

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

QUICKEN LOANS INC.,

Respondent,

Case 28-CA-075857

and

LYDIA E. GARZA, an individual,

Charging Party.

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**RESPONDENT QUICKEN LOANS INC.'S BRIEF IN SUPPORT OF  
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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## I. INTRODUCTION

Administrative Law Judge Joel P. Biblowitz (the “ALJ”) erroneously found that the “Proprietary/Confidential Information” and “Non-disparagement” provisions contained in Quicken Loans Inc.’s Mortgage Banker Employment Agreement (“MBEA”) violate Section 8(a)(1) of the National Labor Relations Act (the “Act”). The ALJ misapplied and otherwise disregarded Board and other precedent by failing to consider the context of the disputed provisions, improperly reading handpicked phrases in isolation, and simply presuming – without any supporting evidence – that employees could be unlawfully restricted in the exercise of Section 7 rights.<sup>1</sup> To justify a strained interpretation of the MBEA’s provisions, the ALJ further wrongly disregarded record evidence that refutes any claim of illegality and improperly precluded Quicken Loans from offering other evidence supporting its defenses. Simply put, the ALJ incorrectly found that the Acting General Counsel (the “AGC”) satisfied its burden of proof. The National Labor Relations Board (the “Board”) should not adopt the Decision and recommendations of the ALJ, but rather dismiss the complaint in its entirety.

## II. STATEMENT OF THE CASE

### A. Quicken Loans and its Mortgage Bankers

Quicken Loans is a Michigan-based mortgage banking financial institution engaged in originating, closing, funding, servicing and marketing residential mortgage loans and consumer loans. *See* AGCX 2, Section B.1. Quicken Loans services clients in all 50 states. Tr. 34. Quicken Loans employs Mortgage Bankers to provide financial services to its clients and prospective clients throughout the country. Tr. 34-37.

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<sup>1</sup> Citation to “ALJD \_\_\_” refers to the page(s) and line number(s) of the ALJ’s Decision dated January 8, 2013. Citation to “Tr. \_\_\_” refers to the page(s) of the transcript from the hearing in this matter conducted on November 13, 2012. Citation to “AGCX \_\_\_” refers to exhibits introduced by Acting General Counsel at the November 13, 2012 hearing. Citation to “QLX \_\_\_” refers to exhibits introduced by Quicken Loans at the November 13, 2012 hearing.

The identities of, and specific contact and other information for, all Quicken Loans Mortgage Bankers are publicly available. Tr. 39-41. The general public is provided free of charge access to such information through the fully searchable website hosted by the National Mortgage Licensing System & Registry (“NMLS”). Tr. 39-41; *see also* NMLS Consumer Access, <http://www.nmlsconsumeraccess.org> (last visited Feb. 18, 2013). Further, the identities of, and contact information for, Quicken Loans Mortgage Bankers is available to all employees company-wide through the Quicken Loans’ intranet website <http://rockworld>. Tr. 41-42.

**B. Mortgage Banker Recruitment and Compensation**

The ALJ erroneously precluded Quicken Loans from offering evidence at the hearing regarding its recruitment efforts and methods. Tr. 36-37. Had such evidence been permitted, Quicken Loans would have demonstrated that in effort to attract qualified candidates for employment, Quicken Loans’ website – [www.quickenloans.com](http://www.quickenloans.com) – which is publicly accessible, contains detailed job postings containing, and other extensive information concerning, Mortgage Banker pay, benefits, working conditions and responsibilities. *See* Quicken Loans Careers, <http://quickenloanscareers.com> (last visited Feb. 18, 2013). The following are some examples of the specific information Quicken Loans freely discloses to the general public:

- Detailed description of Mortgage Banker job duties, responsibilities and expectations;
- Mortgage Bankers earn a base salary plus incentive pay that averages \$45,000-\$55,000 per year;
- Mortgage Bankers are provided with intense job training;
- Mortgage Bankers are provided an opportunity to participate in personal development programs;
- Mortgage Bankers have opportunities to receive and/or participate in incentives, rewards, and contests;
- Detailed descriptions of the benefits Mortgage Bankers receive, including, without limitation:
  - (1) medical coverage with no need for referrals through a PPO or an HSA from either Blue Cross Blue Shield of Michigan or Medical Mutual of Ohio;
  - (2) minimal per-paycheck employee contribution for medical coverage;
  - (3) limited out-of-pocket medical expenses and low co-pays and deductibles;

