

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

**QUICKEN LOANS, INC.**

**and**

**Case 28-CA-075857**

**LYDIA E. GARZA, an Individual**

**ACTING GENERAL COUNSEL'S BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

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**I. INTRODUCTION**

After Lydia Garza quit her job as a mortgage banker with Respondent Quicken Loans, Inc., she went to work for a competitor, Loan Depot. Respondent responded swiftly by filing a civil lawsuit against Garza and five other former coworkers for alleged violations of their Mortgage Banker Employment Agreements. Key among the provisions in those Agreements, which are required to be executed by thousands of Respondent’s employees across the country, are confidentiality and non-disparagement provisions restricting employees in the exercise of their Section 7 rights.

**II. FACTUAL BACKGROUND**

**A. Respondent’s Business**

Quicken Loans, Inc. (Respondent) is a mortgage loan provider with headquarters in Detroit, Michigan and an office and place of business in Scottsdale, Arizona.<sup>1</sup> (Tr. 9-10) Respondent employs approximately 1,700 mortgage bankers across the country, whose job duties include processing loan applications and negotiating rates and terms on loans to be

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<sup>1</sup> “Tr. \_\_\_” refers to pages of the transcript from the hearing held on November 13, 2012. “GC \_\_\_” refers to exhibits introduced by the Acting General Counsel at the hearing. “R \_\_\_” refers to exhibits introduced by Respondent at the hearing.

offered by Respondent. (Tr. 12, 36) Respondent requires as a condition of employment that all of its mortgage bankers execute a Mortgage Banker Employment Agreement (Agreement), the most recent version of which is identical to the Agreement executed by the Charging Party, Lydia E. Garza (Garza), in 2007. (Tr. 10-12, 43; GC 2)

**B. Respondent's Unlawful Rules**

The following provisions maintained in Respondent's Agreement are alleged to violate Section 8(a)(1) of the Act:

**Section D: Proprietary/Confidential Information**

2. You agree that:

- (a) You shall hold and maintain all Proprietary/Confidential Information in the strictest of confidence and that you shall preserve and protect the confidentiality, privacy and secrecy of all Proprietary/Confidential Information;
- (b) You shall not disclose, reveal or expose any Proprietary/Confidential Information to any person, business or entity . . .

\* \* \*

- (e) You shall take all necessary precautions to keep Proprietary/Confidential Information secret, private, concealed and protected from disclosure, and shall follow and implement the Company's privacy and security procedures . . .

**Attachment A**

- A. **"Proprietary/Confidential Information"** – For purposes of this Agreement, "Proprietary/Confidential Information" means:
  - (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 . . .

“Proprietary/Confidential Information” includes, but is not limited to, the following categories of information, irrespective of the medium in which it is stored . . . :

\* \* \*

Personnel Information including, but not limited to, all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses;

Personal Information Pertaining to Company Executives and Officers including, but not limited to, personal and family information, personal financial information, investment and investment opportunities, background information, personal activities, information pertaining to the work and non-work schedules, contacts, meetings, meeting attendees, travel, home phone numbers, cell phone numbers, addresses, and email addresses;

\* \* \*

## **Section K: Additional Terms and Requirements**

2. **Non-disparagement.** The Company has internal procedures for complaints and disputes to be addressed and resolved. 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, 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). You agree to provide full cooperation and assistance in assisting the Company to investigate such statements if the Company reasonably believes that you are [the] source of the statements. The foregoing does not apply to statutorily privileged statements made to governmental or law enforcement agencies.

