

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

WEWORK COMPANIES INC.

and

TARA ZOUMER, an individual

Case 32-CA-173569

**WEWORK COMPANIES INC.'S RESPONSE TO SUPPLEMENTAL NOTICE
TO SHOW CAUSE AND TO THE GENERAL COUNSEL'S MOTION FOR
SUMMARY JUDGMENT**

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COMES NOW WeWork Companies, Inc. (“WeWork” or “the Company”), Respondent herein, and responds to the National Labor Relations Board’s (“the Board”) August 29, 2016 Order Correcting and Supplemental Notice to Show Cause¹ and the General Counsel’s August 9, 2016 Motion for Summary Judgment (the “General Counsel’s Motion” or the “8/9/16 GC Mot.”), as follows:

INTRODUCTION

As an initial matter, the Board should grant WeWork’s Motion for Summary Judgment for the reasons set forth in its August 9, 2016 Memorandum of Law in Support of its Motion for Summary Judgment (“WeWork’s Motion” or the “8/9/16 WeWork Motion”).² In addition, the Board should deny the General Counsel’s Motion and grant WeWork’s Motion for the following additional reasons:

1. *The EDRP Does Not Restrict WeWork Employees’ Right to Access the National Labor Relations Board.* WeWork’s Employment Dispute Resolution Program (“EDRP”) does not restrict access to the Board because it *clearly and explicitly* does not affect an employee’s ability to file charges before the National Labor Relations Board (“NLRB”). Contrary to the General Counsel’s argument, an employee could not reasonably interpret the EDRP as limiting his or her ability to bring a claim or charge before the NLRB.

¹ The Board originally issued an Order Transferring Proceeding to the Board and Notice to Show Cause on August 17, 2016 (the “Order”). The Order mistakenly failed to acknowledge WeWork’s Motion for Summary Judgment filed on August 9, 2016. As a result, the Board issued an Order Correcting and Supplementing Notice to Show Cause on August 29, 2016.

² Respondent does not repeat herein each and every argument set forth in WeWork’s Motion. Instead, in this Response, WeWork addresses certain arguments made by the General Counsel that were not fully addressed in WeWork’s Motion and otherwise refers to WeWork’s Motion when appropriate.

2. *The EDRP Does Not Make Arbitration Awards Confidential.* Contrary to the General Counsel’s argument, the EDRP’s provision on confidentiality does not make the arbitration award confidential because the confidentiality provision explicitly specifies those aspects of the arbitration that are confidential and the arbitration award is not mentioned at all in the provision.
3. *WeWork Has a Countervailing Interest in Maintaining the Confidentiality Provision in the EDRP.* WeWork has a strong countervailing interest in maintaining the confidentiality of arbitration, both to the benefit of the Company as well as its employees.
4. *The Definition of “Proprietary Information” in the Invention, Non-Disclosure and Non-Solicitation Agreement Does Not Restrict Employees’ Right to Discuss Compensation or Salary.* None of the cases that the General Counsel relies upon deals with definitions of confidential information that are similar to the definition of “Proprietary Information” in the Invention, Non-Disclosure and Non-Solicitation Agreement (“INNA”). Instead, the cases that the General Counsel relies upon explicitly forbid employees from discussing their compensation or salary. That is clearly not the case with respect to the INNA, which contains a definition of “Proprietary Information” that is intended to safeguard WeWork’s confidential business and financial information, not to restrict discussion of wages, salary or any other terms and conditions of employment.
5. *The Non-Disparagement Provision in the INNA Is Narrowly Tailored.* None of the cases that the General Counsel relies upon are similar to the non-disparagement provision in the INNA. Unlike the non-disparagement provisions

that the General Counsel relies upon, the provision in the INNA is limited to malicious statements made by employees, not any and all false statements. As a result, the provision in the INNA is lawful.

6. *WeWork Is Entitled to a Wright Line Defense.* WeWork's termination of the Charging Party was not an unfair labor practice because even if either the EDRP or the INNA were unlawful, which neither is, WeWork would nevertheless have terminated the Charging Party for refusing to agree to the other agreement. Thus, even if only one of WeWork's two independent reasons for terminating the Charging Party were lawful under the National Labor Relations Act ("NLRA"), her termination cannot violate Section 8(a)(1).

