

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

In the Matter of:

QUICKEN LOANS INC.,

and

Case No. 28-CA-075857

LYDIA E. GARZA, an Individual

POST-HEARING BRIEF OF QUICKEN LOANS, INC.

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	2
III. BACKGROUND CONCERNING QUICKEN LOANS’ MORTGAGE BANKER EMPLOYMENT AGREEMENT WITH LYDIA GARZA	2
IV. A REASONABLE QUICKEN LOANS EMPLOYEE WOULD NOT CONCLUDE THAT THE MBEA LIMITS SECTION 7 RIGHTS	6
1. The MBEA Provision Pertaining To Proprietary/Confidential Information Is Not Overbroad and Is Lawful	10
2. The Nondisparagement Provision Is Not Overbroad and Is Lawful.....	17
V. CONCLUSION.....	20
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

	Page(s)
U.S. SUPREME COURT DECISIONS	
<i>Burlington Northern & Sante Fe Ry. v. White</i> , 548 U.S. 53 (2006).....	8
<i>NLRB v. IBEW Local 1229 (Jefferson Standard)</i> , 346 U.S. 464 (1953).....	18
<i>Oncale v. Sundowner Offshore Servs.</i> , 523 U.S. 75 (1998).....	8, 9, 10
U.S. COURT OF APPEALS DECISIONS	
<i>Adtranz ABB Daimler-Benz Corp. v. NLRB</i> , 253 F.3d 19 (D.C. Cir. 2001).....	7
NATIONAL LABOR RELATIONS BOARD DECISIONS	
<i>Ark Las Vegas Restaurant Corp.</i> , 335 NLRB 1284 (2001).....	19
<i>Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371</i> , 358 NLRB No. 106 (Sept. 7, 2012).....	15
<i>Fiesta Hotel d/b/a Palms Hotel & Casino</i> , 344 NLRB 1363 (2005).....	7
<i>Flex Frac Logistics, LLC</i> , 358 NLRB No. 127 (Sept. 11, 2012).....	14
<i>Kmart</i> , 330 NLRB 263 (1999).....	11
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998).....	passim
<i>Lutheran Heritage Village</i> , 343 NLRB 646 (2004).....	6, 9, 18, 19
<i>Mediaone of Greater Florida</i> , 340 NLRB 277 (2003).....	12
<i>Safeway, Inc.</i> , 338 NLRB 525 (2002).....	9, 17

TABLE OF AUTHORITIES
(Continued)

	Page(s)
<i>Security Walls, LLC,</i> 356 NLRB No. 87 (2011)	14
<i>The Roomstore,</i> 357 NLRB No. 143 (2011)	7
<i>Tradesmen Int'l,</i> 338 NLRB 460 (2002)	7
<i>Valley Hospital Medical Center Inc.,</i> 351 NLRB 1250 (2007)	18

I. INTRODUCTION

This case arises from a charge by a former Quicken Loans employee, Lydia Garza. Ms. Garza resigned her position as a Mortgage Banker at Quicken Loans on October 18, 2011, and immediately accepted the same position for a direct competitor in violation of commitments she voluntarily made in a Mortgage Banker Employment Agreement (“MBEA”) between her and Quicken Loans. After Quicken Loans sought to enforce the noncompetition provision in the MBEA, Ms. Garza filed her charge alleging, in pertinent part, that the MBEA contained provisions that allegedly interfered with her rights protected by Section 7 of the Act. At the hearing, Ms. Garza conceded that during her employment for Quicken Loans she did not believe that any of her Section 7 rights were restricted; necessarily she could not have, because she claimed she never read the provisions that she also claimed, only after her resignation, somehow interfered with those rights. There was no evidence at the hearing that any Quicken Loans employee has ever construed the language of the MBEA in the manner that she, and the Acting General Counsel (“AGC”), now claim interferes with the rights of Quicken Loan employees. No employee has ever been disciplined or terminated by Quicken Loans for allegedly violating the provisions that are subject to the strained, myopic interpretations at issue in the Complaint.