- (4) dental coverage through MetLife Dental Plan that allows two cleanings, x-rays and exams each year at no cost and additional coverage up to \$1,500 per year;
- (5) orthodontic coverage up to \$2,000;
- (6) vision coverage through VSP Vision Insurance with annual eye examination for \$10 a year and an allowance for frames, lenses or contacts;
- (7) short-term and long-term disability insurance which is 100% paid for by the company;
- (8) basic life insurance which is 100% paid for by the company;
- (9) flexible spending accounts;
- (10) 401K plan (with up to \$2,500 employer match) through Fidelity Investments offering traditional and Roth options with 35 different investment options (including the Fidelity Freedom Funds);
- (11) tuition assistance up to \$5,000 per year for full-time employees and \$2,500 per year for part-time employees;
- (12) 11 paid holidays per calendar year;
- (13) 2 weeks of vacation per year;
- (14) paid time off to perform volunteer work;
- (15) family of company and other discounts;
- (16) free parking and snacks, on-site childcare; and
- (17) free educational seminars.

*See* Quicken Loans Careers – Benefit Plans, <http://quickenloanscareers.com/benefits/benefit-plans> (last visited Feb. 18, 2013); Quicken Loans Careers – Perks, <http://quickenloanscareers.com/benefits/perks> (last visited Feb. 18, 2013) Quicken Loans Careers – Company Events, <http://quickenloanscareers.com/benefits/companyevents> (last visited Feb. 18, 2013); Engineered to Amaze – Quicken Loans Careers, <http://www.quickenloanscareers.com/web/ApplyNow.aspx?RefID=50232> (last visited Feb. 18, 2013).

The ALJ also prevented Quicken Loans from fully eliciting testimony at the hearing regarding the various types of information available to all employees company-wide through the <http://rockworld>. Tr. 42-43. Nevertheless, the record evidence demonstrates that Quicken Loans’ Mortgage Banker Compensation Plan (“Compensation Plan”), which details Mortgage Banker incentive pay, is available on <http://rockworld> and may be accessed by every company employee (not just Mortgage Bankers). *See* AGCX 2, Section C.8. (providing that incentive pay

is earned pursuant to the Compensation Plan); *see also* AGCX 2, Section C.9. (providing that the Compensation Plan is available on <http://rockworld>). Similarly, Quicken Loans' Mortgage Banker Duties and Responsibilities and Company Expectations and Values document ("Mortgage Banker Duties document") and Do The Right Thing policy, which detail the essential duties, standards, responsibilities and expectations for/of Mortgage Bankers, also are available on <http://rockworld> and may be accessed by every company employee (not just Mortgage Bankers). *See* AGCX 2, Section C.2; *see also* AGCX 2, Sections C.8. and C.9. (providing that the Mortgage Banker Duties document and Do The Right Thing policy are available on <http://rockworld>).

Simply put, Quicken Loans is an open book when it comes to Mortgage Banker pay, benefits, working conditions, responsibilities and contact information.

**C. Mortgage Bankers Are Provided With Extensive Training and Subject to Stringent Licensing Requirements**

Quicken Loans invests substantial time and resources educating and training each of its Mortgage Bankers to provide effective financial services advice and consultation. AGCX 2, Section B.3; *see also* Tr. 37-39. The initial cost to Quicken Loans to develop employees into licensed Mortgage Bankers is approximately \$25,000.00 per Mortgage Banker. Tr. 39.

Quicken Loans requires all Mortgage Bankers to complete its in-depth, high-level and comprehensive classroom-style Banker Greatness Training ("BGT") program when they begin their employment. Tr. 37.<sup>2</sup> BGT covers all aspects of the complex loan origination process at Quicken Loans. *Id.* In addition to BGT, Quicken Loans provides Blueprint, which is additional training designed to enhance a Mortgage Banker's productivity in providing financial services to

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<sup>2</sup> In connection with the hiring process, Mortgage Bankers agree that Quicken Loans may conduct thorough background checks, including by obtaining information concerning financial history, credit worthiness, and credit reports. Tr. 39.

clients and prospective clients over the telephone. Tr. 37-39. Separate and apart from the classroom-style training, Quicken Loans also has developed proprietary training materials and practice tests, and provides these to the Mortgage Bankers to prepare them for federal and state licensure examinations. Tr. 37-39. The Mortgage Bankers take nine federal and state examinations while employed at Quicken Loans to obtain the requisite licenses to perform their duties. Tr. 37-39.<sup>3</sup>

**D. Quicken Loans Mortgage Bankers Duties and Responsibilities**

As detailed in the Mortgage Banker Duties document, qualified and licensed Mortgage Bankers are responsible for conducting personalized and thorough consultative interviews of each client. AGCX 2, Section C.2. Mortgage Bankers must gather and analyze each client's personal and financial information, income, employment, assets, investments, debts, unique circumstances, individual objectives, goals, and needs. AGCX 2, Section C.2, Tr. 35-36. Mortgage Bankers also must consider a broad range of loan programs and determine the most appropriate programs based on the client's objectives and circumstances. AGCX 2, Section C.2, Tr. 35-36.

