

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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	:	
NEW PENN FINANCIAL, LLC,	:	
	:	Motion Sequence No. 003
Plaintiff,	:	
	:	Index No. 653668/2018
- against -	:	
	:	Masley, J.
360 MORTGAGE GROUP, LLC,	:	
	:	<b>Oral Argument Requested</b>
Defendant.	:	
	:	
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**DEFENDANT’S MEMORANDUM OF LAW IN OPPOSITION  
TO PLAINTIFF’S MOTION TO REDACT AND SEAL**

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November 9, 2018

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Defendant 360 Mortgage Group, LLC (“360 Mortgage”) respectfully submits this memorandum of law in opposition to Plaintiff New Penn Financial, LLC’s (“New Penn”) motion to redact the public filing of 360 Mortgage’s memorandum of law in support of its motion to dismiss (NYSCEF No. 10) and Exhibits C and D to the Affirmation of David J. Ranzenhofer in support of 360 Mortgage’s motion to dismiss (NYSCEF Nos. 14-15).

### **PRELIMINARY STATEMENT**

New Penn’s motion, like its complaint, is an attempt to re-write the parties’ agreements. In the complaint, New Penn asks the Court to re-write the price terms. In this motion, it asks the Court to re-write the confidentiality provisions. But under the plain terms of the applicable confidentiality provision (which New Penn’s counsel drafted), 360 Mortgage is permitted to disclose confidential information to defend itself in this litigation. That provision provides, in pertinent part, that “[t]he Recipient may disclose the Disclosing Party’s Confidential Information . . . (iv) to defend itself in connection with a legal proceeding regarding the transactions contemplated by this Agreement.” (Affirmation of David J. Ranzenhofer in Support of Defendant 360 Mortgage Group, LLC’s Motion to Dismiss the Complaint, dated September 20, 2018 (“Ranzenhofer MTD Aff.”), Exs. C-D, § 11.14(b) (NYSCEF Nos. 50-51).) The agreements place no limitations on such disclosure.

New Penn attempts to re-write that provision. It characterizes the applicable confidentiality provision as “narrow” and “limited.” (Plaintiff’s Memorandum of Law (“Pl.’s MOL”), at 2-3, 5 (NYSCEF No. 44).) But that provision contains no limitations. In contrast, other confidentiality provisions in the parties’ agreements, which are inapplicable here and which 360 Mortgage does not rely on, show that the parties knew how to limit the disclosure of confidential information when they wanted to. *See infra* Part I.B.1. New Penn also argues that “disclose” means 360 Mortgage can “use” the confidential information but cannot disclose it

publicly. (Pl.’s MOL at 2.) The agreements simply do not say that. There are no limits on 360 Mortgage’s disclosure to defend itself in litigation. Further, New Penn attempts to impose some sort of “necessity” limitation on 360 Mortgage’s disclosures. (Pl.’s MOL at 5-6.) The agreements contain no such limitation. There is no basis to deprive 360 Mortgage of its contractual right to use confidential information to defend itself.

New Penn’s motion should be denied.<sup>1</sup>

### **STATEMENT OF RELEVANT FACTS**

This case involves a transaction split into two substantively identical parts, each of which was documented in a Bulk Agreement for the Purchase and Sale of Mortgage Servicing Rights between 360 Mortgage as the Seller and New Penn as the Purchaser (each an “Agreement” and, together, the “Agreements”). (Compl. ¶ 30 (NYSCEF No. 2).) Pursuant to the Agreements, the parties also executed two Assignment Agreements (each an “Assignment” and, together, the “Assignments”). (*Id.* ¶¶ 32-33.)

### **Previous Filings Relevant to New Penn’s Motion**

New Penn asserts claims for breach of the Agreements or to reform Annex A to each Assignment. (*Id.* ¶¶ 66-81.) But it did not attach the Agreements, the Assignments, or

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<sup>1</sup> As an initial matter, New Penn was ordered to serve counsel for 360 Mortgage “by NYSCEF *and* email [with] a copy of this Order to Show Cause, together with the papers upon which it is based.” (NYSCEF No. 46 (emphasis added).) New Penn never served by email the signed order to show cause, its memorandum of law, the Affirmation of Christopher P. Malloy, dated September 28, 2018 (“Malloy Aff.”) and its exhibit, or the Affidavit of Andrew Miller, dated September 28, 2018 (“Miller Aff.”), as required by the Court’s order. Thus, New Penn’s motion should be denied for the independent reason that its papers were never properly served.

