on social media noting that broad

[12] See McFerran dissent in *Medic Ambulance Service*, 370 NLRB No. 65, slip op. at 28.

[13] Specifically, Respondent cites *Motor City Pawn Brokers*, 369 NLRB No. 132 (2020), and *Medic Ambulance, Inc.*, 370 NLRB No. 65 (2021), both of which were decided under the analysis set forth in *Boeing Co.*, 365 NLRB No. 154 (2017).

prohibitions against publicizing "financial information" have been long held to be protected as such information could include employee wages and other financial terms and conditions of employment. Additionally, the General Counsel notes that the provision also prohibits employees from posting "confidential, sensitive or proprietary information" about Respondent on social media, which General Counsel alleges is overly broad due to Respondent's overly broad definition of "confidential" and "proprietary" as discussed in more detail above. Finally, the General Counsel contends that the provision is unlawful as it bans "inappropriate language or material" on social media, which could be interpreted by a reasonable employee to include protected Section 7 activities.

The General Counsel's contentions here fail as she ignores the critical fact that the clause here pertains solely to the employees' use of company equipment. The threshold question then is whether Respondent can lawfully restrict how its equipment is used. As set forth in *Caesar's Entertainment*, "decades of Board precedent establish that the Act generally does not restrict an employer's right to control the use of its equipment." 368 NLRB No. 143, slip op. at 1. Here, Respondent's rule targets use of company equipment and limits its use specifically with regard to access to social media.[14] Current Board law holds that "facially neutral restrictions on the use of employer IT resources are generally lawful to maintain, provided they are not applied discriminatorily." Id. There is no evidence here that this rule has been applied in a discriminatory manner. As such, I find that Respondent's Social Media provision is lawful under current Board law, and recommend dismissing this allegation.[15] *Caesars Entertainment*, 368 NLRB No. 143 (2019).

4. Arbitration Clause

In paragraph 6(a) of the complaint the General Counsel asserts that Respondent's Arbitration clause violates Section 8(a)(1) as it would be interpreted to restrict employee access to the Board's processes. Specifically, General Counsel alleges that the arbitration clause is unlawful as employees would reasonably understand it to include a requirement to submit unfair labor practice claims to arbitration. Initially, the Arbitration clause sets forth: "If a material dispute arises under this Agreement . . . for which the Company shall be entitled to equitable relief, the parties *shall* submit such dispute to binding arbitration." (emphasis added). Significantly, the last part of the arbitration clause sets forth in all capital letters:

> BY SIGNING THIS AGREEMENT, EMPLOYEE ACKNOWLEDGES THAT HE OR SHE IS GIVING UP THE RIGHT TO A TRIAL IN COURT OF LAW AS TO ANY DISCRIMINATION OR OTHER STATUTORY CLAIMS, AND IS HEREBY AGREEING TO SUBMIT *ALL* SUCH CLAIMS TO BINDING ARBITRATION. (Emphasis added.)

[14] None of the cases cited by General Counsel in support of its contentions here involve use of company equipment and thus they are easily distinguishable from the instant provision which solely relates to use of company equipment.

[15] I note that even under the Board holding in *Purple Communications*, which was overruled by *Caesars Entertainment*, 368 NLRB No. 143 (2019), this rule is lawful, as it only addresses employees' use of IT equipment for posting on social media and does not involve employee use of company email. See *Purple Communications*, 361 NLRB 1050 (2014).

This language placed strategically at the end of the provision and emphasized with all capital letters, would certainly lead and average employee to believe that they were waiving their right to pursue unfair labor practices in any other way. Notably, this is one of only two places in the employment agreement that contains capital letters, signifying its importance to the reader. The Board has found similar language in arbitration clauses to violate the Act. See *20/20 Communications, Inc.*, 369 NLRB No. 119 (2020) (finding that an arbitration clause stating that "all disputes and claims . . . shall be determined exclusively by final and binding arbitration," and none of the listed exclusions from the agreement's coverage includes claims arising under the National Labor Relations Act" to violate the Act); *U-Haul Co. of California*, 347 NLRB 375, 377 (2006) (finding that an arbitration clause that "covers all disputes relating to or arising out of an employee's employment," including various common law and statutory causes of action and "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations with [the employer] or the termination of that employment," to be unlawfully broad).