It is further alleged that Respondent violated Section 8(a)(1) of the Act by reminding Garza, in a letter dated October 25, 2011, of her “continuing obligation to keep secret all Proprietary/Confidential Information.” (Tr. 16-17; GC 3)

### **C. Garza’s Employment**

Garza worked as a mortgage banker for Respondent for approximately five years, beginning in about March 2006. (Tr. 14) As a condition of her employment, Garza was required to execute a Mortgage Banker Employment Agreement, which contained the unlawful provisions described above. (GC 2)

Garza left Respondent’s employment in approximately October 2011, after which she received a letter from Patty Jones, Respondent’s Director for Team Relations – Human Resources, reminding Garza of her continuing obligations under the Agreement, including her obligation to keep secret Respondent’s “Proprietary/Confidential Information,” which is defined in the Agreement as set forth above. (GC 3) After Garza began working for Respondent’s competitor, Loan Depot, in October 2011, Respondent filed a lawsuit against Garza and five other employees for alleged violations of their respective Agreements. (Tr. 13-14, 18-19)

## **III. ARGUMENT**

### **A. Respondent Violated Section 8(a)(1) of the Act by Promulgating and Maintaining an Overly-Broad and Discriminatory Provision in its Mortgage Banker Employment Agreement Regarding Proprietary/Confidential Information**

In determining whether the maintenance of specific work rules violates Section 8(a)(1) of the Act, “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). Where the rules are likely to have a chilling

effect on Section 7 rights, “the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.” *Id.* See also *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976).

The Board applies the same analysis set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to an employer-mandated employment agreement that it applies to other unilaterally-implemented workplace rules alleged to violate Section 8(a)(1). See, e.g., *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 4 (Jan. 3, 2012) (applying the *Lutheran Heritage Village-Livonia* test to employer’s mandatory arbitration agreement imposed as a condition of employment); *NLS Group*, 352 NLRB 744, 745 (2008) (finding a confidentiality provision in an employment agreement unlawful under *Lutheran Heritage Village-Livonia*). Under that analysis, the Board utilizes a two-step inquiry to determine whether an employer has unlawfully maintained a rule that would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village–Livonia*, 343 NLRB at 646-47. First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. Second, if the rule does not explicitly restrict protected activities, it will nevertheless violate Section 8(a)(1) upon a showing that: “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647. The Board will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity. *Id.* Rules that are ambiguous regarding their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that they do not restrict their Section 7 rights, are unlawful. See *University Medical Center*, 335 NLRB 1318, 1320-22 (2001) (work rule that prohibited “disrespectful conduct” towards supervisors and other

individuals unlawful because it included “no ... limiting language which removes [the rule’s] ambiguity and limits its broad scope”), enforcement denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003). In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, so that they would not reasonably be construed to cover protected activity, are not unlawful. *See Tradesmen International*, 338 NLRB 460, 460-61 (2002) (prohibition against “disloyal, disruptive, competitive, or damaging” conduct would not be reasonably construed to cover protected activity, given the rule’s focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

Section D of the Agreement at issue here requires that employees maintain all “Proprietary/Confidential Information” in the strictest of confidence, prohibits disclosure of such information, and mandates that employees take all necessary precautions to keep such information from disclosure. Attachment A to the agreement defines “Proprietary/Confidential Information” in relevant part as follows:

(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 . . .

“Proprietary/Confidential Information” includes, but is not limited to, the following categories of information, irrespective of the medium in which it is stored . . . :

\* \* \*

Personnel Information including, but not limited to, all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses, and email addresses;

Personal Information Pertaining to Company Executives and Officers including, but not limited to, personal and family information, personal financial information, investment and investment opportunities, background information, personal activities, information pertaining to the work and non-work schedules, contacts, meetings, meeting attendees, travel, home phone numbers, cell phone numbers, addresses, and email addresses;

