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.

_____/

RESPONDENT QUICKEN LOANS INC.'S BRIEF IN REPLY TO
ACTING GENERAL COUNSEL'S ANSWERING BRIEF

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The AGC failed to adequately address Quicken Loans Inc.'s ("Quicken Loans") argument that the ALJ erroneously concluded that a reasonable employee could read the Proprietary/Confidential Information and Non-disparagement provisions to restrict Section 7 activity. Quicken Loans has demonstrated that the "names, wages, benefits, addresses [and] telephone numbers" of its employees – which was the basis for the ALJ's Decision – are not subject to the Proprietary/Confidential Information provision because that information is ***publicly available***. Consequently, the AGC disregards the basis for the ALJ's Decision and now claims that the disputed confidentiality provision purportedly prevents employees from "discussing non-public information about themselves or their co-workers, such as salaries and discipline" or "performance evaluations, grievance/complaint information, termination data, etc." AGC Answer, pp. 3-4. However, that provision does not contain such restrictions and otherwise cannot be reasonably construed to unlawfully restrict Section 7 rights. Moreover, the AGC cannot establish that the Proprietary/Confidential Information and Non-disparagement provisions restrict Section 7 rights by relying on inapposite Board precedent, ignoring Board precedent contradicting their position, or completely disregarding the context of the disputed provisions. The Board should reverse the ALJ's Decision and dismiss the Complaint in its entirety.

II. ARGUMENT

A. The Proprietary/Confidential Information Provision Is Not Unlawful

The ALJ erroneously found that the Proprietary/Confidential Information provision restricts Section 7 rights because he believed it prohibits discussion of employee "names, wages, benefits, addresses or telephone numbers." ALJD 4:29-33; Resp't Exceptions, ¶¶ 6-8; Resp't Exceptions Br., pp. 13-16. Quicken Loans established that the ALJ's finding was erroneous

because such information is ***publicly available*** and, therefore, is not subject to non-disclosure. Resp't Exceptions Br., pp. 2-4. Simply put, Quicken Loans established there is no basis for the ALJ's conclusion that the provision restricts Section 7 rights.

Realizing that the ALJ's conclusion disregarded Board precedent (*see* Resp't Exceptions Br., pp. 2-4, 13-16), the AGC now claims that the Proprietary/Confidential Information provision restricts employees from "discussing non-public information about themselves or their co-workers, such as salaries and discipline" or "performance evaluations, grievance/complaint information, termination data, etc." AGC Answer, pp. 3-4.[1] The AGC's arguments fail.[2]

1. <u>The Proprietary/Confidential Information Provision Cannot Be Invalidated By Mischaracterizing and/or Unreasonably Construing Its Contents</u>

The Proprietary/Confidential Information provision provides that the information relating to company "personnel" that is protected from disclosure is non-public "personal information ***of co-workers***" and "personnel files." AGCX 2, Attach. A, § A (emphasis added). A finding that it applies to an employee's own non-public disciplinary, performance or termination information disregards the specific examples and limiting language contained in the provision. Reasonable employees would not construe the provision, which relates to non-public and personal information of others, as preventing disclosure of information relating to their employment. *See Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1089 (D.C. Cir. 2003) (finding that "[a] reasonable employee would not believe that a prohibition upon disclosing information, acquired in confidence, 'concerning . . . employees' would prevent him from saying anything about

[1] Quicken Loans already has established that Mortgage Banker "salaries" are publicly available and, therefore, not subject to non-disclosure obligations. Resp't Exceptions, ¶¶ 6-8; Resp't Exceptions Br., pp. 2-4, 13-16. The AGC cannot ignore the evidence and the language of the disputed provision.