This impression is not cured by the sentence near the end of the provision which provides: "[t]his provision does not require the Employee to surrender any substantive statutory or common law benefit, right protection or defense, other than trial by jury." (GC Exh. 2(n).) This provision is ambiguous at best and could easily be read to refer to the employee's right to raise statutory claims *in the context of arbitration*, rather than explicitly stating that the employee may pursue their claim by filing with the Board. As reinforced in *Stericycle*, "ambiguous rules are properly construed against the employer." *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 23 (2023).

Respondent contends that language elsewhere in the agreement clears up any ambiguity presented by the language of the Arbitration clause. Specifically, Respondent points to the following language found in the second paragraph on the second page of the agreement under the general heading "Compliance with Applicable Laws, Regulations, Policies & Rules":

> Nothing in this Agreement or any other agreement between you and the Company shall be interpreted to limit or interfere with your right to report good faith suspected violations of the law to applicable government agencies, including the . . . National Labor Relations Board . . . in accordance with the provisions of any whistleblower or similar provisions of local, state or federal law." (GC Exh. 2(b).)

As General Counsel points out, however, this savings clause falls short of curing the issue on multiple fronts. First, this language does not specifically cover, an employee's right to file charges or pursue unfair labor practices with the Board, but rather addresses only the employees' ability to "*report* good faith suspected violations" to the Board. (Emphasis added.) Reporting suspected violations and pursuing remedies through the Board's processes are two different procedures and in order to be effective a savings clause needs to include more than just the ability to report the suspected violation. See *First Transit, Inc.*, 360 NLRB 619 (2014) (finding a savings clause that addressed only "union organization rights," was too narrow and that an effective savings clause "should adequately address the broad panoply of rights protected by Section 7.") *Compare, Briad Wenco*, 368 NLRB No. 72, slip op. at 2 (2019) (holding that an arbitration clause did not run afoul of the Act where the relevant clause explicitly provided

"nothing in [the] Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceedings conducted by an administrative agency, including, but not limited to . . . the National Labor Relations Board.")

Next, the savings clause is qualified in that it only covers suspected violations made in "good faith." By adding the qualifier that the reporting can only be made in good faith, Respondent restricts the employee's otherwise unfettered right to file or report a suspected violation or file a charge with the Board. In addition, Respondent's qualifier raises the question of who will be the judge of whether the report to the agency was made in good faith. Indeed, the term "good faith" is not defined anywhere in the agreement and certainly the implication would be that Respondent would be the one who decides whether the reporting of an issue was being made in "good faith." As pointed out by the General Counsel, an employee could reasonably interpret the rule to restrict or prohibit them from reporting a suspected unfair labor practice to the Board out of concern that Respondent could subjectively conclude that the report was not made in good faith. This unfettered right to access to the Board is imperative as the Board has observed "a typical employee interprets work rules as a layperson rather than as a lawyer." *Stericycle, Inc.*, 372 NLRB No. 113 slip op. at 15; *Ingram Book Co.*, 315 NLRB 515, 516 fn.2 (1994).

Third, the savings clause is not proximate to the arbitration clause in the Employment Agreement and the provisions do not reference one another. The savings clause is located on the 2nd page of the agreement, while the Arbitration provision can be found on the 14th page of the 21-page document. (GC Exh. 2(b), 2(n).) Moreover, the Arbitration provision does not reference the language in Section 5, and the language in Section 5, does not reference the arbitration provision. In addition, the paragraph is not prominent and does not have its own heading. Instead, it is placed under the heading "Compliance with Applicable Laws, Regulations, Policies & Rules," under a separate paragraph regarding a clause about employees adhering to mortgage lending and banking regulations. (GC Exh. 2(b).) Thus, far from explicitly modifying the arbitration provision, it appears that Respondent is attempting to bury it. See *First Transit*, 360 NLRB 619, 621 (2014) (finding a savings clause inadequate when, inter alia, it was neither prominent nor proximate to the rules it purported to inform and it did not cross reference those rules); *Lincoln Eastern Management Corp.*, 364 NLRB 112, 114 (2016) (finding that the arbitration policy taken as a whole "is not written in a manner reasonably calculated to assure employees that their statutory right of access to the Board's processes remains unaffected"). Compare *Briad Wenco*, 368 NLRB No. 72 (finding unequivocally worded saving clause in close proximity and explicitly referenced in arbitration agreement to be sufficient to inform employees that their rights to access to the Board and its processes was preserved).

