UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

MACY'S, INC.

and **Case No. 1-CA-123640**

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1445

Alejandra Hung, Esq., Counsel for the General Counsel.
Alfred O'Connell, Esq., Pyle Rome Ehrenberg P.C., Counsel for the Charging Party.
William Joy, Esq., Morgan, Brown & Joy, Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: The parties herein waived a hearing and submitted this case directly to me by way of a Joint Motion and Stipulation of Facts dated April 2, 2015, which states as follows:

This is a joint motion by the parties to this case: Macy's, Inc. (Respondent); the Charging Party, United Food and Commercial Workers Union, Local 1445 (the Union); and the General Counsel, to transfer this case to an Administrative Law Judge pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The transfer of the case will effectuate the purposes of the Act and avoid unnecessary costs and delay.
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If this motion is granted, the parties agree to the following:[1]

1. The record in this case consists of the charge in Case 01-CA-123640, the Complaint, the Answer, the Stipulation of Facts, the Statement of Issues Presented, and each party's Statement of Position.

2. This case is submitted directly to an Administrative Law Judge for issuance of findings of facts, conclusions of law, and an Order.

3. The parties waive a hearing before an Administrative Law Judge.

4. An Administrative Law Judge should set the time for the filing of briefs.

[1] By Order dated April 6, 2015, I accepted the Stipulated Record and set May 4, 2015 as the date briefs are due.

I. Stipulation of Facts

1. (a) The charge in Case 01-CA-123640 was filed by the Union on March 3, 2014. (A copy of the charge and affidavit of service are attached hereto as Exhibits A and B respectively.)

2. (a) On August 28, 2014, the Regional Director for Region One of the Board issued a Complaint and Notice of Hearing (the Complaint) alleging that Respondent violated the National Labor Relations Act (the Act). (A copy of the Complaint is attached hereto as Exhibit C). The hearing in this matter has been postponed indefinitely by oral agreement of the parties.

(b) On September 8, 2014, Respondent filed a timely Answer to the Complaint , denying that it had committed any violation of the Act. (A copy of the Answer to the Complaint is attached hereto as Exhibit D).

3. Respondent is a corporation engaged in the operation of retail department stores throughout the United States, including a store located in Saugus, Massachusetts (the Saugus store). Annually, Respondent, in conducting its business operations derives gross revenues in excess of $500,000 and purchases and receives at the Saugus store goods valued in excess of $5,000 directly from points outside the Commonwealth of Massachusetts. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, Lori Barroso and Danielle McKay have been Respondent's Human Resources Manager and Store Manager at its Saugus store, respectively, and have been supervisors of Respondent within the meaning of Section 2(11) of the and agents of Respondent within the meaning of Section 2(13) of the Act.

6. At all material times, and since at least September 5, 2013, Respondent has maintained an Employee Handbook entitled "Code of Conduct" (the Handbook) that includes the following policy regarding Confidential Information:

> **Being Honest ... Company Assets and Information**
>
> Our Company's assets must be used, purchased or disposed of only for the Company's benefit. We are all obligated to protect the assets of the Company and use them appropriately.
>
> In addition to merchandise, equipment furnishings and other property, our Company's assets include Company information, the personal information of the Company's employees and customers, any work product we may develop in the course of our employment and any business or financial opportunity that the Company could avail itself of.

Confidential Information

What To Know

Confidential information about our Company, its business, associates, customers and business partners should be protected. It can be used only to pursue the Company's business interests or to comply with the Company's legal or other obligations.

What is confidential information? It could be business or marketing plans, pricing strategies, financial performance before public disclosure, pending negotiations with business partners, information about employees, documents that show social security numbers or credit card numbers- in short, any information, which if known outside the Company could harm the Company or its business partners, customers or employees or allow someone to benefit from having this information before it is publicly known.

Just as our Company requires that its own confidential information be protected, our Company also requires that the confidential and proprietary information of others be respected.