[2] The ALJ did not rely on "discipline" or "performance evaluations, grievance/complaint information, termination data, etc." to support his finding that the Proprietary/Confidential Information provision is unlawful. *See* ALJD 4:24-36. If the AGC believed that the basis for the ALJ's Decision should have been broader, the AGC could have filed exceptions or cross-exceptions. Because the AGC failed to do so, the AGC waived this new argument. *See* NLRB Rules & Regulations § 102.46(d)(2).

himself or his own employment.”). A contrary conclusion would require the Board to presume – without any supporting evidence – that Quicken Loans intended to interfere with Section 7 rights. Such a ruling would be contrary to Board precedent. *See Lutheran Heritage Village*, 343 NLRB 646, 646 (2004) (the Board “***must not presume*** improper interference with employee rights.” (emphasis added)); *see also Palms Hotel & Casino*, 344 NLRB 1363, 1368 (2005) (the Board declining to attribute “to employers an intent to interfere with employee rights, in order to divine ambiguities that will render such rules unlawful.”).

The Proprietary/Confidential Information provision also does not specifically prohibit Mortgage Bankers from disclosing other employees’ disciplinary, performance or termination information. AGC Answer, p. 4.[3] While the provision generically protects non-public “personal information ***of co-workers***” and “personnel files,” it does not contain any of the specific categories that the AGC presumes a reasonable employee could read into the actual provision. AGCX 2, Attach. A, §A. Further, the Board has acknowledged that personnel files may include personal information regarding a litany of sensitive, private matters concerning an employee’s medical condition, family matters, restraining orders related to domestic violence, wage garnishments evidencing the employee’s indebtedness, copies of driver’s licenses, and immigration I-9 paperwork. *See IRIS U.S.A., Inc.*, 336 NLRB 1013, 1016 (2001). Personnel files also have documents containing such highly sensitive information as an employee’s social security number and date of birth, which is information commonly used for identity theft. “[T]o the extent an employee is privy to confidential information about another employee . . . he has no right to disclose that information contrary to the policy of his employer.” *Cmty. Hosps. of Cent. Cal.*, 335 F.3d at 1089. Imagine the chaos and potential liability that would be caused if employees were permitted to freely disclose the contents of a co-worker’s personnel file (such

[3] *See* Footnote 2, *supra*.

as, on a Facebook page) without their co-worker's consent and hide behind a claim of concerted activity. Finally, the AGC cannot disregard that once an employee discloses her/his own non-public disciplinary, performance or termination information to a co-worker, the Proprietary/Confidential Information provision does not restrict that co-worker from disclosing such information. That is because once disclosed to others, the information is no longer "non-public" and is not subject to the protections of the provision. Consequently, contrary to the ALJ's Decision, the Proprietary/Confidential Information provision is lawful.

2. <u>The AGC Relies on Inapposite Authority</u>

The Proprietary/Confidential Information provision only prohibits disclosing ***non-public*** information. AGCX 2, Attach. A, § A. The AGC's reliance on authority relating to provisions that have no such limiting language is misplaced and cannot establish the disputed provision restricts Section 7 rights. *See, e.g., Cintas Corp.*, 344 NLRB 943, 943 (2005) (provision applied to "any information concerning the company" and its employees); *IRIS U.S.A.*, 336 NLRB at 1015 (provision applied to "[a]ll of the information" regarding employees).

The Proprietary/Confidential Information provision does not prohibit Mortgage Bankers from disclosing their wages, salaries, benefits, compensation or other terms and conditions of employment. Resp't Exceptions Br., pp. 2-4, 13-16. In fact, the provision does not mention these categories at all. AGCX 2, Attach. A, § A. In any event, the information is publicly available and, therefore, not subject to non-disclosure obligations. Resp't Exceptions Br., pp. 2-4. The AGC cannot establish the provision here is unlawful by citing cases involving provisions that specifically prohibited disclosing salaries, pay and wages. *See, e.g., The NLS Grp.*, 352 NLRB 744, 744 (2008) (confidentiality rule expressly prohibited employee disclosure of compensation); *Double Eagle Hotel & Casino*, 341 NLRB 112, 113 (2004) (confidentiality rule expressly prohibited disclosure of "salary information," "salary grade," and "types of pay

increases")[4]; *Blue Cross-Blue Shield of Ala.*, 225 NLRB 1217, 1218 (1976) (handbook policy threatening termination expressly forbade employees from discussing their salaries); *Sharp v. Koronis Parts, Inc.*, 927 F. Supp. 1208, 1212 (D. Minn. 1996) (unlawful rule provided that "[w]ages paid to employees by Company are personal and confidential."). Therefore, no basis exists to find that a reasonable employee would construe the Proprietary/Confidential Information provision to restrict Section 7 activity. The ALJ's Decision should be reversed.