For the aforementioned reasons, as well as those set forth in WeWork's Motion, the Board should deny the General Counsel's Motion, and grant WeWork's Motion in its entirety.

ARGUMENT³

I. WeWork's Maintenance of the EDRP Does Not Violate Section 8(a)(1)

The General Counsel's Motion on the issue of whether WeWork's maintenance of the EDRP violates Section 8(a)(1) should be denied for the reasons set forth in WeWork's Motion. (*See* 8/9/16 WeWork Mot. at 9-20.) In addition, WeWork addresses below the General Counsel's incorrect argument that, despite the explicit language in the EDRP that the agreement does not preclude an employee from pursuing a claim or charge before the NLRB, an employee would still reasonably construe the EDRP as precluding or restricting access to the Board. (*See* 8/9/16 GC Mot. at 10, ¶ 13.)

³ Respondent respectfully refers the Board to WeWork's Motion for the Factual Background and Legal Standard to this dispute. (8/9/16 WeWork Mot. at 3-9.)

The General Counsel argues that the Board should grant summary judgment in its favor because “an employee could reasonably interpret the Arbitration Agreement to preclude or restrict access to the Board.” (*Id.* at 10, ¶ 8.) However, based on the plain language of the EDRP, it would be unreasonable for any WeWork employee to interpret the EDRP to restrict access to the Board. Relying primarily on *SolarCity* (*see id.* at 11-13, ¶ 8), the General Counsel argues that “in the absence of an explicit provision that informs employees that they have an unconditional right to file charges with the Board, employees would refrain from accessing the Board out of fear of running afoul of the employer’s overall policy.” *See SolarCity Corp.*, 363 NLRB No. 83 slip op. at 5 (2015). Yet WeWork has provided employees with *exactly* the kind of clear provision that the Board requires. Specifically, the EDRP explicitly provides that it “**does not affect** an employee’s right to file a charge with, provide information to, or participate in any proceeding initiated by a government agency, including, without limitation . . . the National Labor Relations Board.” (Ex. A to 8/9/16 WeWork Mot. (EDRP), § III (emphasis added).) This provision (the “NLRB carve-out provision”), clearly conveys to employees that they have an unconditional right to file charges with the Board.

The General Counsel tries to create an ambiguity in the EDRP where none exists by pointing to language in the first paragraph of the *same* section of the EDRP—*i.e.*, Section III, “The Types of Claims That Are Covered by the Program”—as the NLRB carve-out provision. Specifically, the General Counsel argues that the language in the first paragraph of Section III does not contain a carve-out for employee claims or charges brought before the NLRB and therefore the EDRP must be ambiguous. The General Counsel further argues that because the NLRB carve-out provision for charges brought before the NLRB is in a subsequent paragraph in the *same* section of the EDRP, the EDRP “creates an unlawful ambiguity” under *SolarCity*.

(8/9/16 GC Mot. at 12, ¶ 8.) But the language in the EDRP is clearly distinguishable from the language in *SolarCity*.

In *SolarCity*, while the arbitration agreement in question contained a carve-out for claims brought before the NLRB, that carve-out itself contained several caveats. Specifically, the arbitration agreement at issue in *SolarCity* states that:

[T]his Agreement does not prohibit me from pursuing . . . claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer related laws, ***but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement.*** Such permitted agency claims include filing a charge or complaint with . . . the National Labor Relations Board.

SolarCity Corp., 363 NLRB No. 83 at *6 (Dec. 22, 2015) (emphasis added).⁴

Unlike in *SolarCity*, there is nothing in the EDRP that would require “specialized legal knowledge to determine whether employees’ right to file Board charges is permitted or precluded.” *Id.*⁵ That is because the relevant language in the EDRP is without qualification. No reasonable layperson could read that the EDRP “does not affect” an employee’s right to file charges with the Board and conclude that he or she was precluded from filing charges with the Board.

In order to bolster its argument, the General Counsel claims that the NLRB carve-out provision for charges brought before the NLRB “***purportedly*** allow[s] for claims with the

⁴ Similarly, in *Securitas Security Services USA, Inc.*, the other case that the General Counsel relies upon, there was language similar to that in *SolarCity* that the Board determined could be confusing to an employee. 363 NLRB No. 182, slip op. at 4 (2016) (“This argument disregards the confusing language in the Agreements stating that the filing of Board charges is permitted ‘only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate.’”).