What To Do

In performing our duties, we as associates may have access to confidential information relating to our Company, its business, customers, business partners or our co-workers.

We are all trusted to maintain the confidentiality of such information and to ensure that the confidential information, whether verbal, written or electronic, is not disclosed except as specifically authorized. Additionally, it must be used only for the legitimate business of the Company.

Here are some simple rules to follow.

Confidential information should:

- Be stored in locked file cabinets or drawers and not be left where others can see it,
- Be clearly marked as confidential whenever possible,
- Be shared only with those who need to see it for Company business purposes,
- Not be sent to unattended fax machines or printers,
- Not be discussed where others may hear,
- Be shredded when no longer needed.

Always respect the confidentiality of the information of third parties. We must not use or disclose any of it except as authorized under a written agreement approved by our Law Department.

7. At all material times, and since at least September 5, 2013, Respondent has maintained a Handbook policy regarding the Use and Protection of Personal Data, which states in relevant part:

What To Know

The Company has certain personal data of its present and former associates, customers and vendors. It respects the privacy of this personal data and is committed to handling this data responsibly and using it only as authorized for legitimate business purposes.

What is considered personal data? It is information such as names, home and office contact information, social security numbers, driver's license numbers, account numbers and other similar data.

What To Do

We have a strict obligation to use such personal data in a manner that:
• respects the privacy of our co-workers and our Company's customers and vendors,
• complies with all applicable laws and regulations, and Company policies,
• upholds any confidentiality or privacy obligations of the Company in its contracts.

In addition, we must follow all policies and measures adopted by the Company for the protection of such data from unauthorized use, disclosure or access. If any of us becomes aware of any instance of data being accessed or being used in an unauthorized manner, we must report it immediately to our Divisional Security Administrator or the Law Department.

8. At all material times, and since at least September 5, 2013, Respondent has maintained the following Handbook policy regarding Intellectual Property:

What To Know

Trademarks, trade names, copyrights, trade secrets, rights of publicity and other similar proprietary information are considered intellectual property. Our Company owns many valuable intellectual property rights, such as our trademarks INC and Alfani.

Our Company may lose its rights in the intellectual property that it already owns, or risk lawsuits and other penalties if we fail to comply with certain laws.

Our Company also has the right to use the intellectual property of certain business partners under agreements. American Rag is one such example. We must use our Company's or a business partner's intellectual property only as authorized.

If we violate the terms of these agreements, our Company may not only lose the right to use the licensed intellectual property, but may also be

subject to substantial damage claims.

What To Do

We must not use the intellectual property rights of others without their permission.

We may use the intellectual property of the Company only for the benefit of the Company, and should not allow others to use our logo or other intellectual property except in accordance with prescribed procedures. Similarly, if and when the Company is permitted to use the intellectual property of its business partners, we must follow the reasonable usage guidelines provided by the business partner.

We must not provide to or accept from third parties any proprietary information or the right to use intellectual property without a written agreement that is prepared by our Law Department.

If any of us makes a discovery, or develops an invention, design, process, concept or idea in the course of our employment with the Company, the Company owns it. We should assist the Company's lawyers in documenting the Company's ownership.

9. At all material times, and since at least September 5, 2013, Respondent has maintained a Handbook policy regarding Government Investigations and Contacts, which states, in relevant part:

What To Know

Our Company's policy is to cooperate with appropriate governmental requests or investigation, and to comply with all applicable laws governing contacts with government officials. Our Law Department is responsible for managing all such requests, investigations or contacts and providing truthful and accurate information.

What To Do

If we are asked to provide information- verbal or written- for a government investigation, or if a government representative appears at our workplace, we must promptly notify our Human Resources representative or the Law Department and obtain approval for the release of any information. We must not obstruct, influence, mislead or impede the investigation.