B. <u>The Non-disparagement Provision Is Not Overbroad and Is Lawful</u>

Quicken Loans established that the ALJ erroneously found that the Non-disparagement provision is unlawful. Resp't Exceptions, ¶¶ 3-5, 9-10; Resp't Exceptions Br., pp. 18-21. Confronted with that reality, the AGC mischaracterizes the basis for the ALJ's Decision, relies on another aspect of the provision not even considered by the ALJ, and cites inapposite authority. The AGC's arguments fail.[5]

1. <u>The ALJ May Not Presume the Non-disparagement Provision Is Unlawful</u>

The AGC erroneously claims, without citation to the Decision, that the basis for the ALJ's finding was that the provision prohibits "employees' 'critical' discussions of their terms and conditions of employment." AGC Answer, p. 6. There is no evidence to support a finding. Moreover, the ALJ did not find that employees would reasonably construe the language to prohibit such activity. Instead, the ALJ found that the provision was unlawful because employees purportedly "are allowed to criticize their employer and its products as part of their Section 7 rights." ALJD 4:46-47. The ALJ's Decision is erroneous.

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[4] In enforcing the Board's order, the Tenth Circuit specifically noted that those three compensation-related types of information were the reason for finding the Section 8(a)(1) violation. *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1260 (10th Cir. 2005).

[5] The AGC also claims that the Decision was "based on a proper application of the law." AGC Answer, p. 6. The AGC simply dismisses that the ALJ used an incorrect standard. *Compare* ALJD 4:49-51 (finding that a reasonable employee "***could***" conclude that the Non-disparagement provision violates Section 8(a)(1)), *with Lafayette Park Hotel*, 326 NLRB 824, 825-26 (1998) (finding that the appropriate inquiry is whether employees ***would*** reasonably construe the language to prohibit Section 7 activity).

The ALJ disregarded Board precedent, which permits employers to lawfully prohibit 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." Resp't Exceptions Br., pp. 18-19. The ALJ also disregarded Board precedent providing that the determination of whether conduct is protected by the Act is based on the specific facts of each action. Resp't Exceptions Br., p. 19. A reasonable reading of the disputed provision, in light of all of the surrounding circumstances, the context of this case, and the context of the MBEA as a whole, establishes there is no Section 8(a)(1) violation.

The AGC cannot seek to invalidate the provision by now claiming it unlawfully requires Mortgage Bankers to "respond to employer interrogation regarding their protected activities." AGC Answer, p. 7. This new theory did not provide a basis for the ALJ's Decision. *See* ALJD 4:38-51.[6] Moreover, there is no evidence that any Mortgage Banker was ever subjected to "interrogation" for being "critical" of the terms and conditions of their employment or disciplined for not participating in an investigation. The AGC's reliance on *Beverly Health & Rehabilitation Services*, 332 NLRB 347 (2000), which invalidated a provision that compelled employees to cooperate in any employer investigations of legal violations, including ***unfair labor practice charges***, is misplaced. The AGC disregards the salient fact that the Non-disparagement provision here "***does not apply to statutorily privileged statements*** made to governmental . . . agencies." AGCX 2, § K.2 (emphasis added). The AGC cannot demonstrate a violation of Section 8(a)(1) by unfairly attributing unlawful intent to Quicken Loans, reading phrases in the disputed provision in isolation, and disregarding the context of this case. Resp't Exceptions Br., pp. 11-12. The record evidence fails to support the ALJ's Decision that the Non-disparagement provision violates Section 8(a)(1).