In light of all of the above, I find that Respondent's arbitration clause violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent United Wholesale Mortgage, LLC, in Pontiac, Michigan, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act, as alleged in paragraphs 5(e) and (f) of the complaint, when it maintained in its Employment Agreement overly broad, ambiguous and/or discriminatory work rules regarding Proprietary and Confidential Information, including Company Financial Information, Personnel Information, Company Business, Marketing and Advertising Information and Plans, Internal Company Communications, No Recording Rule, and numerous rules by incorporation.

3. Respondent violated Section 8(a)(1) of the Act, as alleged in paragraph 5(a) of the complaint, when it maintained in its Employment Agreement overly broad, ambiguous and/or discriminatory work rules regarding its Return of Property & Information provision, including: provisions restricting employee use of Company records; provisions restricting employee use of office and office space; and provisions regarding returning all lists and compilations created by an employee, regardless of where it is stored.

4. Respondent violated Section 8(a)(1) of the Act, as alleged in paragraphs 5(c) and (d) of the complaint, when it maintained in its Employment Agreement overly broad, ambiguous and/or discriminatory Communications Rules, including Media & Press Inquiries as well as a Non-Disparagement rule.

5. Respondent violated Section 8(a)(1) of the Act, as alleged in paragraph 6(a) of the complaint, when it maintained in its Employment Agreement an overly restrictive Arbitration Clause.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that the Respondent must be ordered to rescind the unlawful portions of its current Employment Agreement and print and distribute a revised Employee Agreement that does not contain the unlawful portions.[16]

[16] In its proposed Notice, General Counsel requested that the remedy include a make whole remedy for any employee or former employee who was adversely affected by the unlawful provisions contained in Respondent's Employment Agreement. The General Counsel, however, did not allege that any employee or former employee was specifically adversely affected by the Employment Agreement's provisions. Therefore, the General Counsel's request for such relief is denied as it is wholly unsupported. Similarly, the Charging Party's request that Respondent be ordered to make whole the Charging Party for all direct and foreseeable harms suffered, including attorneys' fees is also denied.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[17]

ORDER

The Respondent, United Wholesale Mortgage, LLC, d/b/a UWM Financial Services, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing overly broad and ambiguous provisions in Respondent's Employee Agreement regarding Proprietary and Confidential Information including: Company Financial Information; Personnel Information; Company Business, Marketing and Advertising Information and Plans; Internal Company Communications, the no recording rule; and rules referencing Respondent's "Proprietary & Confidential" definition as employees could reasonably interpret these provisions as prohibiting them from exercising their Section 7 rights.

(b) Maintaining and/or enforcing overly broad and ambiguous work rules in Respondent's Employee Agreement regarding Return of Property & Information including: provisions restricting employee use of Company records; provisions restricting employee use of office and office space; and provisions regarding returning all lists and compilations created by an employee, regardless of where it is stored, as employees could reasonably interpret these provisions as prohibiting them from exercising their Section 7 rights.

(c) Maintaining and/or enforcing overly broad and ambiguous work rules in Respondent's Employee Agreement regarding Communications, including its Media & Press Inquiries and Non-Disparagement provisions as employees could reasonably interpret these provisions as prohibiting employees from exercising their Section 7 rights.

(d) Maintaining and/or enforcing an overly restrictive Arbitration Clause in Respondent's Employee Agreement as employees could reasonably interpret this provision as prohibiting them from exercising their Section 7 rights.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind all relevant provisions detailed in paragraphs 1(a)-(d) above in our Employment Agreement.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Furnish, publish and/or distribute to all current employees a new Employee Agreement that: (1) does not contain the unlawful provisions noted in paragraphs 1(a)-(d) above; (2) advises employees that the unlawful provisions above have been rescinded; or (3) provides lawful language that describes, with specificity, which types of conduct or communication is proscribed by the Employee Agreement and the conduct/communication that is protected by the Act.

(c) Notify all current and former employees in writing that the relevant provisions detailed in paragraphs 1(a)-(d) above, contained in the Employee Agreement, that were maintained on December 21, 2021, have been rescinded, are void and that Respondent will not prohibit employees from engaging in protected concerted activity as described in paragraphs 1(a)-(d) above;

(d) Within 14 days after service by the Region, post in conspicuous places including all places where notices to employees are customarily posted copies of the attached notice marked "Appendix". In addition to physical posting of paper notices, the notice shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and former employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 21, 2021.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., January 11, 2024.