Any contacts with government officials for the purpose of influencing legislation, regulations or decision-making may constitute lobbying. We must not contact or communicate with any government official for such purpose on behalf of the Company without having specific authorization. If a need arises to do so, we must contact the Law Department.

10. At all material times, and since at least September 5, 2013, Respondent has maintained a Handbook policy regarding Confidentiality and Acceptable Use of Company Systems, which states, in relevant part:

> The following standards and procedures apply to your use of, or access to, all Confidential Information.
>
> **1. All Non-Public Information is Sensitive**
>
> Any information that is not generally available to the public that relates to the Company or the Company's customers, employees, vendors, contractors, service providers, Systems, etc., that you receive or to which you are given access during your employment or while you are performing services for the Company is classified as "Confidential" or "Internal Use Only" under the Macy's Information Security Policy. As is set forth in the Macy's Information Security Policy, internal access to Confidential Information should only be granted on a "need to know" basis, and such information should not be shared with third parties without prior approval from your Company supervisor and consultation with the Law Department.
>
> **3. Use and Protection of Personal Data**
>
> Company maintains certain information regarding its present and former associates, customers and vendors. Company respects the privacy of this data where it includes personally-identifiable information ("Personal Data"). Personal Data includes names, home and office contact information, social security numbers, driver's license numbers, account numbers and other similar data. Company is committed to handling Personal Data responsibly and using it only as appropriate for legitimate business purposes. This commitment requires that all Company employees, contractors, and third parties who are granted access to Personal Data by Company follow all policies adopted by the Company for the protection of such data against unauthorized use, disclosure or access. Such policies, including those' set forth in the Macy's Information Security Policy, may vary depending on the sensitivity of the Personal Data at issue.
>
> Personal Data may not be shared with any third party without the written approval of your senior Sales Promotion executive or, for support organizations, your Chief Executive Officer.

11. The policies (also referred to herein as rules) described above were not promulgated in response to union activity or applied in any manner to restrict Section 7 rights.

12. Respondent has not, by any other actions, led employees to believe that the rules described above prohibit Section 7 activity.

13. On April1, 2014, Macy's notified its employees through its intranet portal In-Site (the method customarily used by Macy's to notify employees of any changes in company policy) that it had revised its Code of Conduct by adding to the

introductory page the following:

> Nothing in the Code or the policies it incorporates, is intended or will be applied, to prohibit employees from exercising their rights protected under federal labor law, including concerted discussion of wages, hours or other terms and conditions of employment. This Code is intended to comply with all federal, state, and local laws, including but not limited to the Federal Trade Commission, Endorsement Guidelines and the National Labor Relations Act, and will not be applied or enforced in a manner that violates such laws.

II. ISSUE PRESENTED

Whether Respondent violated Section 8(a)(1) of the Act by maintaining the rules described above in paragraphs 6-10.

III. POSITIONS OF THE PARTIES

A. General Counsel's Position

Counsel for the General Counsel contends that the cited Handbook provisions are overly broad and have a reasonable tendency to interfere with, restrain, and coerce employees in their exercise of the rights guaranteed in Section 7 of the Act.

The Handbook's Confidential Information Policy violates Section 8(a)(1) of the Act because, by prohibiting employees from disclosing any company information and information about employees, in the absence of clarification, it could be reasonably construed by employees to preclude discussion of wages and other terms of conditions of employment among fellow employees, and restrict the exercise of their Section 7 rights.

The Handbook's Use and Protection of Personal Data Policy contains an unqualified prohibition against the disclosure of any information about employees, former employees, and customers, and violates Section 8(a)(1) of the Act insofar as it could be reasonably construed by employees to restrict discussion of terms and conditions of employment among fellow employees, and restrict the exercise of their Section 7 rights.

The Handbook's Intellectual Property Policy violates Section 8(a)(1) of the Act because it is overbroad and could be reasonably construed by employees to prohibit the use of the Respondent's logo or trademark as a means to identify the Respondent in the course of Section 7 activity related to terms and working conditions of employment, including its use in employee communications such as leaflets, signs, and even photos, thereby restricting the exercise of their Section 7 rights.