In a case such as this one, where there is no evidence that a provision has been enforced, reviewed, discussed or construed by any employee to interfere with rights protected by Section 7, can the provision nevertheless be said to restrict those closely held rights? Assuming that the Quicken Loans employees who are parties to the MBEA are reasonable employees, and AGC does not contend they are not, the total absence of any evidence of an unlawful construction of the terms of the MBEA by any employee refutes AGC’s claim that such an argument necessarily arises from the language itself. The case at bar involves a naked and abstract claim of a violation that is divorced from the realities of Quicken Loans’ workplace, and unsupported by the very

consideration of the context that the Board's decisions, and common sense, require to be included in determining whether any interference exists. No employee – including the Charging Party during her employment – has ever claimed that the MBEA interferes with Section 7 rights. It does not. AGC failed to meet her burden to prove that the language in this case, reasonably construed by reasonable Quicken Loans employees, restricts Section 7 rights.

The Complaint has no merit. It should be dismissed.

II. STATEMENT OF THE CASE

On March 5, 2012, Ms. Garza filed a charge alleging that Quicken Loans maintained certain work rules that interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act. Acting General Counsel Exhibit (“AGCX”) 1(a). On September 14, 2012, Regional Director Cornele Overstreet issued a Complaint and Notice of Hearing (“Complaint”) based on certain allegations in the charge. AGCX 1(c). Specifically, the Complaint alleged violations of Section 8(a)(1) of the Act based on claims that the Quicken Loans’ MBEA provisions pertaining to Proprietary/Confidential information and Non-disparagement are overly broad and discriminatory. AGCX 1(c). Quicken Loans timely answered the Complaint, denying any unfair labor practices occurred. AGCX 1(e).

The hearing commenced on November 13, 2012. Both the AGC and Quicken Loans presented and rested their cases the same day. At the end of the hearing, the Judge granted the parties until December 11, 2012, to submit post-hearing briefs concerning the allegations set forth in the Complaint. This Post-Hearing Brief is timely filed.

III. BACKGROUND CONCERNING QUICKEN LOANS’ MORTGAGE BANKER EMPLOYMENT AGREEMENT WITH LYDIA GARZA

Quicken Loans is a full-service mortgage banking company engaged in originating, closing, funding, servicing and marketing residential mortgage loans and consumer loans

through various business channels. *See* AGCX 2, p. 1. It services customers in all 50 states. Tr. 34. To provide its high level of services, Quicken Loans employs approximately 1,600 to 1,700 Mortgage Bankers, whom it hired after concluding extensive background checks. Tr. 12; 39. Quicken Loans collects substantial information from its customers in connection with the mortgage application and approval process. Likewise, Quicken Loans also collects substantial information regarding applicants to ensure they are fit for positions of great responsibility. For example, Quicken Loans collects information regarding prospective employees' backgrounds, financial histories and credit worthiness. Tr. 39.

After being hired and executing the MBEA, Quicken Loans invests substantial time and resources into educating and training each of its Mortgage Bankers to become productive, successful and service-oriented professionals. Indeed, the Mortgage Banker training process at Quicken Loans takes up to six months to complete and costs Quicken Loans an estimated \$25,000.00 per Mortgage Banker. Tr. 39. Specifically, Quicken Loans requires all Mortgage Bankers to go through its formal, classroom-style Banker Greatness Training ("BGT") program when they begin their employment. Tr. 37. BGT covers all aspects of the mortgage lending services that the Company provides, including specific training in its sales processes and methodologies and loan origination procedures. *Id.* In addition to BGT, Quicken Loans provides Blueprint, which is training designed to enhance Mortgage Bankers' productivity in assisting Quicken Loans clients over the phone. *Id.* Separate and apart from the classroom-style training Quicken Loans provides to its employees, it also developed proprietary training materials and practice tests and provides these to the Mortgage Bankers to prepare them for federal and state licensure examinations. Tr. 38. The Mortgage Bankers take nine federal and state examinations while employed at Quicken Loans to obtain the requisite licenses to perform