⁵ To the extent that either *SolarCity* or *Securitas Security Services, USA* is inconsistent with finding that the EDRP is lawful, they should be overruled as failing to effectuate the purposes of the NLRA.

NLRB.” (8/9/16 GC Mot. at 12, ¶ 8 (emphasis added).) There is nothing “purported,” however about WeWork employees’ rights to bring claims before the NLRB. Again, the sentence could not be clearer. It provides that the EDRP “*does not affect* an employee’s right to file a charge with, provide information to, or participate in any proceeding initiated by a government agency, including, without limitation . . . the National Labor Relations Board.” (Ex. A to 8/9/16 WeWork Mot. (EDRP), § III (emphasis added).) There is no limitation or qualification on that right in the EDRP.

Because the EDRP unambiguously permits access to the Board, the Board should deny the General Counsel’s Motion and grant WeWork’s Motion on this issue.

II. The Confidentiality Rule in the EDRP Is Lawful.

The General Counsel’s Motion on the issue of whether WeWork’s rule regarding “Confidentiality” (the “Confidentiality Rule”) in the EDRP violates Section 8(a)(1) should be denied for the reasons set forth in WeWork’s Motion. (*See* 8/9/16 WeWork Mot. at 20-23.) And as set forth herein, the Confidentiality Rule is lawful for at least two additional reasons.

First, the General Counsel’s contention that the Confidentiality Rule restricts employees from publicly disclosing the terms of an arbitration award is incorrect. In fact, the Confidentiality Rule does not mention the arbitration award as falling within the scope of the provision. The Confidentiality Rules provides:

Given the nature of the subject matter, confidentiality is a central component of this Program. Except as prohibited by law, the *arbitration proceedings and the information exchanged or submitted in such proceedings* shall be treated in a strictly confidential manner and not disclosed to third parties. The parties agree to submit any disputes concerning confidentiality that cannot be resolved to the arbitrator prior to making any disclosure.

(Ex. A to 8/9/16 WeWork Mot. (EDRP), § VI, at 5 (emphasis added).)

While the Confidentiality Rule makes confidential the arbitration proceedings and the information exchanged or submitted in such proceedings, it does not make confidential the award itself. In fact, by making clear which aspects of the arbitration are confidential while at the same time omitting any mention of the arbitration award itself, the Confidentiality Rule should be understood to permit the disclosure of the arbitration award. The interpretive canon of *expressio unius est exclusio alterius* applies when a contract or statute provides a series of two or more items that “are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (internal citations omitted). That canon applies in this case to the Confidentiality Rule, which lists information exchanged between the parties, information submitted to the arbitrator by the parties, and the proceedings themselves as confidential, but omits any mention of any awards issued by an arbitrator. Thus, disclosure of the arbitration award itself is not confidential based on its exclusion from the Confidentiality Rule.

Second, WeWork has a strong “countervailing interest” (*see* 8/9/16 GC Mot. at 14) in making the arbitration proceedings, and the information exchanged or submitted during such proceedings, confidential. Both WeWork and its employees benefit from the confidentiality of arbitration. For employees, many of the disputes that may arise between employees and WeWork may concern sensitive subjects that employees wish to keep confidential. The confidentiality of the proceedings may encourage employees to bring claims that they would otherwise not bring due to a concern for unwanted publicity. Furthermore, employees who bring claims under the EDRP may pursue claims against WeWork without unwanted scrutiny from other employees. For WeWork, the confidentiality of the EDRP enables the Company to resolve disputes while keeping the workplace focused on the needs of its Members. Unlike other

companies, WeWork’s Members are a constant part of the workplace environment.⁶ In order for WeWork to deliver its services effectively—a community work environment focused on the needs of its Members—it is important to keep workplace disputes out of the public spaces where Members are present. Consequently, WeWork’s strong countervailing interest in continuing to provide its services to Members justifies the imposition of the Confidentiality Rule in the EDRP.⁷

III. The Definition of “Proprietary Information” in the Invention, Non-Disclosure and Non-Solicitation Agreement Is Lawful.

The General Counsel’s Motion on the issue of whether the inclusion of “personnel data” as part of the definition of Proprietary Information in the INNA violates Section 8(a)(1) should be denied for the reasons set forth in WeWork’s Motion. (*See* 8/9/16 WeWork Mot. at 23-26.)