Further, the Handbook's Government Investigations and Contacts Policy violates Section 8(a)(1) because it could be reasonably construed to prohibit employees from participating in government investigations and require employees to notify Respondent's Human Resources Department or Law Department first. Further, the Policy is overbroad to the extent that as it affects employees' contact with the National Labor Relations Board and other law enforcement officials about wages, hours, and working conditions.

The Handbook's Confidentiality and Acceptable Use of Company Systems Policy is overbroad and violates Section 8(a)(1) because it prohibits employees from disclosing any information about the company, employees, and customers, in the absence of clarification, and could be reasonably construed by employees to preclude discussion of terms and conditions of employment, among fellow employees and restrict the exercise of their Section 7 rights.

Because the Handbook applies to employees at Respondent's facilities throughout the United States, the General Counsel seeks a nationwide remedy for the unfair labor practices. Specifically, the General Counsel seeks rescission of the above described rules, written notice to employees that the above rules have been rescinded and a Notice posting, applicable to all Respondent's facilities.

B. Respondent's Position

Respondent asserts that the sections of its code of conduct alleged to be unlawful are not unlawful when considered in the proper context because employees would not reasonably construe the language to prohibit Section 7 activity. There is limiting language in the provisions of the Code in question which would clarify to employees that the rule does not restrict Section 7 rights.

Page 16 of the Code of Conduct, Confidential Information, has language which limits the definition to information "which if known outside the Company could harm the Company or its business partners, customers or employees or allow someone to benefit from having this information before it is publicly known." Respondent contends that discussion by employees of wages and conditions of employment could not be reasonably construed by employees as information that would harm the company

Page 18 of the Code of Conduct, Personal Data, gives examples of data, e.g. "social security numbers, driver's license numbers, account numbers and other similar data" whose disclosure would be illegal or unprotected conduct such that the provision could not be reasonably construed to cover protected activity.

Next, page 22 of the Code of Conduct, Intellectual Property, does not restrict employees in using the company's logo. The clause prohibits allowing "others" to use the logo. Furthermore, this entire provision, when read in context, would lead any employee to understand that it is to protect intellectual and proprietary property and not to restrict an employee from using the company's name/logo on a picket sign or for any other Section 7 activity.

Page 24 of the Code of Conduct, Government Investigations, states in the opening sentence that the company policy is to "comply with all applicable laws governing contacts with government officials." The policy does not prohibit employees from speaking to a government official, such as an NLRB agent, and when read in context with the opening sentence would not be reasonably construed to do so.

Page 31 of the Code of Conduct, Confidentiality and Acceptable Use of Company Systems is a detailed seven-page policy. Personal Data lists, as on Page 18 of the Code of Conduct, "social security numbers, driver's license numbers, account numbers and other similar data" and thus employees who read the policy as a whole would not believe it extended to terms and conditions of employment.

Furthermore, Respondent contends that a "safe harbor" or "savings clause" in the Code of Conduct informs all of its provisions and precludes a finding that employees would reasonably read any of the challenged work rules as unlawfully restricting their Section 7 rights.

C. Union's Position

The Union concurs with the General Counsel's position.

This stipulation is made without prejudice to any objection that any party may have as to the relevance of any facts stated herein.

Analysis

In determining whether any, or all, of the above referenced provisions contained in the Employee Handbook violate the Act, the initial inquiry is to *Lutheran Heritage Village- Livonia,* 343 NLRB 646 (2004). Under that test, the initial inquiry is whether the rule at issue explicitly restricts activities that are protected by Section 7 of the Act; if so, it is unlawful. If not, the finding of a violation is dependent upon a showing of one of the following: employees would reasonably construe the rule to prohibit protected activity, or the rule has been applied to restrict the exercise of that activity. As the rule does not explicitly restrict activities protected by Section 7 of the Act, and as the parties, as part of the Joint Motion and Stipulation of Facts, agreed these rules were not promulgated in response to union activity, or were applied in a manner to restrict Section 7 rights, the test for each of these challenged restrictions is whether employees could reasonably construe any or all of them to restrict protected activity. If the answer is that they could reasonably be construed to do so, the final question is whether the savings clause contained in the revised Code of Conduct effective April 1, 2014 precludes a finding of a violation of any of these rules.