[6] *See* Footnote 2, *supra*.

2. **The AGC Relies on Inapposite Authority**

In sharp contrast to the cases the AGC cites, there is no contextual evidence to support the ALJ's Decision that the Non-disparagement provision restricts Section 7 activity.

For instance, in *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989), the employer's rule prohibited "[m]alicious gossip or derogatory attacks" and expressly provided that a first offense would result in a "3-day suspension with intent to terminate." *Id.* at 1221. Significantly, the Board specifically noted that evidence existed that the employer maintained the rule in the context of union animus. *See id.* at 1210-16, 1218-20. Unlike *Southern Maryland*, the Non-disparagement provision at issue here does not threaten any disciplinary action. AGCX 2, § K.2. Further, the record here is devoid of any purported union animus.

Similarly, in *Cincinnati Suburban Press, Inc.*, 289 NLRB 966 (1988), the Board held that the employer unlawfully discharged the charging party for engaging in protected speech critical of the employer's clear efforts to block unionizing its workforce. *See id.* at 966-68. Thus, the basis for the Board's finding was that the employer explicitly terminated the charging party for violating its non-disparagement rules. *Id.* at 967 n.4, 973-74. Here, the record is devoid of any evidence that Quicken Loans ever enforced the disputed provision, let alone enforced it to thwart the unionization of Quicken Loans' workforce.[7] The Board should reject the ALJ's Decision.

C. **Evidence Relating to Context Is Relevant**

While the proper determination is whether Quicken Loans' Mortgage Bankers would reasonably construe the disputed provisions to restrict Section 7 activity, the determination of what a reasonable Mortgage Banker would believe cannot be considered in a vacuum. The AGC

[7] The Board should further disregard AGC's reliance on *Cincinnati Suburban Press* because it was overruled by the Board. *See Lafayette Park Hotel*, 326 NLRB at 827 n.13 ("To the extent that [*Cincinnati Suburban Press*] can be read as tantamount to a finding that the rule in question is unlawful ***even in the absence of the activity with which it was viewed in context***, [it] is ***overruled***." (emphasis added)).

cannot disregard Board precedent, including the AGC's authority, that demonstrates evidence of context is relevant.

For instance, in *Lafayette Park Hotel*, which the AGC cites for the "objective" standard, the Board specifically relied on evidence relating to context in finding that the workplace rules were lawful. *See* 326 NLRB at 826 ("[T]he Respondent has ***not by other actions*** led employees reasonably to believe that the rule prohibits Section 7 activity." (emphasis added)). In fact, the Board refused to engage in speculation to find rules unlawful where no evidence suggested employees construed them as chilling Section 7 activity. *See id.* ("[W]e find that the mere maintenance of this rule . . . has no more than a ***speculative effect*** . . . ." (emphasis added)).

Similarly, the Board's recent Advice Memorandum further demonstrates that evidence relating to context is relevant. *See* Advice Memorandum, Case 19-CA-088157 (Feb. 28, 2013) (the "Advice Memo"). In the Advice Memo, the Board found that Boeing's broadly-worded Code of Conduct did not violate Section 8(a)(1) when considering the "context of the policy." Advice Memo, p. 3. Specifically, the Board found that the union's presence at new employee orientation would lead reasonable employees to believe they could discuss employer assets and information with union representatives. Advice Memo, p. 7. The Board also found that employees would not reasonably find a policy to chill Section 7 activity "where employer had not led employees to believe it applied to Section 7 activity." *See* Advice Memo, p. 5 n.11 (citing *Tradesmen Int'l*, 338 NLRB 460, 462 (2002)).