In addition, the cases that the General Counsel relies upon in its Motion are inapposite. For example, in *Hyundai America Shipping Agency Inc.*, 357 NLRB No. 80, 2011 WL 4830117, slip. op. at 21 (2011), the term “personnel data” was not even at issue. In *Alternative Entertainment, Inc.*, 363 NLRB No. 131 (2016), the Board found a rule that prohibited employees from disclosing “any compensation or employee salary information” and “personnel

⁶ For example, and as set forth in more detail in WeWork’s May 11, 2016 Position Statement, WeWork’s Community team is continuously interacting with WeWork’s Members. Many of those Community team employees sit at a front desk and act as the face of WeWork, tasked with addressing the concerns and issues of the Company’s Members. Further, the front desks are often constructed with an open design, which encourages members to walk up to the front desk and chat and ask questions of the Community team. (*See, e.g.*, 5/11/16 WeWork Position Statement, at 10.)

⁷ As set forth in WeWork’s Motion, to the extent that the NLRB’s recent decisions in *Prof. Janitorial Serv. of Houston*, 363 NLRB No. 35, 2015 WL 7568340, at *1 n.3 (Nov. 24, 2015), *Jack in the Box, Inc.*, 364 NLRB No. 12, 2016 WL 3014419, at *1 (May 24, 2016), and *Calif. Commerce Club, Inc.*, 364 NLRB No. 31, 2016 WL 3361191, at *1 (June 16, 2016), mandate the conclusion that the EDRP’s Confidentiality Rule violates Section 8(a)(1), the NLRB should overturn them because they constitute a generalized attack on the character of arbitration itself that runs afoul of the Federal Arbitration Act. (*See* 8/9/16 WeWork Mot. at 20-23.)

data (including salary information),” unlawful. Based on a plain reading of the rule in *Alternative Entertainment*, it is clear that it was designed to prohibit employees from discussing compensation or salary. *Id.* (“The specific behavior at issue prohibits the ‘[u]nauthorized disclosure of business secrets or confidential business or customer information, including any compensation or employee salary information.’”). That is clearly not the case here where the definition of Proprietary Information does not mention employee compensation or salary, is focused on safeguarding information related to WeWork’s “business or financial affairs,” and “personnel data” is only part of an illustrative list of items that *may* be considered Proprietary Information. (8/9/16 WeWork Mot. at 23-26.)

Finally, in *Quicken Loans*, the relevant provision at issue “define[d] proprietary and confidential information as ‘nonpublic information relating to . . . the Company’s business, personnel . . . all personnel lists, personal information of co-workers . . . personnel information such as home phone numbers, cell phone numbers, addresses and email addresses.’” *Quicken Loans, Inc.*, 359 NLRB No. 141, 2013 WL 3168731, at *7 (June 21, 2013), *set aside by* 2014 WL 2929767 (NLRB June 27, 2014), *rationale adopted by* 361 NLRB No. 94, 2014 WL 5590503 (NLRB Nov. 3, 2014). There, the provision at issue directly made personnel lists and personnel information confidential. Section 2 of the INNA does not. *Cf. Lily Transp. Corp.*, 362 NLRB No. 54, 2015 WL 1439930, at *1 n.3 (Mar. 30, 2015) (“[In *Mediaone*], the nondisclosure provision at issue targeted ‘Proprietary Information,’ and expressly referenced ‘employee information’ only as a component of ‘[i]ntellectual property.’ Based on those limitations, the Board found that employees would reasonably understand that the provision concerned

disclosure of proprietary business information, not employees' terms and conditions of employment."').⁸

Thus, the cases that the General Counsel relies upon in support of its position that the definition of Proprietary Information in the INNA is unlawful are all inapposite.

IV. The Non-Disparagement Provision in the Invention, Non-Disclosure and Non-Solicitation Agreement Is Lawful.

The General Counsel's Motion on the issue of whether the non-disparagement provision in the INNA violates Section 8(a)(1) should be denied for the reasons set forth in WeWork's Motion. (*See* 8/9/16 WeWork Mot. at 26-29.)