Annex A to either Assignment to its complaint. Rather, it selectively and misleadingly quoted from and referenced portions of those documents in an effort to state a claim. (*See, e.g., id.* ¶¶ 32, 34-38, 40-41, 43-45, 47-51.) New Penn also quoted from and referenced portions of a letter of intent between New Penn’s parent, New Residential Investment Corp. (“NRZ”), and 360 Mortgage (the “LOI”). (*See, e.g., id.* ¶¶ 26-27.)

360 Mortgage moved to dismiss the complaint (*see* NYSCEF Nos. 9-27, 49-52), and in support of its motion, 360 Mortgage filed the documents on which New Penn purports to predicate its claims – the LOI, the Agreements, the Assignments, and Annex A to each Assignment. (*See* Ranzenhofer MTD Aff. Exs. B-H (NYSCEF Nos. 13-19, 50-51).) 360 Mortgage filed each of those documents in accordance with all applicable confidentiality obligations.

The LOI. Under the LOI, NRZ and 360 Mortgage “agree that the existence and terms of this LOI (the ‘Confidential Information’) are confidential, and neither party will disclose the Confidential Information without the other party’s prior written consent.” (Ranzenhofer MTD Aff. Ex. B at 7 (NYSCEF No. 13).) Therefore, counsel for 360 Mortgage emailed counsel for New Penn and advised them that 360 Mortgage intended to file the LOI and asked if NRZ would consent to it being filed on the public docket. (*See* Affirmation of David J. Ranzenhofer in Opposition to New Penn’s Motion to Seal or Redact, dated November 9, 2018 (“Ranzenhofer Opp’n Aff.”), Ex. 1 at 3.) Pursuant to further discussions between counsel (*see* Ranzenhofer Opp’n Aff. Exs. 1-3), 360 Mortgage filed the LOI on the public docket with redactions requested by NRZ/New Penn. (*See* Ranzenhofer MTD Aff. Ex. B (NYSCEF No. 13).) 360 Mortgage also moved to seal the unredacted version of the LOI as well as certain other documents. (*See* NYSCEF Nos. 28-31.) The motion to seal the unredacted version of the LOI

utilized the specific language requested by NRZ/New Penn to justify sealing that document. (*See* Ranzenhofer Opp'n Aff. Ex. 3 at 1.)

The Agreements. The Agreements, which were drafted by New Penn's transaction counsel, define "Confidential Information" as "Any and all information regarding the transactions contemplated by this Agreement . . . ." (Ranzenhofer MTD Aff. Exs. C-D, § 1.01 (NYSCEF Nos. 50-51).) The Agreements provide a general obligation to hold Confidential Information "in strict confidence." (*Id.* § 11.14(a).) However, the Agreements also provide several exceptions to that obligation. (*Id.* § 11.14.) As relevant here, the Agreements provide:

The Recipient may disclose the Disclosing Party's Confidential Information only (i) to its and its Affiliates' officers, directors, attorneys, accountants, employees, agents and representatives and, with respect to the Purchaser only, rating agencies, consultants, bankers, financial advisors and potential financing sources (collectively, "Representatives") who need to know such Confidential Information and who are subject to a duty of confidentiality (contractual or otherwise) with respect to such Confidential Information, (ii) to those Persons within the Recipient's organization directly involved in the transactions contemplated by this Agreement, and who are bound by confidentiality terms substantially similar to the terms set forth herein, (iii) to the Recipient's regulators and examiners, (iv) to defend itself in connection with a legal proceeding regarding the transactions contemplated by this Agreement and (v) as required

by Applicable Requirements. The Recipient shall be liable for any breach of its confidentiality obligations and the confidentiality obligations of its Representatives.

(*Id.* § 11.14(b) (emphasis added).) Therefore, 360 Mortgage properly filed the Agreements on the public docket without consulting New Penn or NRZ, and it did not include the Agreements on the list of documents subject to its motion to seal that it sent to New Penn’s counsel. (*See* Ranzenhofer Opp’n Aff. Ex. 1 at 2.)

The Assignments. The Assignments contain no confidentiality restrictions. (*See* Ranzenhofer MTD Aff. Exs. E-F (NYSCEF Nos. 16-17.) Therefore, 360 Mortgage filed them on the public docket.