Confidential Information

There are numerous provisions in the Employee Handbook that Counsel for the General Counsel alleges unlawfully restricts employees in the exercise of their Section 7 rights, under the cover of Confidential Information. Under **Being Honest…Company Assets and Information**, in Paragraph 6 of the Stipulation of Facts, the Handbook states, *inter alia*: “We are all obligated to protect the assets of the Company and use them appropriately…our Company’s assets include Company information, the personal information of the Company’s employees and customers.” Under **Confidential Information What to Know,** the Handbook states**:** “Confidential Information about our Company, its business, associates, customers and business partners should be protected…What is confidential information? It could be…information about employees…in short, any information, which if known outside the Company could harm the Company or its business partners, customers or employees or allow someone to benefit from having this information before it is publicly known.” Under **What to Do,** the Handbook continues:

> In performing our duties, we as associates may have access to confidential information relating to our Company, its business, customers, business partners and our co-workers.
>
> We are all trusted to maintain the confidentiality of such information and to ensure that the confidential information, whether verbal, written or electronic, is not disclosed except as specially authorized.

> Here are some simple rules to follow.
>
> Confidential information should:
>
> Be shared only with those who need to see it for Company business purposes. Not be discussed where others may hear.

In Paragraph 7 of the Stipulation, under **What to Know**, the Handbook states:

> The Company has certain personal data of its present and former associates, customers and vendors. It respects the privacy of this personal data and is committed to handling this data responsibly and using it only as authorized for legitimate business purposes.
>
> What is considered personal data? It is information such as names, home and office contact information…and other similar data.

Under **What To Do**, the Handbook states: “We have a strict obligation to use such personal data in a manner that:

> Respects the privacy of our co-workers and our Company’s customers and vendors.”

In Paragraph 10, under Confidentiality and Acceptable Use of Company Systems, The section entitled **All Non-Public Information is Sensitive** states, inter alia:

> Any information that is not generally available to the public that relates to the Company or the Company's customers, employees, vendors, contractors, service providers, Systems, etc., that you receive or to which you are given access during your employment or while you are performing services for the Company is classified as "Confidential" or "Internal Use Only" under the Macy's Information Security Policy. As is set forth in the Macy's Information Security Policy, internal access to Confidential Information should only be granted on a "need to know" basis, and such information should not be shared with third parties without prior approval from your Company supervisor and consultation with the Law Department.

The Section entitled **Use and Protection of Personal Data** states:

> Company maintains certain information regarding its present and former associates, customers and vendors. Company respects the privacy of this data where it includes personally-identifiable information ("Personal Data"). Personal Data includes names, home and office contact information, social security numbers, driver's license numbers, account numbers and other similar data. Company is committed to handling Personal Data responsibly and using it only as appropriate for legitimate business purposes. This commitment requires that all Company employees, contractors, and third parties who are granted access to Personal Data by Company follow all policies adopted by the Company for the protection of such data against unauthorized use, disclosure or access. Such policies, including those set forth in the Macy's Information Security Policy, may

> vary depending on the sensitivity of the Personal Data at issue.
>
> Personal Data may not be shared with any third party without the written approval of your senior Sales Promotion executive or, for support organizations, your Chief Executive Officer.

