UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

QUICKEN LOANS, INC.

and **Case 28-CA-075857**

LYDIA E. GARZA, an Individual

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

Counsel for the Acting General Counsel (General Counsel), pursuant to Section 102.46 of the Board's Rules and Regulations, submits this Answering Brief to the exceptions filed by Quicken Loans, Inc. (Respondent) to the Decision of Administrative Law Judge Joel P. Biblowitz (ALJ), [JD(NY)-03-13] (ALJD), issued on January 8, 2013.

I. THE ALJ PROPERLY FOUND THAT THE "PROPRIETARY/ CONFIDENTIAL INFORMATION" PROVISION IN RESPONDENT'S MORTGAGE BANKER EMPLOYMENT AGREEMENT VIOLATES SECTION 8(a)(1) OF THE ACT (EXCEPTIONS 1 through 8)

Respondent, by its Exceptions 1 through 8, asserts that the ALJ erred in finding that the "Proprietary/Confidential Information" provision of Respondent's Mortgage Banker Employment Agreement (Agreement) violates Section 8(a)(1) of the Act. More specifically, Respondent contends that the ALJ misapplied Board precedent and made findings contrary to the record evidence in reaching his conclusion. Contrary to Respondent's argument, the ALJ correctly concluded that the "Proprietary/Confidential Information" provision of the Agreement unlawfully restricts employees' Section 7 rights by prohibiting employees from discussing their wages and other terms and conditions of employment.

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).

Here, the ALJ properly found that the provision, which prohibits disclosure of, among other things, "non-public information relating to or regarding the Company's . . . personnel . . .," including "personnel files," can "no doubt . . . substantially hinder employees in the exercise of their Section 7 rights." (ALJD at 4; GC 2) By its plain meaning, the rule prohibits employees from discussing non-public information about themselves or their coworkers, such as salaries and discipline. Such a rule is patently unlawful. Moreover, there is no language clarifying any potential ambiguity or otherwise restricting the scope of the rule.

Respondent, however, asserts that the ALJ's finding is erroneous because the record evidence does not establish "(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 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." (Respondent's Brief in Support of Exceptions at 14-15) Respondent's argument ignores that the record evidence need only establish that Respondent maintained the provision at issue and that such provision applied to all of Respondent's mortgage bankers, facts that are undisputed. Evidence regarding employees' awareness of the provision or understanding of the provision, and evidence regarding Respondent's enforcement of the provision, is irrelevant because the appropriate standard in evaluating the lawfulness of the provision at issue is an objective, not a subjective, one. See *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). Contrary to Respondent's assertion, the question is not whether any of Respondent's employees construed the provision to restrict their Section 7 rights; the question is whether, objectively, a reasonable employee could so construe the provision.

Applying an objective standard, as the ALJ properly did in this case, the provision at issue can no doubt be reasonably read to restrict employees' Section 7 rights. A blanket prohibition on employees disclosing information to include "personnel files" can no doubt be read to prohibit disclosure of disciplinary information, performance evaluations, grievance/ complaint information, termination data, etc., all information that Respondent does not contend is public information. See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112, 113-14 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). See also *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). If Respondent had intended to limit the provision at issue to "non-public, sensitive information relating to Quicken Loans' clients and prospective clients for purposes of providing financial services and developing on-going relationships" and to "non-public, sensitive information relating to Quicken Loans' proprietary training and testing," it certainly could have done so. (Respondent's Brief in Support of Exceptions at 16) Instead, however, it expressly defined "Proprietary/Confidential Information" to include "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" as well as personal and financial information pertaining to company executives and officers. (GC 2) Nothing in the broad language of the provision's prohibitions clarifies or restricts the scope of coverage in a way that would not reasonably be construed to cover protected activity. See *Tradesmen International*, 338 NLRB at 460-61. Such a provision, then, is plainly unlawful.[1]

[1] Respondent's suggestion that state law precludes employees from "unilaterally disclos[ing] personnel file information" is misleading; the statute cited by Respondent, Mich. Comp. Laws §§ 423.501-512, precludes *employers* – not employees – from divulging personnel file information without consent. A state statute precluding employees from divulging personnel file information would certainly conflict with the Act.

Accordingly, the ALJ properly found that the "Proprietary/Confidential Information" provision of Respondent's Agreement is overly broad and violates Section 8(a)(1) of the Act, and Respondent's Exceptions 1 through 8 should be rejected.