Annex A to the Assignments. Each Annex A is a Microsoft Excel spreadsheet, and together, they list 24,686 mortgage loans, identified by loan number, and data regarding those loans. (Affidavit of Kristy Goldman, dated September 18, 2018, ¶ 2 (NYSCEF No. 29).) Public filing of those spreadsheets would “reveal the loan numbers of the mortgage loans, which would create a risk of fraud or identify theft.” (*Id.* ¶ 4.) Thus, 360 Mortgage moved to seal the Annex A spreadsheets, and New Penn consented to that motion. (*See* NYSCEF Nos. 28-31.)

### **New Penn’s Motion to Seal**

After 360 Mortgage filed its motion to dismiss, New Penn requested that the clerk temporarily restrict access to 360 Mortgage’s memorandum of law, the Assignments, and the Agreements. (NYSCEF No. 32.) New Penn subsequently moved to redact the public version of 360 Mortgage’s memorandum of law and the Agreements and filed those documents with its proposed redactions. (*See* NYSCEF Nos. 34-44.)<sup>2</sup> New Penn asserted that the redacted

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<sup>2</sup> New Penn concedes that there is no basis to redact the Assignments. (*See* Malloy Aff. ¶ 13 n.1.)

information is “competitively sensitive” and “public disclosure of those terms could cause competitive harm to New Penn and NRZ.” (Pl.’s MOL at 1-2; *see also* Malloy Aff. ¶ 5; Miller Aff. ¶ 3.) New Penn sought to redact 41 pages in their entirety and parts of 35 additional pages, many of which are almost entirely redacted, of each 120-page Agreement. (Pl.’s MOL at 7.)

On October 2, the Court held an initial hearing on New Penn’s motion and ordered that, pending its final decision, 360 Mortgage should redact the information New Penn contends is competitively sensitive from its public filings. (Ranzenhofer Opp’n Aff. Ex. 4 at 7:23-26, 10:15-16.) The Court indicated that redactions should be narrowly tailored and limited to such things as numbers, amounts, formulas, and unique terms. (Ranzenhofer Opp’n Aff. Ex. 4 at 9:13-10:3; *see also* NYSCEF No. 46 at 2 (permitting redaction of “commercially sensitive information, such as numbers, amounts, strategies, [and] unique terms”).)

Following entry of the order to show cause, New Penn re-filed its proposed redactions and redacted even more of the Agreements. (*See* Affirmation of Christopher P. Malloy, dated October 3, 2018 (NYSCEF Nos. 47).) New Penn now contends that 53 pages need to be entirely redacted and 34 pages need to be partially redacted (many of which are almost entirely redacted). (*See id.* ¶ 6.) For the first time, New Penn offered a specific basis to redact three numbers in each Agreement (*see id.* ¶ 2 (referring to bank account numbers)), but it still offered nothing more than its conclusory assertions that information is “competitively sensitive” to justify redacting anything else.<sup>3</sup>

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<sup>3</sup> Even though the Agreements permitted 360 Mortgage to file them without any redactions, the three bank account numbers can be redacted pursuant to 22 N.Y.C.R.R. 202.5(e)(1)(iv).

However, the entire pages should not be redacted.

In accordance with the Court's directive, 360 Mortgage re-filed its papers on the public docket containing New Penn's proposed redactions, stating again that it did not agree with those redactions. (Affirmation of David J. Ranzenhofer, dated October 5, 2018, ¶¶ 9-10 (NYSCEF No. 52).)

### ARGUMENT

“Under New York law, there is a broad presumption that the public is entitled to access . . . judicial proceedings and court records.” *Mosallem v. Berenson*, 76 A.D.3d 345, 348 (1st Dep't 2010). New York “has ‘long recognized that civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly, and fairly.’” *Id.* A party seeking to seal court records must demonstrate “good cause.” *See* 22 N.Y.C.R.R. 216.1(a). “‘Confidentiality is clearly the exception, not the rule,’ and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access.” *Mosallem*, 76 A.D.3d at 349 (citations omitted).

#### I.

#### **NEW PENN CANNOT SHOW COMPELLING CIRCUMSTANCES BECAUSE THE AGREEMENTS GIVE 360 MORTGAGE THE RIGHT TO DISCLOSE THEM TO DEFEND ITSELF IN THIS LITIGATION**

##### **A. The Plain Language of the Agreements Permits 360 Mortgage to Disclose Them**

“[A] written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 66 (1st Dep't 2008), *aff'd*, 13 N.Y.3d 398 (2009); *see also* *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 6 (1st Dep't 2004) (“[I]t is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms.”). “A court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties.” *Riverside*, 60 A.D.3d at 66

(citations omitted). “This rule has special import . . . where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm’s length.” *150 Broadway*, 14 A.D.3d at 6 (internal quotation marks omitted).