All of the above provisions prohibit the employees from divulging "the personal information of the Company's employees and customers," "information about employees…which if known outside the Company could harm the Company or its…employees," "confidential information," "information such as names, home and office contact information," "any information that is not generally available to the public that relates to the Company or the Company's…employees," "personally-identifiable information (Personal Data). Personal Data includes names, home and office contact information…."

The test under *Lutheran Heritage,* is whether employees could reasonably construe these rules as prohibiting, or limiting their protected activities. In evaluating contested rules of conduct, the Board attempts to work out "…an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation v. NLRB,* 324 U.S. 793, 797-798 (1945). In other words, while employees have a right to engage in union and concerted activities, employers have "a substantial and legitimate interest in maintaining the confidentiality of private information." *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). However, in formulating its privacy and confidentiality rules, the employer must tread carefully and not venture into its employees' Section 7 rights.

In *Triana Industries*, 245 NLRB 1258 (1979), the Board held that Section 7 "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment." *Aroostook County Regional Opthamology Center,* 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir 1996) held that wage discussions among employees are considered to be at the core of Section 7 rights because wages, "probably the most critical element in employment," are "the gist on which concerted activity feeds." In *Parexel International, LLC,* 356 NLRB No. 82 (2011), the Board stated: "But whether such discussions lead to union activity or not, our precedents provide that restrictions on wage discussions are violations of Section 8(a)(1)."

As stated above, the ultimate issue herein is whether employees reading these rules, would reasonably construe them as restricting their Section 7 rights. In *Lafayette Park Hotel*, *supra*, the provision stated that the following conduct is unacceptable: "Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information." The Board dismissed this allegation saying that employees would not read it as prohibiting the discussion of wages among fellow employees or with a union:

> Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information. Although the term "Hotel-private" is not defined in the rule, employees in our view reasonably would understand that the rule is designed to protect that interest rather than to prohibit the discussion of their wages.

Similarly, in *Ark Las Vegas Restaurant Corporation,* 335 NLRB 1284, 1290-1291 (2001), the challenged rule stated:

> It is our policy to ensure that the operations, activities and affairs of Ark Las Vegas and our clients are kept confidential to the greatest extent. If, during their employment, employees acquire confidential or proprietary information about Ark Las Vegas or its clients, such information is to be handled in strict confidence and not to be discussed.

Citing *Lafayette Park, supra,* the Board dismissed this allegation finding that employees would not read this provision as restricting their right to discuss wages and other conditions of employment with fellow employees or a union. As neither *Lafayette Park* nor *Ark* specifically restrict the flow of employee information, they can easily be differentiated from the instant matter.

In *Cintas Corporation*, 344 NLRB 943 (2005), the challenged provision stated: "We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners[2], new business efforts, customers, accounting and financial matters." The Board found this provision unlawful due to the unqualified prohibition of the release of any information about "partners"-employees, finding that employees would reasonably construe this to restrict discussions of their terms of employment. Similarly, in *Double Eagle Hotel & Casino*, 341 NLRB 112, 114 (2004), the restrictive provision stated: "You are not, under any circumstances, permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non-employee without approval from the General Manager or the President." In finding that this provision violated the Act, the Board found that employees could reasonably read this as chilling their Section 7 rights: "It is hard to imagine a rule that more explicitly restricts discussion of terms and conditions of employment more than the Confidential Information rule herein." Similarly, the restrictions on the release of personal information of the Respondent's employees, including their names and home and office contacts, obviously restricts employees in their Section 7 rights to discuss their terms and conditions of employment with fellow employees, as well as their ability to notify a union of other employees of the Respondent who might be interested in participating in the union movement. The fact that this restriction was repeated so many times in the Handbook further enforces the belief that employees could reasonably believe that it interferes with their Section 7 rights. I therefore find that these restrictions violate Section 8(a)(1) of the Act. *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