their duties. *Id.*

Once qualified and licensed to work as Mortgage Bankers, employees are responsible for collecting and reviewing highly confidential personal and detailed financial information about Quicken Loans customers. For example, Mortgage Bankers are trained to analyze a customer's assets, including reviewing a customer's tax forms, paystubs, bank statements and other personal, confidential information to determine whether the customer qualifies for a loan. Tr. 35. Maintaining the confidentiality of all customer financial information obviously is an essential job requirement and a basic expectation for all Mortgage Bankers.

To protect the investment it makes in its Mortgage Bankers as well as to protect the confidential and proprietary information that Mortgage Bankers are entrusted with, Quicken Loans enters into the MBEA with each of its Mortgage Bankers. GCX 2. The purpose of the MBEA is to protect the Company's business interests and assure compliance with considerable legal regulations applying to its business. As the parties acknowledge in the MBEA, they enter into the agreement because of:

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

GCX 2, p.1.

Ms. Garza entered the MBEA at issue on October 4, 2007, well before the 10(b) period applicable to this case. Tr. 21. She testified that she did not review the MBEA before she signed it, or at any subsequent time while employed by Quicken Loans. Tr. 22.¹ As described above, among many other provisions, the MBEA obligated Ms. Garza to refrain from engaging in a competing line of business or working for a competing company for nine months after her separation with Quicken Loans. AGCX 2.

After working at Quicken Loans for five years as a Mortgage Banker, Ms. Garza resigned her employment effective October 18, 2011, and began working in the same position at loanDepot, a direct competitor also located in Maricopa County, Arizona. Tr. 14. Her new employment with loanDepot was in direct violation of her covenant not to compete in the MBEA. On October 25, 2011, Director of Team Relations-Human Resources sent Ms. Garza a letter to remind Ms. Garza of her ongoing obligations to Quicken Loans, including her agreement to refrain from disclosing Proprietary/Confidential Information, soliciting Quicken Loans' clients, and engaging in a competing line of business for nine months from the date of her separation from Quicken Loans. AGCX 3.

Because Ms. Garza continued working for loanDepot and settlement efforts failed, Quicken Loans filed and served Ms. Garza with a civil complaint in approximately November 2011. Tr. 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.

In March 2012, after Quicken Loans sued her and after she ceased working for Quicken Loans, Ms. Garza filed her charge alleging the MBEA violated Section 8(a)(1) of the Act.

¹ Ms. Garza testified the MBEA was readily, easily available to her during her employment. Clearly, she did not object to any allegedly overbroad provisions in the MBEA not because she failed to read it, but because it never occurred to her to construe the MBEA as violative of any of her Section 7 rights.

AGCX 1; Tr. 24. The allegations have no merit. The Complaint should be dismissed.

IV. A REASONABLE QUICKEN LOANS EMPLOYEE WOULD NOT CONCLUDE THAT THE MBEA LIMITS SECTION 7 RIGHTS

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 familiar 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 (emphasis in original). If so, the work rule is unlawful. *Id.* If not, as is the case here, an alleged violation is dependent upon AGC demonstrating one of the following: (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. There is no evidence, nor has the AGC contended, that Quicken Loans promulgated the MBEA in response to any union or other protected activity, nor that it applied the disputed provisions at issue here to restrict the exercise of Section 7 rights. The second and third prongs of the *Lutheran Heritage Village* test simply are irrelevant to this case. AGC claims that unknown and purely hypothetical employees would construe the language of two provisions in the MBEA to prohibit Section 7 activity. That claim has no merit.