The Agreements provide that the recipient of Confidential Information “may disclose” such information in five situations, (*see Ranzenhofer MTD. Aff. Exs. C-D, § 11.14(b)* (NYSCEF Nos. 50-51)), including “to defend itself in connection with a legal proceeding regarding the transactions contemplated by this Agreement” (*id.* § 11.14(b)(iv)). 360 Mortgage’s defense in this case falls squarely within that provision, which permits disclosure without limitation. Thus, New Penn’s motion is meritless and should be denied.

**B. New Penn’s Arguments Are Baseless**

**1. The Exception to Confidentiality in Section 11.14(b)(iv) Is Not “Limited” or “Narrow”**

To avoid the plain language of the Agreements, New Penn characterizes Section 11.14(b)(iv) as “limited” and “narrow.” (Pl.’s MOL at 2-3, 5.) But calling that provision “limited” or “narrow” does not make it so. In fact, nothing in that provision limits how or when a party may disclose Confidential Information to defend itself. (*See Ranzenhofer MTD. Aff. Exs. C-D, § 11.14(b)* (NYSCEF Nos. 50-51).) New Penn’s attempt to impose limitations not contained in the Agreements should be rejected. *See Riverside*, 60 A.D.3d at 66.

Moreover, the breadth of Section 11.14(b)(iv) contrasts with the confidentiality provision in the LOI, which was drafted by NRZ (or its counsel), and other confidentiality provisions in the Agreements, which were drafted by New Penn’s counsel. Those other provisions show that the parties knew how to limit disclosure when they wanted to. For example, the LOI flatly prohibits disclosure of its existence or terms without the other party’s written consent. (*Ranzenhofer MTD Aff. Ex. B at 7* (NYSCEF No. 13).) As another example, pursuant

to Section 11.14(c) of the Agreements, the parties may not disclose information (confidential or otherwise) about the other to the media, to the press, or for publication without written consent.

(Ranzenhofer MTD. Aff. Exs. C-D, § 11.14(c) (NYSCEF Nos. 50-51); *see also, e.g., id.*

§ 11.14(b)(i)-(ii) (limiting disclosure, in non-litigation situations, to certain persons and only permitting disclosure when the persons to whom disclosure would be made are bound by a duty of confidentiality).)

In contrast to the above provisions, Section 11.14(b)(iv) does not limit disclosure. (*See id.* § 11.14(b).) For instance, it does not say that a party may only disclose Confidential Information to court personnel or must file under seal or in redacted form. Thus, the presence of limitations in other provisions, and the absence of any limitations in Section 11.14(b)(iv), refutes New Penn's claim that Section 11.14(b)(iv) is "narrow" or "limited."

New Penn also relies on Section 11.14(d), which addresses situations where disclosure is legally compelled by subpoena or otherwise. (Pl.'s MOL at 3, 5-6.) Section 11.14(d) is inapplicable here because 360 Mortgage is not being compelled to disclose anything. Rather, 360 Mortgage is exercising its right to disclose information under Section 11.14(b)(iv).

## **2. "Disclose" Means Disclose, Not Use But Not Disclose**

New Penn also argues that "disclose" means 360 Mortgage can "use" confidential information but cannot disclose it publicly. (*See Ranzenhofer Opp'n Aff. Ex. 5 at 1* ("The exception to the confidentiality provision in Section 11.14(b) of the Bulk Agreements might permit 360 Mortgage to *use* confidential materials in its defense, but it does not permit it to *gratuitously disclose them publicly* in the process." (emphasis added)); *see also* Pl.'s MOL at 2 (arguing that Section 11.14(b) "allow[s] a party to *use* confidential information to defend itself in a legal proceeding . . . [but] does not give 360 Mortgage the right to *gratuitously publicize* confidential information for reasons unrelated to its defense." (emphasis added)).) The

Agreements simply do not say that. Rather, they do not limit 360 Mortgage's right to disclose confidential information to defend itself in litigation. "[D]isclose" means disclose, not use but not disclose.

**3. There Is No "Necessity" Requirement Relating to 360 Mortgage's Disclosure of the Agreements**

New Penn's assertions that it was not "necessary" for 360 Mortgage to publicly file the Agreements (Pl.'s MOL at 5-6) is another baseless attempt to re-write the Agreements.