Further, much of the authority the AGC relied upon in its Answering Brief involves considerable contextual evidence that supported a finding that a rule was unlawful. *See, e.g.*, *D. R. Horton, Inc.*, 357 NLRB No. 184, at 1 (Jan. 3, 2012) (holding that the employer's class/collective action waiver agreement was unlawful in the context of the employer rejecting

employee attempts to collectively arbitrate Fair Labor Standards Act claims); *Blue Cross-Blue Shield of Ala.*, 225 NLRB at 1218-20 (ordering a second bargaining unit election where the employer promulgated an unlawful rule requiring the confidentiality of salary information and actively threatened and discharged noncompliant employees); *The NLS Grp.*, 352 NLRB at 744-45, 749-50 (holding the employer's confidentiality rule to be unlawful in the context of the charging party being terminated for discussing his compensation with a client); *Univ. Med. Ctr.*, 335 NLRB 1318, 1318-20 (2001) (invalidating the employer's confidentiality and insubordination rules in the context of the employer's refusal to recognize and bargain with the incumbent union)[8]; *Cintas*, 344 NLRB 943 (determining the confidentiality rule to be unlawful in the context of contentious relations between the employer and unions resulting in numerous unfair labor practice charges alleging unlawful terminations and threats to cut-off benefits for supporting unionization); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) (evidence of the "employees' actual interpretation of the confidentiality rule" would have been "instructive").[9]

Notwithstanding the AGC's claim otherwise, evidence of context is relevant. As demonstrated in Quicken Loans' opening brief, unlike *D.R. Horton, Blue Cross-Blue Shield, The NLS Group, University Medical Center*, and *Cintas*, the context of this case and the disputed provisions demonstrates that employees would ***not*** reasonably construe the language to restrict Section 7 rights. In fact, the only witness called by the AGC at the hearing filed the instant

[8] As demonstrated above, the D.C. Circuit reversed the Board, finding that "[a] reasonable employee would not believe that a prohibition upon disclosing information, acquired in confidence, 'concerning . . . employees' would prevent him from saying anything about himself or his own employment." *Cmty. Hosps. of Cent. Cal.*, 335 F.3d at 1089.

[9] The AGC's citation to *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) is also misplaced. *Flamingo Hilton-Laughlin*, relied on *Aroostook County Regional Opthamology Center*, 317 NLRB 218 (1995). *Flamingo Hilton-Laughlin*, 330 NLRB at 292. The D.C. Circuit Court of Appeals, however, denied enforcement of the Board's decision in *Aroostook*. *See Aroostook Cnty. Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996) ("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." (emphasis added)).

charge to gain leverage in a state court lawsuit filed against her – and admits she never even read or otherwise knew about the provisions the ALJ found violated Section 7.

D. The ALJ Committed Error By Excluding Further Evidence Regarding Context

Quicken Loans attempted, but was denied the ability to, offer additional evidence of how the Charging Party construed the MBEA, whether her supervisors discussed the disputed provisions in the MBEA, and other evidence relevant to the context of the MBEA and this case. By excluding Quicken Loans' contextual evidence and otherwise failing to consider the same, the ALJ committed error warranting reversal of his Decision. *Cf. Northport Health Servs., Inc. v. NLRB*, 961 F.2d 1547, 1552-54 (11th Cir. 1992) (remanding to the Board where it adopted the ALJ's decision that utilized the wrong legal standard and failed "to give a full and fair consideration to the Company's evidence tending to undermine the ALJ's position" and noting "additional hearings may need to be held in order to complete the gaps in the present record."); *NLRB v. Process & Pollution Control Co.*, 588 F.2d 786, 789-91 (10th Cir. 1978) (holding the ALJ erred in failing to admit relevant evidence).

III. CONCLUSION

For all of the foregoing reasons, Quicken Loans respectfully requests that the Board reverse the ALJ's Decision and dismiss the Complaint.

Respectfully submitted,
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STATEMENT OF SERVICE

I hereby certify that a copy of Respondent Quicken Loans Inc.'s BRIEF IN REPLY TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF, in Case 28-CA-075857, was E-Filed and served by E-Mail on this 19th day of March 2013, on the following:

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