In determining whether employees would reasonably construe an employer’s work rule or policy to prohibit Section 7 activity, the Board gives the rule a “reasonable reading”, refrains from “reading particular phrases in isolation”, and “must not *presume* improper interference with employee rights.” *Lutheran Heritage Village*, 343 NLRB at 646 (emphasis added). Indeed, the legal standard is not whether a challenged rule arguably precludes any imaginable protected activities; the Board will not find a violation simply because a rule *could* be construed to restrict Section 7 rights.

We are simply unwilling to engage in ... speculation in order to condemn as unlawful a facially neutral work rule 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. We ... decline to parse through work rules, viewing phrase in isolation, and attributing to employers an intent to interfere with employee rights, in order to divine ambiguities that will render such rules unlawful.

Fiesta Hotel d/b/a Palms Hotel & Casino, 344 NLRB 1363, 1368 (2005) (emphasis in original).²

Moreover, in determining the “reasonableness” of a rule, it must be construed in its surrounding context. According to *Lafayette Park*, relevant factors are non-enforcement of the rule; whether the rule was promulgated in response to protected activities; union animus; and whether the employer has substantial and legitimate business concerns. 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. In this regard, the Judge must determine whether the average Quicken Loans employee, given the circumstances, would reasonably conclude that his or her Section 7 rights have been chilled or limited. See, e.g., *The Roomstore*, 357 NLRB No. 143, n. 3 (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); *Tradesmen Int’l*, 338 NLRB 460, 462 (2002) (rule forbidding “slanderous” or “detrimental” statements about the employer, which appeared on a list of conduct prohibiting “sexual or racial harassment” and “sabotage” could not reasonably be understood to restrict Section 7 activity).

² The Board in *Fiesta Hotel* was guided by and cited to the D. C. Circuit’s decision in *Adtranz ABB Daimler-Benz Corp. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001), which also made clear that the Board “may not cavalierly declare policies to be facially invalid without supporting evidence, particularly where, as here, there are legitimate business purposes for the rule in question and there is no suggestion that anti-union animus motivated the policy.”

Judicial precedents also require a judge to review the context in assessing how a “reasonable employee” may view certain conduct. In *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80-81 (1998), the U. S. Supreme Court stated:

[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.

In *Burlington Northern & Sante Fe Ry. v. White*, 548 U.S. 53 (2006), the Court said: We 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.

The Board and the courts mandate that application of the objective “reasonable employee” standard requires the Judge to evaluate the context in which the alleged unlawful conduct occurred. The context in this case includes employment in a highly regulated field which is acutely sensitive to legal compliance issues, including a high interest in the security of personal and financial information of customers, where the evidence demonstrates the rules at issue in the MBEA have *never* been applied nor construed to restrict Section 7 rights. Indeed, the MBEA specifically and repeatedly refers to Quicken Loans’ values and expectations with regard to all legal compliance matters, and provides that Quicken Loans and its employees agree that “this Agreement is reasonable and necessary” because of the following specific reasons:

(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, p. 1.

Among the expectations specifically referred in the MBEA, of course, is the commitment to legal compliance matters that affect Quicken Loans' workplace. The MBEA prohibits a construction of its provisions in *any manner* that would violate applicable laws. The MBEA provides that the parties are committed to "Adherence to Applicable Laws, Regulations and Rules" and, in the context of all of the legal requirements under which Quicken Loans employees are required to operate, states employees will adhere to and comply with "all applicable state and federal laws and regulations." AGCX 2, p. 2. *See id.* p. 11 (providing that all of the provisions of the MBEA will be construed in accordance with the law). No reasonable Quicken Loans employee would read the definition of Proprietary/Confidential Information or the Non-disparagement provision in the MBEA in a manner contrary to the Act. The MBEA explicitly prohibits such a construction.³

As set forth below, neither of the rules at issue in the instant case explicitly prohibits Section 7 protected activity. Nor were the rules implemented in response to union or other protected, concerted activities. No such activities are alleged in this case. Since there is no credible evidence that the rules at issue were applied to restrict Section 7 protected activity, the