New Penn argues that "Section 11.14(b)(iv) neither requires [Confidential] [I]nformation to be filed in the public docket nor provides a basis for 360 Mortgage to oppose an application to redact or seal Confidential Information." (Pl.'s MOL at 5.) The question is not whether the Agreements *require* filing in the public docket. Rather, it is whether they *permit* it. They do. (Ranzenhofer MTD Aff. Exs. C-D, § 11.14(b)(iv) (NYSCEF Nos. 50-51).) New Penn signed contracts which permitted the defendant to decide whether to disclose Confidential Information in a lawsuit between the parties. (*Id.*) In contrast, the Agreements do not allow a party to disclose Confidential Information "to prosecute" or "to bring" a lawsuit. (*Id.*) Thus, New Penn contracted away its right to contend that Confidential Information could not be disclosed by 360 Mortgage if New Penn sued it. New Penn cannot deprive 360 Mortgage of its contractual right to defend itself publicly.<sup>4</sup>

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<sup>4</sup> In its complaint, New Penn disclosed the existence of the LOI and the Agreements, and it selectively and misleadingly quoted from those documents. (*See* Compl. ¶¶ 26-27, 32, 34-38, 40-41, 43-45, 47-51.) That was a breach of their plain terms. (*See* Ranzenhofer MTD Aff. Ex. B at 7 (NYSCEF No. 13); Ranzenhofer MTD Aff. Exs. C-D, § 11.14 (NYSCEF Nos. 50-51).) New Penn erroneously contends that it "asked permission from [360 Mortgage] whether they would

New Penn also speculates that 360 Mortgage “publicly release[ed] Confidential Information for reasons other than defending itself.” (Pl.’s MOL at 6.) New Penn offers no support for that baseless speculation. (*Id.*) Rather, it says public filing of the Agreements is not “necessary” for 360 Mortgage’s defense. (*Id.*) The Agreements contain no limitation that disclosure must be only to the extent necessary or any other limiting words. Under the plain language of the Agreements, 360 Mortgage, not New Penn, can decide how 360 Mortgage defends itself in this action, including to what extent filing the Agreements is necessary.

Finally, New Penn argues that “filing the entire [Agreements] was unnecessary.” (Pl.’s MOL at 6-7.) Again, the Agreements do not permit disclosure only to the extent necessary or in any other way limit how a party may disclose Confidential Information to defend itself.<sup>5</sup>

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regard those parts as violating the Confidentiality Agreement.” (Ranzenhofer Opp’n Aff. Ex. 4 at 5:17-19.) Not so. Rather, New Penn represented that its complaint did not contain Confidential Information, but it did not tell 360 Mortgage what sections of the LOI and the Agreements it referenced or quoted from. (Ranzenhofer Opp’n Aff. Ex. 6 at 1, 3.) The Agreements do not permit New Penn to cherry pick the public record.

<sup>5</sup> The Agreements allow 360 Mortgage to disclose Confidential Information to defend itself, and they contain no exception for “commercially sensitive” information. Even if they did, New Penn fails to show compelling circumstances to redact anything. It offers only a conclusory affidavit stating that the redacted terms are competitively sensitive and public disclosure could damage its and NRZ’s competitive positions. Nowhere does New Penn show any specific term is unique or otherwise sensitive. In reality, New Penn’s proposed redactions show it seeks to redact standard contract terms that the Court indicated should not be redacted. (*See, e.g.*, Miller Aff. Ex. 1 at iii-

**CONCLUSION**

For the foregoing reasons, New Penn’s motion to redact and seal should be denied.

Dated: New York, New York  
November 9, 2018

Respectfully submitted,

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iv, 4, 11, 12, 14, 17, 19-36.) Further, New Penn’s contention that it “requests limited redactions” (Pl.’s MOL at 7) is demonstrably false, as it seeks redaction of the majority of each Agreement (53 pages in their entirety and parts of 34 pages, many of which are almost entirely redacted). (See Affirmation of Christopher P. Malloy, dated October 3, 2018, ¶ 6 (NYSCEF Nos. 47); see generally Miller Aff. Exs. 2, 4 (NYSCEF Nos. 39, 41).)

**PRINTING SPECIFICATIONS STATEMENT**

I hereby certify pursuant to 22 N.Y.C.R.R. § 202.70(g), Rule 17, that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used as follows:

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Dated: New York, New York  
November 9, 2018

Respectfully submitted,

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