**E. Quicken Loans Provides its Mortgage Bankers With Access to Confidential and Proprietary Information and Relationships with its Clients and Prospective Clients**

The mortgage business is highly competitive and a company's competitive advantage depends on its ability to obtain, maintain and protect its proprietary and confidential information. AGCX 2, Sections B.3. and D. In addition to BGT, Quicken Loans has developed, at considerable time and expense, a comprehensive marketing system to obtain clients, client inquiries, leads and referrals. AGCX 2, Sections H.2. and I.1; Tr. 35-36. This system includes

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<sup>3</sup> Mortgage Bankers must be intimately familiar with numerous statutes and regulations. Some examples include fair credit reporting laws, RESPA (restricting financial services and real estate professionals exchange of money), TILA (requiring disclosure of accurate information), the Gramm-Leach-Bliley Act (requiring, among other things, confidentiality of client information), and "net benefits" and/or "high-cost" requirements. AGCX 2, Section C.5.

its web-based business and relationships with third parties. AGCX 2, Attachment A, Section A.; AGCX 2, Section H.4.(c). A significant portion of Quicken Loans' business consists of repeat business and referrals from clients who previously obtained mortgages from Quicken Loans. AGCX 2, Section H.

To further Quicken Loans business interests, Quicken Loans provides its Mortgage Bankers with its proprietary and confidential business information, including, but not limited to, relating to: (a) its client inquiries, leads and applicants; (b) client referral sources; (c) its clients; (d) client lead information; (e) data and compilation pertaining to clients, prospects, leads, and inquiries; (f) information pertaining to the sources of client inquiries or leads; and (g) other aspects of its business. Quicken Loans Mortgage Bankers gain access to, use and compile Quicken Loans' confidential and proprietary information to originate, fund and close mortgage loans for, and develop relationships with, Quicken Loans' clients and prospective clients. AGCX 2, Section D.1.

**F. Quicken Loans Mortgage Bankers Sign MBEAs**

Each Quicken Loans Mortgage Banker acknowledges that they enter into the MBEA because of:

- (a) the special fiduciary nature of the position being entrusted to you as a Mortgage Banker and because, as a Mortgage Banker, you are being placed into a position of trust, confidence and fidelity;
- (b) the special governmental and regulatory requirements applicable to those persons engaged in the mortgage banking industry;
- (c) the time and resources the Company devotes to and invests in the development of the unique and extraordinary skills of its Mortgage Bankers;
- (d) your creation of, access to and/or utilization of confidential and proprietary information belonging exclusively to the Company;
- (e) the need to protect the legitimate business interests of the Company; and
- (f) the need to clarify the expectations and understandings between the Company and you.

AGCX 2, Section B.3.; *see also* AGCX 2, Sections C.2., G.1., H.1., and I.1. (describing the myriad of legitimate business interests protected by requiring Mortgage Bankers to enter into various contractual obligations contained in the MBEA).

The MBEA contains the following non-disclosure obligations that are at issue in the instant case:

(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 . . . .

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(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 . . . .

AGCX 2, Section D.2. Pursuant to the MBEA, "Proprietary/Confidential Information" is defined in Attachment A to the MBEA, in relevant part, as follows:

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 . . . .

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; [and]

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.

AGCX 2, Attachment A, Section A. (emphasis added).

The MBEA also contains the following non-disparagement obligations also at issue:

**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 source of the statements. The foregoing does not apply to statutorily privileged statements made to governmental or law enforcement agencies.

AGCX 2, Section K.2.

The MBEA further contains, among others, non-competition and non-solicitation obligations, which Ms. Garza does not claim violate Section 8(a)(1) of the Act. AGCX 1(a); *see also* AGCX 2, Sections G., H., and I.

**G. Ms. Garza's Employment with Quicken Loans and Execution of the MBEA**

Ms. Garza was employed with Quicken Loans for approximately five years as a Mortgage Banker, beginning in March 2006. Tr. 14. Ms. Garza entered into the MBEA at issue on October 4, 2007. Tr. 21. Ms. Garza testified that, although the MBEA was readily and easily available to her, she did not review the MBEA before she signed it or at any time while she was employed with Quicken Loans. Tr. 21-24. The ALJ erroneously precluded Quicken Loans from

inquiring into whether Ms. Garza read the MBEA after her employment ended but before she filed the instant charge, the conduct Ms. Garza believed was prohibited under the disputed provisions, or whether Ms. Garza violated the disputed provisions. *See* Tr. 23-26, 30-32.