³ The value of contract language limiting arguably ambiguous references to employees' rights has frequently been cited. *See, e.g., Lutheran Heritage Village*, 343 NLRB at 652 n. 7 ("Member Liebman observes that if the prohibited conduct is of a kind so general as to imply that protected activity may be encompassed, an employer can easily eliminate the ambiguity by adding a statement to its rule that the prohibition does not apply to conduct that is protected under the National Labor Relations Act."); *Safeway, Inc.*, 338 NLRB 525, 527 n. 3 (2002) (dissenting opinion) ("Employers who adopt [overbroad] confidentiality rules can quite easily explain to employees that those rules do not apply to activity protected by Sec. 7"). The MBEA specifically prohibits a construction that would violate any law, including Section 7 of the Act.

only question here is whether Quicken Loans employees would reasonably construe the rules at issue to prohibit their Section 7 activity. By reading the MBEA in its totality and in the context of the Company's workplace, there is no basis on which to find that either of the disputed rules violates Section 8(a)(1).

1. The MBEA Provision Pertaining To Proprietary/Confidential Information Is Not Overbroad and Is Lawful

Paragraph 4(a) of the Complaint isolates certain portions of the MBEA's Proprietary/Confidential Information provision and contends they violate Section 8(a)(1) of the Act. They do not.

MBEA Part D recognizes that "during the course of your employment with the Company, [employees] will gain access to, use, and compile information that [they] agree is the Company's 'Proprietary/Confidential Information,' as defined in Attachment A." AGCX 2, p. 3. The provision therefore states that employees:

shall hold and maintain all Proprietary/Confidential Information in the strictest of confidence and that [employees] shall preserve and protect the confidentiality, privacy and secrecy of all Proprietary/Confidential Information;

[employees] shall not disclose, reveal or expose any Proprietary/Confidential Information to any person, business or entity ...

[and employees] 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.

Id.

The plain language of Part D makes no reference to Section 7 rights, and no restriction on such rights can be inferred. It is justified, and indeed it would be dangerous to Quicken Loans' business for it not to protect all of the "Proprietary/Confidential" information that it has invested in creating and collecting. After all, Proprietary/Confidential information is, first and foremost,

the information of Quicken Loans. Proprietary/Confidential information is information that is owned by Quicken Loans; it belongs to the Company because it was prepared for and in connection with its business. Information that Quicken Loans does not claim to own is not Proprietary/Confidential Information because it is not “proprietary” given the ordinary and customary usage of that term. Likewise, Proprietary/Confidential information necessarily is limited to non-public information; it must be *confidential* in the sense that it is not generally known. Information that is public and is not allegedly confidential does not come within the scope of Proprietary/Confidential Information either.

Attachment A to the MBEA incorporates these basic requirements in its definition of Proprietary/Confidential Information. It states that:

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 . . .

The Board has never ruled that an employer’s efforts to protect its proprietary, confidential information somehow infringes employees’ rights under the Act. To the contrary, in *Lafayette Park Hotel*, 326 NLRB at 824, the Board ruled that “clearly, business have a substantial and legitimate interest in maintaining the confidentiality of private information.” Applying that basic right, it upheld a confidentiality provision that prohibited employees from divulging “hotel-private information.” While “hotel-private” information was not defined in the rule, the Board found that employees would reasonably understand it was designed to protect private information (including guest information and the employer’s contracts with suppliers) and not as precluding them from discussing their own personal information, such as their wage rates, with other employees. *Id.*; see also *Kmart*, 330 NLRB 263 (1999) (noting that an employer has a “legitimate interest in the confidentiality of its private information” and ruling

that a provision stating that “company business and documents are confidential” was not unlawful).