In addition, the cases that the General Counsel relies upon in support of its Motion are inapposite. In *Casino San Pablo*, the Board found the non-disparagement provision at issue to be overbroad because it prohibited the making of false statements, as opposed to just maliciously false statements. 361 NLRB No. 148, at *5 (2014) (prohibiting "*false, fraudulent or malicious statements* to or about a Team Member, a guest or San Pablo Lytton Casino") (emphasis in original); *id.* ("The Board [in *Lafayette Park Hotel*] reasoned that prohibiting employees from making merely false statements, as opposed to maliciously false statements, was overbroad and had the tendency to chill protected activity."). Similarly, in *Quicken Loans*, the non-disparagement provision was not limited in any way by an element of malice. *Quicken Loans, Inc.*, 195 L.R.R.M. (BNA) ¶ 1200, 2013 WL 100863 (N.L.R.B. Div. of Judges Jan. 8, 2013) ("You agree that you will not (nor will you cause or cooperate with others to) *publicly criticize, ridicule, disparage or defame* the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image (including,

⁸ As set forth in WeWork's Motion, the legality of the definition of Proprietary Information in the INNA is controlled by the Board's precedent in *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 278-79 (2003). (*See* 8/9/16 WeWork Mot. at 23-24.)

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 the use of a pseudonym.”) (emphasis added).

Section 9 of the INNA, in contrast, is narrower than the provisions at issue in *Casino San Pablo* and *Quicken Loans* in that it has an element of malice already embedded in it because it prohibits “defamatory and disparaging remarks,” not simply “false” remarks. (Ex. B to 8/9/16 WeWork Mot. (INNA), § 9 (“The Employee agrees and covenants that the Employee will not at any time, during or after the Employee’s Service, make, publish or communicate, or encourage others to make, publish, or communicate, to any person or entity or in any public forum *any defamatory or disparaging remarks, comments or statements* concerning WeWork or WeWork’s affiliates, any of their respective businesses, products, services or activities, or any of their respective current or former officers, directors, managers, employees or agents.”) (emphasis added).) Furthermore, neither the provision in *Casino San Pablo* nor the provision in *Quicken Loans* could be understood within a broader framework as is the case here where WeWork put in place the INNA to protect its proprietary and confidential information. (8/9/16 WeWork Mot. at 28-29.)

V. WeWork’s Termination of the Charging Party Was Lawful Even If The Board Determines That Her Termination Was Motivated in Part By Her Refusal to Sign An Unlawful Agreement.

As explained in greater detail in WeWork’s Motion, neither the INNA nor the EDRP violates Section 8(a)(1). However, even if the Board were to find one of the agreements unlawful, which it should not, it should still grant summary judgment in favor of WeWork on the issue of whether the termination of the Charging Party was an unfair labor practice. That is because WeWork would have taken the same action with respect to the Charging Party even if she had refused to agree to only one of the agreements in question. Thus, because the “lawful

reasons relied upon by [WeWork] would have resulted in the same discipline or discharge decision *even assuming the existence of unlawful motivation,*” summary judgment should be granted in favor of WeWork. *See Dish Network, LLC*, 363 NLRB No. 141 (Mar. 3, 2016) (Member Miscimarra concurring) (emphasis added); *see also Wright Line, Inc.*, 251 NLRB No. 150, 251 NLRB 1083, 1089 (Aug. 27, 1980) (“Once [a *prima facie* showing of unlawful intent] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.”).

CONCLUSION

For the foregoing reasons, as well as those set forth in WeWork’s Motion, Respondent respectfully requests that the Board deny the General Counsel’s Motion in its entirety. Respondent further requests that WeWork’s Motion be granted in its entirety.

Dated: September 12, 2016

Respectfully Submitted,



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BEFORE THE NATIONAL LABOR RELATIONS BOARD
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TARA ZOUMER, an individual

Case 32-CA-173569

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of WeWork Companies Inc.'s Response to Supplemental Notice to Show Cause and to the General Counsel's Motion for Summary Judgment has been served upon the following using the Agency's E-Filing Program:

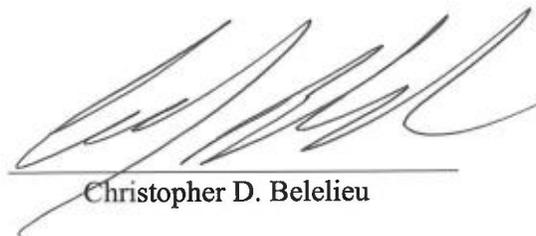
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The undersigned further certifies that a true and correct copy of the above-referenced document was served by email on September 12, 2016 on the following:

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