\* \* \*

Employees would reasonably construe these provisions to preclude protected activity. It is well established that employees have a Section 7 right to discuss their wages and other terms and conditions of employment. *See, e.g., Double Eagle Hotel & Casino*, 341 NLRB at 113-14 (confidentiality rule explicitly restricted discussion of disciplinary information, grievance/complaint information, performance evaluations, salary information, and termination data); *Cintas Corp.*, 344 NLRB 943, 943 (2005) (confidentiality rule that prohibited the release of any information regarding employees would reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment), *enfd.* 482 F.3d 463 (D.C. Cir. 2007); *Iris USA, Inc.*, 336 NLRB 1013, 1013 n.1 (2001) (handbook rule instructing employees to keep information about employees strictly confidential); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3, 291-92 (1999) (rule prohibiting employees from revealing confidential information about customers, fellow employees, or hotel business); *Sharp v. Karonis Parts*, 927 F. Supp. 1208 (D. Minn. 1996) (employer enjoined under Section 10(j) from maintaining a handbook rule prohibiting employees from discussing wages with each other).

A rule such as the one in Section D of Respondent's Agreement either expressly restricts or would reasonably be interpreted to restrict employees from sharing information about salaries and other terms and conditions of employment with each other and with outside

parties, such as a union. In addition, this rule would reasonably be construed to restrict protected organizing activity because it precludes employees from sharing contact information with each other and with third parties, such as a union. Furthermore, the provision restricting disclosure of management's personal information would reasonably be construed to restrict protected employee discussion of issues that directly affect the employees' own terms and conditions, such as management compensation.

At hearing, Respondent relied on the Board's decision in *Safeway, Inc.*, 338 NLRB 525 (2002), to support its argument that the rules at issue in this case do not violate the Act because there is no evidence that Respondent enforced the rule against its employees or disciplined employees for violating the rules.<sup>2</sup> (Tr. 31, 44-45) However, the Board's decision in *Safeway* does not support Respondent's position and is inapposite to this case. Although Respondent argued at hearing that the Board, in *Safeway*, "relied on evidence that there had been no enforcement of the provision in finding the policy was lawful" (Tr. 45), the Board in that case made no such finding. *Safeway* involved a decertification election where the Board reviewed and considered objections submitted by the union following its election loss. One of the union's objections was based on a confidentiality rule maintained by the employer in its General Working Rules and Regulations and alleged by the union to be overly-broad. *Id.* at 525. The hearing officer concluded that the rule was overbroad and upheld the objection on the grounds that the maintenance of the rule "could have affected the election results." *Id.* The majority of the Board, however, disagreed. Notably, the Board found it "unnecessary to pass on the hearing officer's finding that the rule was overbroad." *Id.* at 526 n. 3. Instead, the

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<sup>2</sup> Although Respondent attempted to introduce evidence at hearing that Respondent had not disciplined employees for violating the rules at issue, Judge Biblowitz sustained the Acting General Counsel's objections and found such evidence to be irrelevant to the question of whether the rules, on their face, violate the Act. (Tr. 31-32, 44)

Board concluded that, even assuming the rule was overbroad, its maintenance by the employer “could not reasonably have affected the results of the election” in part because there was no evidence of enforcement of the rule. *Id.* at 526.

In *Safeway*, the Board’s inquiry into the employer’s enforcement of the rule was relevant only to the question of whether the rule could have affected the outcome of the election, not to the question of whether the rule, on its face, was unlawful. Accordingly, the Board’s holding in *Safeway* has no application to the facts of this case. Section D of Respondent’s Agreement, as set forth above in its definition of “Proprietary/ Confidential Information,” violates Section 8(a)(1) of the Act, as does Respondent’s reaffirmation of the rule, by its written letter to Garza on October 25, 2011, reminding Garza of her “continuing obligation” under the offending provision of the Agreement.

**B. Respondent Violated Section 8(a)(1) of the Act by Promulgating and Maintaining an Overly-Broad and Discriminatory Provision in its Mortgage Banker Employment Agreement Regarding Non-Disparagement**

Section K of Respondent’s Agreement contains the following “Non-Disparagement” clause:

The Company has internal procedures for complaints and disputes to be addressed and resolved. 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, 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). You agree to provide full cooperation and assistance in assisting the Company to investigate such statements if the Company reasonably believes that you are [the] source of the statements. The foregoing does not apply to statutorily privileged statements made to governmental or law enforcement agencies.