Susannah Merritt
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW, GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT require you to sign our Employment Agreement with unlawful terms.

WE WILL NOT maintain provisions in our Employment Agreement that restrict or interfere with your rights to engage in protected concerted activities related to your wages, hours, or other terms and conditions of employment.

WE WILL NOT maintain a provision in our Employment Agreement under the heading Proprietary & Confidential Information that prohibits you from disclosing all "non-public information relating to or regarding the Company's business, personnel, Customers, operations or affairs."

WE WILL NOT maintain provisions in our Employment Agreement that prohibit you from disclosing compensation information.

WE WILL NOT maintain provisions in our Employment Agreement under the heading "Personnel Information" that contains language prohibiting you from disclosing personnel information, including "all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files; and personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses."

WE WILL NOT maintain a provision in our Employment Agreement that restricts your right to use our logo or trade name.

WE WILL NOT maintain a provision in our Employment Agreement under the heading Internal Company Communications that prohibits you from disclosing "all Internal Company Communications, including, but not limited to, memos, presentations, emails, voicemails, faxes, postings, instant messages, text messages, intranet website content, and

web-casts."

WE WILL NOT maintain a provision in our Employment Agreement under the heading Proprietary & Confidential Information that contains the following language "[employees] shall not photograph or record through any means the Company's operations, systems, presentations, communications, voicemails, personnel or meetings."

WE WILL NOT maintain a provision in our Employment Agreement under the heading Return of Company Property & Information that restricts your use of Company Records "solely and exclusively for Company business purposes and for no other purpose."

WE WILL NOT maintain a provision in our Employment Agreement under the heading Return of Company Property & Information that restricts your use of offices and office space "solely and exclusively for Company business purposes and for no other purpose."

WE WILL NOT maintain a provision in our Employment Agreement under the heading Return of Company Property & Information that contains the following language: "[u]pon the termination, resignation, or separation of employment for any reason, Employee shall immediately return and deliver to the Company all Company Records and Company Equipment in his or her possession, custody or control without demand from the Company (and even if Employee placed such Company Records and/or Company Equipment in the possession of others)" including "all lists, compilations and/or documents containing information pertaining to the Company's past or current Customers, the Company's prospective customers, and the Company's employees (irrespective of the form or medium in which such information is stored)," even when such information "is compiled or originated by the Employee."

WE WILL NOT maintain a provision in our Employment Agreement under the heading Return of Company Property & Information that contains the following language: "Any Company Records or Company information/data stored on Employee's personal computer (or any other non-company device) remains the Company's property and is subject to inspection and retrieval by the Company, and shall be returned to the Company in the event Employee is no longer employed by the Company for any reason."

WE WILL NOT maintain a provision in our Employment Agreement under the heading Media & Press Inquiries that contains the following language: "All news, media and press inquiries pertaining to the internal business affairs of the Company or any of the Company's leaders shall be treated as Proprietary & Confidential Information and all such inquiries shall be directed to the Company's CEO."

WE WILL NOT maintain a provision in our Employment Agreement under the heading Non-Disparagement that contains the following language: "Employees will not (nor will Employee cause or cooperate with others to) publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, owners, or employees, with or through any written or oral statement of image (including, but not limited to, any statements made via websites, blogs, postings to the internet, or emails and whether or not they are made anonymously or through pseudonym)."

WE WILL NOT maintain an Arbitration provision in our Employment Agreement that interferes with your right to access the processes of, or to file charges with, the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the provision in our Employment Agreement under the heading Proprietary & Confidential Information that prohibits you from disclosing all "non-public information relating to or regarding the Company's business, personnel, Customers, operations or affairs."

WE WILL rescind the provisions in our Employment Agreement that prohibit you from disclosing compensation information.

WE WILL rescind the provisions in our Employment Agreement under the heading "Personnel Information" that contains language prohibiting you from disclosing personnel information, including "all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files; and personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses."

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WE WILL rescind the Arbitration provision in our Employment Agreement that interferes with your right to access the processes of, or to file charges with, the National Labor Relations Board.

UNITED WHOLESALE MORTGAGE, LLC d/b//a
UWM FINANCIAL SERVICES

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-297897 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (616) 930-9165