**H. Ms. Garza Resigns Her Employment With Quicken Loans and Violates the MBEA in Connection with Her Employment with a Competitor**

Ms. Garza resigned her employment with Quicken Loans, effective October 18, 2011. AGCX 3; Tr. 16. She immediately became employed as a Mortgage Banker with loanDepot, a direct competitor of Quicken Loans also located in Maricopa County, Arizona. Tr. 13-14. Ms. Garza's employment with loanDepot violated her contractual obligations to Quicken Loans. *See* AGCX 2, Section I; Tr. 28. Ms. Garza joined five other former Quicken Loans Mortgage Bankers who also became employed with loanDepot in violation of contractual obligations in the MBEA. Tr. 18-19.

On October 25, 2011, Quicken Loans sent Ms. Garza a letter to remind her of the ongoing obligations to Quicken Loans. AGCX 3. Because Ms. Garza continued working for loanDepot and settlement efforts failed, Quicken Loans filed a lawsuit against Ms. Garza and the five other former Quicken Loans Mortgage Bankers in approximately November 2011. Tr. 18-19, 26. At issue in the civil lawsuit was Ms. Garza's violation of the noncompetition and prohibition on employee raiding provisions in the MBEA. Tr. 27-29.

**I. Ms. Garza Files Her Charge**

Several months after Quicken Loans filed its lawsuit against Ms. Garza and its other former employees who became employed with loanDepot, Ms. Garza filed her charge, alleging the "Proprietary/Confidential Information" and "Non-disparagement" provisions contained in her MBEA violated Section 8(a)(l) of the Act. AGCX 1(a); Tr. 24.

On September 14, 2012, Regional Director Cornele A. Overstreet issued the Complaint and Notice of Hearing (the “Complaint”) based on certain allegations in the charge. Specifically, the Complaint alleged that the “Proprietary/Confidential Information” and “Non-disparagement” provisions contained in the MBEA violate Section 8(a)(1) of the Act. AGCX 1(c).

Quicken Loans timely answered the Complaint, denying any unfair labor practices occurred. AGCX 1(e).

After a November 13, 2012 hearing, the ALJ erroneously found that: (1) the “Proprietary/Confidential Information” provision “would substantially hinder employees in the exercise of Section 7 rights” and, therefore, violates Section 8(a)(1) of the Act; and (2) the “Non-disparagement provision violates Section 8(a)(1) because “[a] reasonable employee could conclude that the prohibitions prohibited them [sic] from” exercising Section 7 rights. ALJD 4:5-51.

### **III. QUESTIONS PRESENTED**

1. Whether the ALJ misapplied Board precedent and made findings contrary to the record evidence in concluding that the “Proprietary/Confidential Information” provision in the MBEA violates Section 8(a)(1) of the Act, where the record evidence demonstrates that the disputed provision does not explicitly restrict Section 7 activity. *See* Exceptions 1, 2, 6, 7.
2. Whether the ALJ misapplied Board precedent and made findings contrary to the record evidence in concluding that the “Proprietary/Confidential Information” provision in the MBEA violates Section 8(a)(1) of the Act, where the ACG failed to establish that employees would reasonably construe the language to prohibit Section 7 activity. *See* Exceptions 3, 4, 5, 7, 8.
3. Whether the ALJ misapplied Board precedent and made findings contrary to the record evidence in concluding that the “Non-disparagement” provision in the MBEA violates Section 8(a)(1) of the Act, where the ACG failed to establish that employees would reasonably construe the language to prohibit Section 7 activity. *See* Exceptions 3, 4, 5, 9, 10.
4. Whether the ALJ erroneously precluded Quicken Loans from offering into and/or eliciting evidence relevant to its defenses, including, but not limited to, whether Ms. Garza read the MBEA prior to filing her charge, the conduct Ms. Garza

believed was prevented by the MBEA, whether Ms. Garza believed she violated the Proprietary/Confidential Information provision, whether Ms. Garza spoke with her managers or supervisors regarding the MBEA, Quicken Loans' recruitment efforts and methods, and the types of information that is available on Quicken Loans' intranet website. *See* Exceptions 11, 12, 13.

#### IV. ARGUMENT

An employer violates Section 8(a)(1) when it maintains a work rule that limits employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The test for determining whether a rule violates the Act begins with “whether the rule *explicitly* restricts activities protected by Section 7.” *Lutheran Heritage Village*, 343 NLRB 646, 646 (2004) (emphasis in original). If so, the work rule is unlawful. *Id.* If not, an alleged violation is dependent upon the AGC demonstrating: (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.<sup>4</sup> The burden is on the AGC to prove the maintenance of the work rules would be reasonably construed as chilling the exercise of Section 7 rights. *See Lafayette Park Hotel*, 326 NLRB at 826 (holding that the General Counsel “ha[d] not met his burden”).