Employees would reasonably interpret this clause to prohibit protected complaints about working conditions and protected criticism of Respondent’s labor policies or treatment of employees. *See, e.g., Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (unlawful rule against “derogatory attacks”), *enfd.* in relevant part, 916 F.2d 932 (4<sup>th</sup> Cir. 1990); *Cincinnati Suburban Press*, 289 NLRB 966, 966 n.2, 975 (1988) (rules prohibiting “false, vicious, or malicious” statements concerning any employee, supervisor, the company, or its product found to be unlawful, with Board noting that a narrowly tailored rule necessary to the credibility of the institution or the quality of its product would be permissible). Moreover, the requirement that employees participate in investigations of statements violative of this clause also tends to chill the exercise of Section 7 rights by requiring employees to respond to employer interrogation regarding their protected activities. *Cf. Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348-49 (2000) (maintenance of rule compelling employees to cooperate in the investigation of any violation of laws or government regulations, which would encompass investigations of unfair labor practice charges, interferes with Section 7 rights, which include protection in seeking vindication of those rights), *enfd.* 297 F.3d 468 (6<sup>th</sup> Cir. 2002). Accordingly, Section K of Respondent’s Agreement regarding “Non-Disparagement” is overly-broad and violates Section 8(a)(1) of the Act.

#### **IV. CONCLUSION**

Based upon the foregoing and the record evidence considered as a whole, the Acting General Counsel respectfully submits that Respondent has violated Section 8(a)(1) of the Act as alleged in the Complaint, and that the ALJ should so find and issue a recommended Order requiring Respondent to cease and desist from such unlawful conduct; rescind its unlawful rules described above; post an appropriate Notice to Employees, a proposed copy of which is

attached; and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

Dated at Phoenix, Arizona, this 11<sup>th</sup> day of December 2012.

/s/ Eva Shih Herrera

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**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** do anything that interferes with these rights. More particularly:

**WE WILL NOT** maintain the following provisions in our Mortgage Banker Employment Agreement, or anywhere else:

**Section D: Proprietary/Confidential Information**

2. You agree that:
  - (a) You shall hold and maintain all Proprietary/Confidential Information in the strictest of confidence and that you shall preserve and protect the confidentiality, privacy and secrecy of all Proprietary/Confidential Information;
  - (b) You shall not disclose, reveal or expose any Proprietary/Confidential Information to any person, business or entity . . .

\* \* \*

  - (e) You shall take all necessary precautions to keep Proprietary/Confidential Information secret, private, concealed and protected from disclosure, and shall follow and implement the Company's privacy and security procedures . . .

**Attachment A**

- B. "Proprietary/Confidential Information"** – For purposes of this Agreement, "Proprietary/Confidential Information" means: (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 . . .

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to statutorily privileged statements made to governmental or law enforcement agencies.

**WE WILL** immediately rescind, revise, and revoke the provisions contained in our Mortgage Banker Employment Agreement, which are set forth above, and **WE WILL** furnish you with a revised Mortgage Banker Employment Agreement that does not contain these provisions.

**QUICKEN LOANS, INC.**  
(Employer)

Dated: \_\_\_\_\_  
(Representative)

By: \_\_\_\_\_  
(Title)

*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy 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 or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).*

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- **Telephone:** (602) 640-2160
- **Hours of Operation:** 8:15 a.m. to 4:45 p.m.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE in QUICKEN LOANS, INC., in Case 28-CA-075857, was served by E-Gov, E-Filing, and E-Mail on this 11<sup>th</sup> day of December 2012, on the following:

***Via E-Gov, E-Filing:***

Honorable Joel P. Biblowitz  
Associate Chief Administrative Law Judge  
National Labor Relations Board  
Administrative Law Judge Division  
120 West 45<sup>th</sup> Street, 11<sup>th</sup> Floor  
New York, NY 10036

***Via E-Mail:***

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