II. THE ALJ PROPERLY FOUND THAT THE "NON-DISPARAGEMENT" PROVISION IN RESPONDENT'S MORTGAGE BANKER EMPLOYMENT AGREEMENT VIOLATES SECTION 8(a)(1) OF THE ACT (EXCEPTIONS 3, 4, 5, 9, and 10)

Respondent, by its Exceptions 3, 4, 5, 9, and 10, asserts that the ALJ erred in finding that the "Non-Disparagement" provision of Respondent's Agreement violates Section 8(a)(1) of the Act. More specifically, Respondent contends that the ALJ erroneously found that a reasonable employee "could" conclude that the provision prohibits Section 7 activity, asserting that the proper standard is whether a reasonable employee "would" so conclude. (Respondent's Brief in Support of Exceptions at 18) Respondent's argument is splitting hairs, and the semantical distinction does not convert an objective standard to a subjective one, as Respondent has argued. The ALJ correctly concluded, based on a proper application of the law, that the "Non-Disparagement" provision of the Agreement unlawfully restricts employees' Section 7 rights by prohibiting employees' "critical" discussions of their terms and conditions of employment.

Respondent's "Non-Disparagement" provision prohibits, among other things, employees from "publicly criticiz[ing] . . . the Company or its products, services, policies, directors, officers, shareholders, or employees." (GC 2) The prohibition expressly extends to "websites, blogs, postings to the internet, or emails." (GC 2) There is no question that employees would reasonably interpret the clause to prohibit protected complaints about working conditions and protected criticism of Respondent's labor policies or treatment of employees, including through the use of social media. See, e.g., *Southern Maryland Hospital*,

293 NLRB 1209, 1222 (1989) (unlawful rule against "derogatory attacks"), enfd. in relevant part, 916 F.2d 932 (4th 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, Respondent's 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 (6th Cir. 2002).

Respondent cites to cases suggesting that employer rules prohibiting conduct that negatively impacts an employer's reputation or good will in the community have been upheld as lawful. (Respondent's Brief in Support of Exceptions at 18) Respondent's "Non-Disparagement" provision, however, goes far beyond that. Respondent's broad prohibition on any statements that "criticize" Respondent's policies, and employees, restricts Section 7 activity, including an employee's right to concertedly complain about, for example, a harassing or abusive supervisor, or the unfairness of an employer's attendance policy. Accordingly, the ALJ properly found that the "Non-Disparagement" provision of Respondent's Agreement is overly broad and violates Section 8(a)(1) of the Act, and Respondent's Exceptions 3, 4, 5, 9, and 10 should be rejected.

III. THE ALJ PROPERLY PRECLUDED EVIDENCE THAT IS IRRELEVANT AND UNNECESSARY TO THE DETERMINATIONS THAT RESPONDENT'S "PROPRIETARY/CONFIDENTIAL INFORMATION" AND "NON-DISPARAGEMENT" PROVISIONS ARE UNLAWFUL (EXCEPTIONS 11 through 13)

Respondent, by its exceptions 11 through 13, asserts that the ALJ erred in precluding Respondent from offering evidence at the hearing regarding the following issues: (1) whether the Charging Party read the Agreement before she filed her unfair labor practice charge; (2) the conduct the Charging Party believed was prevented by the Agreement; (3) whether the Charging Party believed she violated the provisions at issue; (4) Respondent's recruitment efforts; (5) whether the Charging Party discussed the Agreement with her managers or supervisors or managers; and (6) the types of information that is available on Respondent's intranet site. (Respondent's Brief in Support of Exceptions at 21-22) Respondent's argument ignores the fact that evidence on those issues is irrelevant and unnecessary to the determination that Respondent's provisions are unlawful on their face.

Respondent cites no cases to support its argument that such evidence is relevant to determining – based on an *objective* standard – whether the provisions at issue restrict employees' Section 7 rights. In fact, Respondent seems to misunderstand that the legal standard in evaluating the lawfulness of the provisions at issue here is an objective one. Respondent concludes that "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." (Respondent's Brief in Support of Exceptions at 18) But an objective standard evaluates just that: whether a hypothetical, unknown, employee would *reasonably* construe the language of Respondent's provisions to restrict their Section 7 rights, not whether Respondent's employees, or even the Charging

Party, did in fact so construe the provisions. Evidence regarding the Charging Party's subjective interpretations of the provisions at issue is not relevant, and such testimony was properly precluded by the ALJ. *Cf. Miller Electric Pump and Plumbing*, 334 NLRB 824, 825 (2001) (in assessing whether a statement is coercive, the Board assesses the objective tendency of the statement to coerce employees, and not the employees' subjective reactions). Accordingly, Respondent's exceptions 11 through 13 should be rejected.

IV. CONCLUSION

Based on the foregoing, the Board should deny Respondent's Exceptions and adopt the findings and conclusions of the ALJ as set forth above.

Dated at Phoenix, Arizona, this 5th day of March 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in QUICKEN LOANS, INC., Case 28-CA-075857, was served by E-Gov, E-Filing, and E-Mail on this 5th day of March 2013, on the following:

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