In *Mediaone of Greater Florida*, 340 NLRB 277, 278 (2003), the Board reviewed whether a work rule prohibiting disclosure of “company and third party proprietary information” violated Section 8(a)(1). The Board noted the rule generally prohibited the release of proprietary information and set forth examples, including business plans, marketing plans, trade secrets, financial information, patents and copyrights. *Id.* at 279. Consequently, the Board concluded there was no basis to find that a reasonable employee would believe the rule preventing disclosure of confidential employee information would prevent him from saying anything about himself or his own employment. *Id.*

The same is true here. The definition of “Proprietary/Confidential Information” in Attachment A spans two pages of the MBEA, and sets forth that the information Quicken Loans seeks to protect includes information such as “customer and applicant information,” “customer inquiry information,” “company financial information,” “company business, marketing and advertising information and plans,” “company operation information,” and “company computer and networking information.” Read as a whole, a reasonable employee would conclude Quicken Loans intended the Proprietary/Confidential Information Provision to prevent disclosure of only confidential proprietary information.

One portion of Attachment A also defines “Proprietary/Confidential Information” to include the following:

Personnel Information including, but not limited to, all personnel lists, rosters, personal information of coworkers, 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, p. 13.

To be considered “Proprietary/Confidential Information” as described above, a record must at minimum be non-public and it must be owned by Quicken Loans. Nothing in Attachment A modifies the basic rubric employed in the MBEA. Reasonable employees of Quicken Loans naturally construe the personnel materials that fall under the definition of Proprietary/Confidential Information as those materials that are confidential and owned by Quicken Loans, and no other materials. Attachment A provides as examples of protected items not only the documentary personnel lists and rosters that the Company generates, but also the handbooks and personnel file materials that contain personal, nonpublic information of coworkers, managers, executives and officers. It is these nonpublic, confidential documents, generated for and maintained by Quicken Loans and which it owns for purposes of its own business, that are protected from disclosure. By contrast, the Proprietary/Confidential Information provision does not purport to restrict public and non-proprietary information from being disclosed. As illustrations, the evidence demonstrates that Mortgage Bankers’ information, including their contact and licensing information, are openly published and distributed through public NMLS listings and through the Company’s own internet listing service. Tr. 41. If the MBEA prohibited such public, non-proprietary information from being disclosed, Quicken Loans would not be disseminating it electronically to the public.

The Board has rejected the interpretation that the AGC is expected to assert here, that the reference to nonpublic personnel *records* of Quicken Loans necessarily includes all information regarding employees’ wages, benefits or employment terms, the restriction of which would chill

Section 7 activities. For example, in *Security Walls, LLC*, in which the employer similarly required that "payroll or personnel records" be kept confidential, the Board upheld an Administrative Law Judge's holding that "an objective reading of this rule would indicate that the rule is directed toward the confidentiality of Respondent's business records and not to the prohibition of employees' Section 7 rights." *Security Walls, LLC*, 356 NLRB No. 87 (2011). The Administrative Law Judge had reasoned that "[i]t is not apparent that employees would construe this rule to preclude their ability to discuss among themselves matters relating to wages and terms and conditions of employment." *Id.* Likewise, the Proprietary/Confidential Information provision in the MBEA is not overbroad and does not violate Section 8(a)(1). It simply does not purport to forbid employees from discussing their wages or terms and conditions of employment. It is commonsensical that employees must not take personnel records and disclose them, which is what the provision prohibits.

By contrast, cases AGC is expected to cite in her Brief involve circumstances where the Board found provisions clearly were both overbroad and coercive. For instance, *Flex Frac Logistics, LLC*, 358 NLRB No. 127 (Sept. 11, 2012) dealt with a confidentiality provision that broadly prohibited employees from disclosing any and all of their personnel information. Unlike the MBEA provision, the one at issue in *Flex Frac* was not limited to proprietary, confidential information, it did not provide any examples of or limit in any way the personnel information that was covered, and therefore, the Board concluded a reasonable employee could infer that the disclosure of terms and conditions of employment would be prohibited. *Id.* Once again, and in sharp contrast here, Quicken Loans provided two pages of examples and clarification of confidential and proprietary information.