In determining whether employees would reasonably construe an employer's work rule or policy to prohibit Section 7 activity, the Board must give the rule a “reasonable reading,” “must refrain from reading particular phrases in isolation,” and “*must not presume* improper interference with employee rights.” *Lutheran Heritage Village*, 343 NLRB at 646 (emphasis added); *see also Fiesta Hotel d/b/a Palms Hotel & Casino*, 344 NLRB 1363, 1368 (2005) (“We . . . decline to parse through workrules, viewing phrases in isolation, and attributing to employers an intent to interfere with employee rights, in order to divine ambiguities that will render such

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<sup>4</sup> The ALJ does not suggest in the Decision – and there is no allegation or evidence for that matter – that the disputed provision was promulgated in response to union or other protected activity or applied to restrict the exercise of Section 7 rights. ALJD 1:30-4:51. Instead, the record evidence is to the contrary. *See* Tr. 32, 45-46.

rules unlawful.”). The Board will not find a rule or policy unlawful simply because it *could* be construed to restrict Section 7 rights:

Where, as here, the rule does not refer to Section 7 activity, [the Board] will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

*Lutheran Heritage Village*, 343 NLRB at 647 (emphasis in original); *see also Fiesta Hotel*, 344 NLRB at 1368 (“[w]e are simply unwilling to engage in . . . speculation in order to condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it. . . . [W]here, as here, the rule *does not* address Section 7 activity, the mere fact that it could be read in that fashion will not establish its illegality.” (emphasis in original)).

Further, the rule must be construed in its surrounding context. Specifically, in *Lafayette Park*, the Board considered such circumstances as non-enforcement of the rule, whether the rule was promulgated in response to protected activities, the non-existence of union animus, and whether the employer has substantial and legitimate business concerns. *Lafayette Park Hotel*, 326 NLRB at 826. Since *Lafayette Park*, the Board has continued to evaluate the reasonableness of a rule based on what a reasonable employee would understand given all the circumstances. *See, e.g., The Roomstore*, 357 NLRB No. 143, slip op. at 1 n.3 (Dec. 20, 2011) (“[A]s in 8(a)(1) cases generally, our task is to determine how a reasonable employee would interpret the action or statement of her employer . . . **and such a determination appropriately takes account of the surrounding circumstances.**” (emphasis added)); *see also Super K-Mart*, 330 NLRB 263, 263 (1999) (“the fact that the [employer]’s confidentiality provision has not been enforced to prohibit employees from discussing their terms and conditions of employment” reinforces its legality).

The record evidence demonstrates that the ALJ erroneously held the disputed provisions violate Section 8(a)(1).

**A. The Proprietary/Confidential Information Provision Is Not Overbroad and Is Lawful**

The ALJ disregarded record evidence supporting Quicken Loans' defenses, read hand-picked phrases in isolation, ignored the context of the MBEA, and simply presumed that the Proprietary/Confidential Information provision hinders employees in the exercise of Section 7 rights. The Board should reject the ALJ's Decision.

The ALJ erroneously found that the disputed provision violates Section 8(a)(1) because "there can be no doubt" that it purportedly would prevent employees from discussing "the wages and other benefits they receive, [sic] the names, wages, benefits, addresses or telephone numbers of other employees." ALJD 4:29-36. There is no basis for such a finding. The disputed provision does not refer to mortgage banker payroll, compensation, salary information, wages, benefits, or commissions. AGCX 2, Attachment A, Section A.<sup>5</sup> Instead, it refers to non-public personnel lists, rosters generated by the company, personal information of others, handbooks, personnel files, and information such as home telephone numbers, cell phone numbers, addresses and email address. As demonstrated below, the information the ALJ found mortgage bankers were precluded from discussing is not specifically identified in the disputed provision and, in any event, *is not non-public*. Further, there is no basis to find that the reference to non-public personal information and personnel files of Quicken Loans necessarily precludes employees from discussing wages, benefits or employment terms. *See Super K-Mart*, 330 NLRB at 264

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<sup>5</sup> In contrast, the "Personal Information Pertaining to Company Executives and Officers" does reference non-public and confidential "personal financial information." To the extent the AGC contends this phrase could be read to prohibit disclosure of Quicken Loans Executives' and Officers' wages and benefits of employment, she can hardly contend that such prohibition runs afoul of the Act because Executives and Officers are supervisors and not employees covered by the Act. *See* 29 U.S.C. §§ 152(3) and 152(11).