Counsel for the General Counsel also challenges the restrictions on the use of information regarding customers and vendors. In certain situations, employees are permitted to use such information in furtherance of their protected concerted activities, and Counsel for the General Counsel argues that these restrictions are also unlawful. In *Trinity Protection Services, Inc.*, 357 NLRB No. 117 (2011), the Board stated, "…employees' concerted communications regarding matters affecting their employment with their employer's customers or with other third parties, such as governmental agencies, are protected by Section 7 and, with some exceptions not applicable here, cannot lawfully be banned." I therefore find that this restriction violates Section 8(a)(1) as well. *Kinder-Care Learning Centers,* 299 NLRB 1171 (1990); *Boch Imports, Inc.*, 362 NLRB No. 83, fn. 4 (2015).

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[2] The company refers to its employees as "partners."

It is further alleged that the Respondent violated the Act by prohibiting the use of the Respondent's "logo or other intellectual property" by others. Although not as obvious as prohibiting the use or release of information about its employees, this prohibition could also be reasonably understood to limit its employees, or a union, from publicizing a dispute with the Respondent by employing its logo in its distributed information. This could be an effective means of publicizing a dispute as the Respondent's logo is well known and easily recognized. In addition, the Respondent cannot defend that it has a legitimate business concern for forbidding the use of its logo; there is no confidentiality issue with the logo and I can see no valid business reason for this rule. I therefore find that the maintenance of this rule violates Section 8(a)(1) of the Act. *Boch Imports, Inc.*, *supra* at p.2; *Pepsi Cola Bottling Co.*, 301 NLRB 1008 (1991).

The final allegation relates to the Respondent's Handbook policy regarding Government Investigations. After stating that it is the Respondent's policy to cooperate with appropriate governmental requests or investigations, it states, *inter alia*:

> If we are asked to provide information- verbal or written- for a government investigation, or if a government representative appears at our workplace, we must promptly notify our Human Resources representative or the Law Department and obtain approval for the release of any information. We must not obstruct, influence, mislead or impede the investigation.

Even though this provision states that it is the Respondent's policy to cooperate with governmental investigations, and that they will not obstruct or impede investigations, I believe that it is reasonable to conclude that employees who are asked to give a statement to a Board agent, or an agent of any other governmental agency, would be hesitant to participate in such a process knowing that they would first have to notify Respondent's representatives of their participation. In *Direc*TV, 359 NLRB No. 54, at p.2 (2013), the rule stated: "If law enforcement wants to interview or obtain information regarding a DIRECTV employee…the employee should contact the security department…who will handle contact with law enforcement agencies…" The Board found that this rule violated the Act because it would lead reasonable employees to conclude that they had to contact the company's security department before cooperating with the Board when the issue might involve their wages, hours and working conditions. In *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, fn.2, the Board stated that a rule violates the Act, "if employees would reasonably believe the rule or policy interferes with their ability to file a Board charge or access to the Board's processes, even if the rule does not expressly prohibit access to the Board." I therefore find that by requiring employees to notify Respondent's representatives prior to participating in a governmental investigation, the Respondent violated Section 8(a)(1) of the Act. *Trinity Protection services, supra.*

The final issue is whether the savings clause that Respondent sent to its employees on April 1, 2014 neutralizes these unlawful provisions. The Board has strict policies for employers attempting to repudiate unlawful rules. In *DirecTV,* 359 NLRB No. 54, at p. 4 (2013), the Board stated:

> In order for a repudiation to serve as a defense to an unfair labor practice finding, it must be timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct. There must be adequate publication of the repudiation to the employees involved, and the repudiation must assure employees that, going forward, the employer will not interfere with the exercise of their Section 7 rights.

In *First Transit, Inc.*, 360 NLRB No. 72, at p. 4-5 (2014), the Board stated:

> We agree that an employer's express notice to employees advising them of their rights under the Act may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule. In our view, however, inclusion of the FOA policy in the handbook under the circumstances presented here does little to ensure that employees would not read otherwise overbroad rules as restricting their Section 7 rights. First, the policy is too narrow, focusing solely on union organizational rights. An effective "safe harbor" provision of this kind, also referred to as a "savings clause," should adequately address the broad panoply of rights protected by Section 7 of the Act…The policy does not expressly reference these rules and the rules do not expressly reference the policy.