Also dissimilar to the provision in this matter, the confidentiality provision reviewed in

Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371,

358 NLRB No. 106 (Sept. 7, 2012), set forth the following:

[A]ll Costco employees shall refrain from discussing private matters of members and other employees. This includes topics such as, but not limited to, sick calls, leaves of absence, FMLA callouts, ADA accommodations, workers' compensation injuries, personal health information, etc.

Also, among the topics the company sought to prohibit disclosure of, were:

[S]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security number of employees, personal health information.

Id. Costco's policy, in short, very broadly prohibited any discussion of "private matters" and of "sensitive information," without limiting it to proprietary, confidential materials of the Company. Further, the illustrations of the type of private, sensitive matters that were subject to non-disclosure in Costco's policy specifically included employment terms about which employees have the protected right to communicate. In particular, the Board concluded that Costco's prohibition of discussing leaves of absence, "payroll" and "compensation" information, and other terms and conditions of employment, clearly would tend to chill employees in exercising Section 7 rights.

Unlike the provisions in decisions discussed above, Quicken Loans explicitly limited the subject matters for which it prohibited disclosure to include information that is confidential and proprietary. The provision at issue in this case does not refer to payroll, compensation, or salary information. It does not refer to wages, benefits, or commissions. It does not even arguably restrict employees' communications about their compensation or other terms and conditions of employment.⁴ The provision merely places limitations on confidential and proprietary records of Quicken Loans.

⁴ In contrast, the "Personal Information Pertaining to Company Executives and Officers" does reference nonpublic and confidential "personal financial information." To the extent AGC

As described above, the Board has recognized an employer's right to adopt rules to protect its confidential and proprietary records. The very nature of the finance and lending industry clearly requires Quicken Loans to take steps to protect its records. Indeed, Quicken Loans had clear lawful and legitimate business purposes in doing so. Mortgage Bankers are entrusted with highly confidential information, including tax forms, credit histories, and other sensitive personal information.

In *Lafayette Park Hotel*, the Board found that the provision at issue in that matter 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. There, the Board 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 parties to the MBEA intend the Proprietary/Confidential Information to protect the nonpublic, confidential and proprietary information specifically for job related purposes. The confidentiality and proprietary information includes information regarding training and testing of its Mortgage Bankers, the nonpublic financial and customer account information that Mortgage Bankers are entrusted with. Maintaining the confidentiality of that information is paramount to Quicken Loan's ability to succeed in gaining business and to comply with federal and state regulations. No reasonable Mortgage Banker would read the provision in the MBEA and conclude that Quicken Loans sought to protect anything other than its confidential and

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 not employees covered by the Act.

proprietary information - not to prevent employees from discussing their terms and conditions of employment.

Finally, there is no basis to conclude that any reasonable employee at Quicken Loans *has ever* construed the provisions in the MBEA from engaging in Section 7 activity. Ms. Garza claimed that she did not even review the provisions until after she left employment with Quicken Loans. Tr. 23. In fact, the AGC offered no evidence that any employee covered by the Act ever read or was aware of the at-issue provision of the MBEA during his or her employment. *See Lafayette Park Hotel*, 326 NLRB at 824 (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 prohibits Section 7 activity); *see also Safeway Inc.*, 338 NLRB at 525 (factoring in 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 into decision that provision could not have been reasonably read to chill Section 7 activity or affected the outcome of a representation election). Where there is absolutely no evidence that any employee was even aware of – let alone considered – the provision that the CGC contends is unlawful, the Complaint should be dismissed.

2. The Nondisparagement Provision Is Not Overbroad and Is Lawful

Paragraph 4(c) of the Complaint, which alleges the Agreement's Non-disparagement Provision also violates Section 8(a)(1), is equally specious. Similar to the Proprietary/Confidential Information provision, the AGC's claim is based on speculation that a Quicken Loans employee would conclude the provision chilled his or her exercise of Section 7 activity. There was no evidence presented to support that claim.