(holding that, even without an “express proviso” detailing what employees may share, reasonable employees would understand they could share business information with other employees because “[r]easonable persons understand that an enterprise can hardly function without such a flow of information.”). To the contrary, it is not unlawful to tell employees they must not unilaterally disclose personnel file information. Various state laws preclude such conduct. *See, e.g.,* Mich. Comp. Laws §§ 423.501-512 (precluding employer from divulging personnel file information without consent). Simply put, any finding or suggestion that the disputed provision explicitly restricts activities protected by Section 7 is not supported by the record evidence and should be flatly rejected.

There also is no basis to conclude any reasonable Quicken Loans employee would construe the Proprietary/Confidential Information provision to restrict Section 7 activity.<sup>6</sup> The only (current or former) Mortgage Banker to testify at the hearing – complainant Ms. Garza – admitted she never read the MBEA. Tr. 21-24. In fact, the record is devoid of any evidence: (1) that any current or former Quicken Loans Mortgage Banker construed the disputed provision to restrict Section 7 activity; (2) that any current or former Mortgage Banker was even aware of the disputed provision; (3) that any current or former Mortgage Banker ever read the disputed

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<sup>6</sup> The U.S. Supreme Court has addressed the reasonable person standard in other contexts. For instance, in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998), the U. S. Supreme Court found:

[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering “all the circumstances.” . . . [T]hat inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field – even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office.

Similarly, in *Burlington Northern & Sante Fe Railway Co. v. White*, the Court held “[w]e refer to reactions of a *reasonable* employee because we believe that the provision’s standard for judging harm must be objective. An objective standard . . . avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff’s unusual subjective feelings.” 548 U.S. 53, 68-69 (2006) (emphasis in original).

provision; (4) that any current or former Mortgage Banker regarded any particular conduct to be prohibited by the disputed provision; or (5) that the disputed provision was enforced by Quicken Loans in the manner contemplated by the Decision. *See* Tr. 21-24, 32, 45-46. Because there is a complete lack of evidence, the ALJ erroneously “*presume[d]* improper interference with employee rights.” *Lutheran Heritage Village*, 343 NLRB at 646 (emphasis added). The ALJ’s Decision should be rejected for this reason alone.

Further, the ALJ erroneously failed to consider the disputed provision as a whole and, instead, read “particular phrases in isolation.” The ALJ wrongly disregarded that the Proprietary/Confidential Information provision provides that non-disclosure obligations *only relate to non-public information* generated for, maintained by and owned by Quicken Loans. The record evidence demonstrates that the information providing the basis for the ALJ’s Decision (*i.e.*, names, wages, benefits, addresses and telephone numbers) is *publicly available* on Quicken Loans’ website, *widely disseminated* to thousands of Quicken Loans’ employees through its intranet website, *and freely accessible to the public* in general including on the fully searchable website hosted by NMLS. *See* Sections II.A.-B., above.<sup>7</sup> Board precedent precludes the ALJ from reading phrases in isolation and ignoring that the disputed provision applies only to *non-public* information. *See Lafayette Park Hotel*, 326 NLRB at 825 (refusing to read a rule in isolation or otherwise attributing to the employer an intent to interfere with employee rights); *see also Aroostook Cnty. Reg’l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 212-13 (D.C. Cir. 1996)

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<sup>7</sup> In contrast to the record evidence here, in *Flex Frac Logistics, LLC*, the provision at issue broadly prohibited employees from disclosing any and all of their personnel information but did not limit such obligations to non-public, proprietary and confidential information. 358 NLRB No. 127, slip op. at 3 (Sept. 11, 2012) (“The . . . confidentiality rule is broadly written with sweeping, nonexhaustive categories that encompass nearly any information related to the [employer].”). The Board concluded a reasonable employee could infer that the disclosure of terms and conditions of employment would be prohibited. *Id.*

(holding that the confidentiality rules, when read in context, clearly only related to confidential, non-public patient medical information).

Board precedent also precludes the ALJ from disregarding the context of the MBEA to invalidate the Proprietary/Confidential Information provision. For example, in *Lafayette Park Hotel*, the Board found that the provision at issue was designed to protect the employer's "substantial and legitimate interest in maintaining the confidentiality of private information, including [customer] information, trade secrets, contracts with suppliers, and a range of other proprietary information." 326 NLRB at 826. The Board then held that employees *reasonably* would understand that the rule was intended to protect the employer's legitimate interests, rather than to "prohibit the discussion of their wages." *Id.*