The principal shortcoming of the Respondent's attempted savings clause is that it is written in a "generic" manner, while the unlawful restrictions are very specific. While the Respondent's Handbook provisions unlawfully restrict its employees use of "confidential information," and the use of the Respondent's logo, as well as cooperating with governmental investigations, the savings clause simply tells them that nothing contained in the handbook is intended to limit them from engaging in their rights protected by the Act, including protected concerted activities. This is far from language that is "specific in nature to the coercive conduct" and "does not expressly reference those rules," as required by *DirecTV* and *First Transit, supra.* I would further note that the Respondent did not notify its employees of its safe harbor rule until approximately seven months after it began maintaining the rules found to be unlawful in its Employee Handbook. I therefore find that the Respondent's attempt to repudiate the unlawful rules described herein is ineffective.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by unlawfully restricting its employees' use of information regarding their fellow employees and the Respondent's customers, the use of the Respondent's logo, and requiring the employees to notify Respondent's Human Resources representative prior to providing information for a government investigation.

The Remedy

Having found that the Respondent has unlawfully maintained rules restricting its employees use of what it considers confidential information regarding other employees and its customers, the use of Respondent's logo and the participation in governmental investigations without prior notice to the Respondent's Human Resources Department, I recommend that the Respondent be required to rescind these provisions and notify all of its employees, nationwide that it has done so and that these provisions are no longer in effect and that it post a notice to its employees to this effect.

Upon the foregoing stipulated record, conclusions of law and the entire record, I hereby issue the following recommended[3]

ORDER

The Respondent, Macy's, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) maintaining overly broad rules in its Employee Handbook that restrict its employees use of information regarding fellow employees and, but to a lesser extent, the Respondent's customers.

(b) maintaining an overly broad rule in its Employee Handbook that restricts the use of the Respondent's logo.

(c) maintaining an overly broad rule in its Employee Handbook that requires employees to notify the Respondent's Human Resources Department prior to participating in a government investigation.

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

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

(a) Within 14 days, rescind and/or revise all the rules referred to in paragraphs 1(a) through 1(c) above.

(b) Furnish all employees at all of the Respondent's facilities nationwide with (1) inserts for the current Employee Handbook that advise that the unlawful rules have been rescinded, or (2) the language of lawful rules on adhesive backing that will cover or correct the unlawful rules; or (3) publish and distribute a revised Employee Handbook that does not contain the unlawful rules.

(c) Within 14 days after service by the Region, post at all of its facilities nationwide copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 1, 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. 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

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[3] 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.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the 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 September 5, 2013.

(d) 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 the Respondent has taken to comply.

Dated, Washington, D.C. May 12, 2015

Joel P. Biblowitz
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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 representatives 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 maintain any rules in our Employee Handbook or elsewhere which restrict your right to discuss your wages and other terms or conditions of employment, or our customers or vendors, with your fellow employees and others;

WE WILL NOT maintain any rules in our Employee Handbook which restrict your right to talk to governmental agencies;

WE WILL NOT unlawfully restrict the right of others to use our logo in conjunction with your protected concerted activities; and

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days, rescind and/or revise the overly broad rules described above; and

WE WILL furnish all employees with (1) inserts for the current Employee Handbook that advise that the unlawful rules have been rescinded, or (2) the language of lawful rules on adhesive backing that will cover or correct the unlawful rules, or (3) publish and distribute revised handbooks that do not contain the unlawful rules.

MACY'S, INC.
(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.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601
Boston, Massachusetts 02222–1072
Hours of Operation: 8:30 a.m. to 5 p.m.
617-565-6700.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-123640 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., 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, 617-565-6701.