The MBEA states:

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, service, 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.

GCX 2, p. 10.

A reasonable reading of the provision in view of the surrounding circumstances demonstrates that “publicly criticize, ridicule, disparage or defame” was meant to cover only individuals who are unprotected by the Act. *See Valley Hospital Medical Center Inc.*, 351 NLRB 1250 (2007) (an employee's criticism of his or her employer that is “malicious” loses the Act's protection). Public criticism, ridicule, disparagement and defamation are not acts that are protected by the Act; whether the criticism or disparagement is protected by the Act is determined by the specific facts of the action. *See NLRB v. IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, 475 (1953) (“The legal principle that ... disloyalty is adequate cause for discharge is plain enough”); *see also Lutheran Heritage Village*, 343 NLRB at 646. Similar to what the Board noted in *Lutheran Heritage Village*, an employee engaging in conduct that may fall under the scope of the Non-disparagement Provision may be protected by Section 7 in some cases and not in others. *Id.* However, “[a]bsent application of the rule to the former conduct, [the Board] would not presume the rule is unlawful.” *Id.* The same principle is true here as there is also no evidence of the provision ever being enforced in any manner.

Reading the provision as a whole confirms it is lawful. Again, the Agreement makes clear that employees should not read any provision in a manner that violates any rights protected by law. Moreover, the MBEA itself recognizes in multiple provisions that employees may from

time to time have and voice complaints both within the Company and outside of the Company. For instance, the Non-disparagement provision notifies employees that the Company has an open door policy that invites employees to bring to them any issues or complaints. *See* GCX 2, p 10. Section O of the Agreement also contemplates instances where employees may feel the need to resolve disputes with the Company by bringing claims and lawsuits against it in public forums. *See* GCX 2, p. 11. The Company obviously does not prevent this type of conduct. It is illogical to argue that a reasonable employee would read the Agreement as a whole, including the provision regarding filing lawsuits against the Company, and conclude the Company was preventing him or her from criticizing or complaining about it. A reasonable employee would conclude the Non-disparagement provision was aimed at conduct that was not protected by the Act.

Similar to this case, in *Lafayette Park*, 326 NLRB at 824, the Board found the employer did not violate Section 8(a)(1) by maintaining a rule prohibiting “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.” The Board found that employees would not reasonably fear the respondent would use the rule to punish them for engaging in protected activity, but would recognize that the rule meant to reach only serious misconduct. *Id.* (rule prohibiting “verbal or other statements which are slanderous or detrimental to the company or any of the company’s employees” was not unlawful); *Lutheran Heritage*, 343 NLRB at 646 (rule prohibiting “abusive language” not unlawful on its face); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 (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 . . .”). The Board’s

conclusions in the foregoing cases finding lawful policies prohibiting employee conduct that “tends to bring discredit” to the employer or “has a negative effect on the Company’s reputation” or “reflects adversely on” or “affects” the employer’s “reputation or good will in the community” or are “abusive” are controlling here.

Finally, as is the case with AGC’s challenge to the Proprietary/Confidentiality provision in the MBEA, the AGC failed to present 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 where there is absolutely no evidence to reach that conclusion. Paragraphs 4(c) and 5 of the Complaint have no merit. They should be dismissed.

V. CONCLUSION

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

Dated this 11th day of December, 2012



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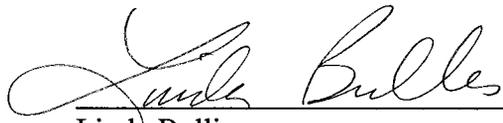
CERTIFICATE OF SERVICE

I certify that I have this 11th day of December, 2012, caused an electronic copy of the foregoing **Post-Hearing Brief** containing the signature of counsel for Respondent Quicken Loans, Inc. in .pdf format, to be filed electronically using the National Labor Relations Board's E-Filing System.

I also certify that I have caused a copy of the foregoing document to be served via electronic mail on the following:

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