Similarly, the record evidence here demonstrates that Quicken Loans' business is highly regulated and Mortgage Bankers are subject to stringent government-mandated licensing and regulatory requirements. AGCX 2, Sections B.3., C.5., and C.6.; *see also* Tr. 34-39. Indeed, Mortgage Bankers are entrusted with non-public, sensitive information relating to Quicken Loans' clients and prospective clients for purposes of providing financial services and developing on-going relationships. AGCX 2, Section C.2.; *see also* Tr. 34-39. Mortgage Bankers also are provided with non-public, sensitive information relating to Quicken Loans' proprietary training and testing. AGCX 2, Section G.1.; *see also* Tr. 37-39. Mortgage Bankers specifically acknowledge that they enter into the MBEA because of the significant investment Quicken Loans makes in them, their unique position of trust and confidence, to protect Quicken Loans' legitimate business interests, and to ensure they are aware of, and comply with, the stringent government-mandated licensing and regulatory requirements. *See* ACGX 2, Section B.3. No reasonable Mortgage Banker would read the disputed provision in the MBEA to protect

anything other than Quicken Loans' confidential and proprietary information – not to prevent employees from discussing their publicly and widely-disseminated terms and conditions of employment.

The ALJ also disregarded the record evidence demonstrating that the Proprietary/Confidential Information provision has neither been applied by Quicken Loans nor construed by any of its Mortgage Bankers to restrict Section 7 rights. Tr. 32, 44-46. The record is simply devoid of any evidence that any Quicken Loans employee has ever construed the language of the MBEA to interfere with Section 7 rights or that any employee has ever been disciplined or terminated for violating the disputed provision in the way contemplated by the ALJ. The record also is devoid of any evidence of union animus. Contrary to Board precedent, the ALJ ignored the context of this case. *See Lafayette Park Hotel*, 326 NLRB at 826 (finding maintenance of rule did not violate Section 8(a)(1) where employer had not through other actions, such as enforcement or a showing of anti-union animus, led employees reasonably to believe that the at-issue rule prohibited Section 7 activity); *see also Safeway, Inc.*, 338 NLRB 525, 525-27 (2002) (considering that that the confidentiality provision was never enforced and was not shown to place any impediment on the ability of employees to discuss the terms and conditions of their employment and finding that the provision would not have been reasonably read to chill Section 7 activity or affected the outcome of a representation election).

The ALJ also ignored that Ms. Garza filed the instant charge even though she admitted that Quicken Loans never enforced the subject provisions against her and she never read the provisions. Tr. 21-24, 32, 45-46. Ms. Garza filed her charge several months after Quicken Loans enforced its rights under other provisions of her MBEA (*i.e.*, non-competition and non-solicitation) because Ms. Garza and five other former Quicken Loans Mortgage Bankers engaged

in prohibited activities with a competitor. Ms. Garza’s charge was filed to gain a tactical advantage in the civil litigation.

In short, there is no basis to find that unknown and purely hypothetical employees – who never testified at the hearing – would reasonably construe the language of the disputed provision to prohibit Section 7 activity.

**B. The Non-disparagement Provision Is Not Overbroad and Is Lawful**

The ALJ also erroneously found that a reasonable employee “could” conclude that the “Non-disparagement” provision in the MBEA violates Section 8(a)(1). ALJD 4:49-51. The correct standard requires a determination that employees *would* reasonably construe the language to prohibit Section 7 activity. *Lafayette Park Hotel*, 326 NLRB at 825 (“the appropriate inquiry is whether the rules *would* reasonably tend to chill employees in the exercise of their Section 7 rights.” (emphasis added)). Nevertheless, the Board should reject the ALJ’s Decision.

The Board has held lawful employer rules that prohibit employee conduct that “tends to bring discredit” to the employer, “has a negative effect on the Company’s reputation,” “reflects adversely on” or “affects” the employer’s “reputation or good will in the community,” or is “abusive.” For instance, in *Lafayette Park*, one provision at issue precluded “[u]nlawful or improper conduct off the hotel’s premises or during non-working hours *which affects* the employee’s relationship with the job, fellow employees, supervisors, *or the hotel’s reputation or good will in the community.*” 326 NLRB at 826-27 (emphasis added). Because there was no evidence that “actions” were aimed at concerted activity and the language of the rule itself was the only basis for the alleged violation, the Board found that the rule would not be reasonably read to restrict Section 7 rights. *Id.*; *see also Lutheran Heritage Village*, 343 NLRB at 647 (rule prohibiting “abusive language” not unlawful on its face); *Ark Las Vegas Rest. Corp.*, 335 NLRB 1284, 1284 n.2, 1291-92 (2001) (respondent did not violate Sec. 8(a)(1) by maintaining a rule

prohibiting “any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company, or its guests . . .”).

Further, Board and other precedent provide that the determination of whether conduct is protected by the Act is based on the specific facts of each action. *See Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1252 (2007) (noting that “[o]therwise protected communications with third parties may be ‘so disloyal, reckless, or maliciously untrue [as] to lose the Act’s protection’” and that “[s]tatements have been found to be unprotected as disloyal where they are made ‘at a critical time in the initiation of the company’s’ business and where they constitute ‘a sharp, public, disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.’”) (citations omitted); *see also NLRB v. Local Union No. 1229, Int’l Bhd. Of Elec. Workers*, 346 U.S. 464, 475 (1953) (“The legal principle that . . . disloyalty is adequate cause for discharge is plain enough.”); *Lutheran Heritage Village*, 343 NLRB at 646 (finding lawful rules intended to “maintain order in the employer’s workplace”).

A reasonable reading of the disputed provision, in light of all of the surrounding circumstances and the context of this case, demonstrates that there is no Section 8(a)(1) violation. Public criticism, ridicule, disparagement and defamation are not acts that automatically are deemed protected by the Act. An employee engaging in conduct prohibited by the Non-disparagement provision may be protected by Section 7 under certain circumstances but not others. The record here, however, is devoid of any evidence that the disputed provision has been enforced in any manner, let alone in a manner to restrict Section 7 rights. Because the record is devoid of any evidence regarding application of the “Non-disparagement” provision to any conduct or evidence that any Mortgage Banker believed his/her Section 7 rights were

restricted, the ALJ erroneously presumed “the rule is unlawful.” *See Lutheran Heritage Village*, 343 NLRB at 646-49 (“The question of whether particular employee activity involving verbal abuse or profanity is protected by Section 7 turns on the *specific facts of each case*. . . . Absent application of the rule to [Section 7 activity], we would not presume that the rule is unlawful.”); *see also Aroostook*, 81 F.3d at 213 (“*In the absence of any evidence* that [the employer] is imposing an unreasonably broad interpretation of the rule upon employees, the Board’s determination to the contrary is unjustified. If an occasion arises where [the employer] is attempting to use the rule as the basis for imposing questionable restrictions upon employees’ communications, the employees may seek review of the Company’s actions at that time.” (emphasis added)).

Moreover, the MBEA repeatedly provides that employees may voice complaints both within and outside of the Company. The Non-disparagement provision, itself, specifically notifies employees that Quicken Loans has an open door policy that encourages them to bring issues or complaints to the company’s attention. *See* AGCX 2, Section K.2. The MBEA further contemplates employees resolving disputes with the company by filing lawsuits against it in public forums (as opposed to private arbitration). *See* AGCX 2, Section O.3. The record evidence demonstrates that a reasonable employee would not conclude that the “Non-disparagement” provision, when read in the context of the MBEA as a whole, restrains Section 7 rights.

Finally, the record is devoid of any evidence that any employee at Quicken Loans read or was aware of the Non-disparagement provision during his or her employment. To find the Non-disparagement provision unlawful would require not only the unreasonable assumption that it

objectively precluded Section 7 activity but also that employees were aware of the provision. There is absolutely no evidence to support such a conclusion.

In short, the ALJ erroneously found that a reasonable employee “could” conclude that the “Non-disparagement” provision in the MBEA violates Section 8(a)(1). The Board should reject the ALJ’s Decision.

**C. The ALJ Erroneously Precluded Quicken Loans From Offering Into and/or Eliciting Evidence Relevant to its Defenses**

With respect to the introduction of evidence at a hearing, Section 102.39 of the Rules and Regulations of the National Labor Relations Board (“Rules and Regulations”) provides as follows:

*Rules of evidence controlling so far as practicable.*—Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723–B, 723–C).

The Federal Rules of Evidence provide that relevant evidence is admissible. Fed. R. Evid. 402. “Relevant evidence” is that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401.

The ALJ erroneously precluded Quicken Loans from offering into and/or eliciting evidence relevant to its defenses. Specifically, the ALJ erroneously precluded the following inquiries and/or evidence:

- Whether Ms. Garza read the MBEA prior to filing her charge (Tr. 23-25);
- The conduct Ms. Garza believed was prevented by the MBEA (Tr. 26);
- Whether Ms. Garza believed she violated the disputed provisions (Tr. 30-32);

- Quicken Loans' recruitment efforts and methods (Tr. 36-37);
- Whether Ms. Garza discussed the MBEA with her managers or supervisors at Quicken Loans (Tr. 32); and
- The types of information that is available on Quicken Loans' intranet website (Tr. 42-43).

## V. CONCLUSION

For all of the foregoing reasons, Quicken Loans respectfully requests that the Complaint be dismissed.

Respectfully submitted,

Dated: February 19, 2013

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**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

QUICKEN LOANS INC.,

Respondent,

Case 28-CA-075857

and

LYDIA E. GARZA, an individual,

Charging Party.

/

**STATEMENT OF SERVICE**

I hereby certify that a copy of Respondent Quicken Loans Inc.'s BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION, in Case 28-CA-075857, was E-Filed and served by E-Mail on this 19th day of February 2013, on the following:

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