IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

YISROEL WEINGOT and SURI WEINBERGER a/k/a SURI WEINGOT.,

Plaintiffs,

v.

UNISON AGREEMENT CORP. et al.,

Defendants.

Case No. 21-cv-04542-JS-AYS

PROPOSED BRIEF OF NATIONAL CONSUMER LAW CENTER AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS

TABLE OF CONTENTS

Interest of amicus curiae 1

Introduction 1

Background 3

Argument 10

I. There are genuine disputes of material fact as to whether Unison's product is a loan 10

A. Under New York law, courts must look to substance rather than form to determine whether something is a loan, and this is a question of fact that is ill-suited for resolution on summary judgment 11

B. Viewing the evidence in the light most favorable to the Weingots, a reasonable juror could conclude that Unison's product is a loan 14

II. Similarly, there are genuine disputes of material fact as to unconscionability 24

Conclusion 25

TABLE OF AUTHORITIES

Cases

Adar Bays, LLC v. GeneSYS ID, Inc.,
179 N.E.3d 612 (N.Y. 2021) .... *passim*

Allen v. Coughlin,
64 F.3d 77 (2d Cir. 1995) 10

Fast Trak Investment Company v. Sax,
962 F.3d 455 (9th Cir. 2020) .... *passim*

Green v. 119 W. 138th St. LLC,
37 N.Y.S.3d 491 (N.Y. App. Div. 2016) 24, 25

Hartley v. Eagle Insurance Co. of London, England,
118 N.E. 622 (N.Y. 1918) 14, 22

Haymount Urgent Care PC v. GoFund Advance, LLC,
609 F. Supp. 3d 237 (S.D.N.Y. 2022) 13, 19, 20, 21

In re Deborah Stone,
No. 24-12767 (Bankr. D. Colo.) 1

In re Hawaii Island Air, Inc.,
2023 WL 4785508 (9th Cir. 2023) 23

Island Leasing, LLC v. Kane,
2020 WL 6326101 (D. Haw. 2020) 23

James B. Nutter & Co. v. Namahoe,
528 P.3d 222 (Haw. 2023) 7, 9

Rubenstein v. Small,
75 N.Y.S.2d 483 (N.Y. App. Div. 1947) 12, 14

Seidel v. 18 E. 17th St. Owners, Inc.,
598 N.E.2d 7 (N.Y. 1992) 19

Stuback v. Sussman,
8 N.Y.S.2d 141 (N.Y. Sup. Ct. 1938) 12

Stuback v. Sussman,
10 N.Y.S.2d 240 (N.Y. App. Div. 1939) 12

Stuback v. Sussman,
23 N.E.2d 544 (N.Y. 1939) 12

Ujueta v. Euro-Quest Corp.,
814 N.Y.S.2d 551 (N.Y. App. Div. 2006) 11

Vee Bee Services Co. v. Household Financial Corp.,
51 N.Y.S.2d 590 (N.Y. Sup. Ct. 1944) 12, 23

Vee Bee Services Co. v. Household Financial Corp.,
55 N.Y.S.2d 570 (N.Y. App. Div. 1945) 12

Statutes

New York Banking Law § 14-a....................9

New York General Obligation Law § 5-501 9

New York Real Property Law § 280 8

New York Real Property Law § 280-b 9, 24

Other Authorities

59A American Jurisprudence 2d Partnership § 270....................7

68 C.J.S. Partnership § 569 7

2022 Unison Home Equity Report,
Unison (2022) 6, 17

About Us,
Unison Investment Management 23

All-Transactions House Price Index for New York,
Federal Reserve Bank of St. Louis, (updated Nov. 26, 2024) 18

All-Transactions House Price Index for the United States,
Federal Reserve Bank of St. Louis, (updated Nov. 26, 2024) 5, 18

FAQ,
Unison 16, 17, 19

Podcast Transcription Session No. 103—Thomas Sponholtz & Jim Riccitelli,
Lend Academy (2017) ....*passim*

Residential Real Estate Generates Strong Returns,
Unison Investment Management 6, 15, 17

Reverse Mortgages: What You Need to Know,
New York Department of Financial Services 7, 8

Sarah B. Mancini & Odette Williamson,
Reversing Course: Stemming the Tide of Reverse Mortgage Foreclosures Through Effective Servicing and Loss Mitigation,
26 Elder L.J. 85, 93 (2018) 8, 9, 23

Simple Interest Calculator,
Calculator.net 15

Unison Announces Securitization of $165 Million Unison Home Equity Agreements,
Newswire (Sept. 20, 2023) 5, 17

Unison Eyes up to Three Home Equity RMBS in 2022,
International Financing Review (Feb. 8, 2022) 6

Unison,
How It Works, YouTube (June 30, 2023) 6

INTEREST OF AMICUS CURIAE

Amicus National Consumer Law Center (NCLC) is a nationwide nonprofit that works for consumer justice and economic security for low-income and other disadvantaged people in the United States.[1] Since 1969, NCLC has worked to protect vulnerable populations like these through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. NCLC has particular expertise in the area of home secured financing, residential mortgage lending, and foreclosure law. It publishes nationally recognized treatises including Home Foreclosures (2d ed. 2023), Mortgage Lending (4th ed. 2024), Mortgage Servicing and Loan Modifications (2d ed. 2023), Consumer Credit Regulation (3d ed. 2020), Truth in Lending (11th ed. 2023), and Unfair and Deceptive Acts and Practices (10th ed. 2021).

NCLC has a particular interest in the development of this area of law. NCLC has published an issue brief on home equity investment loans from Unison and other similar companies, and NCLC is also currently representing one homeowner who signed a contract with Unison and is now facing bankruptcy. *See In re Deborah Stone*, No. 24-12767 (Bankr. D. Colo.). NCLC is offering this brief to provide a broader, national picture to this Court, including: (1) the importance of lending laws to protect consumers and the impact of Unison's attempt to evade them, and (2) the operation of Unison's model writ large.

INTRODUCTION

For many Americans, their home is their financial anchor. It is their largest investment, their source of stability in periods of financial difficulty, and the main inheritance they will pass

[1] Counsel for amicus curiae certifies that no party's counsel authored the brief in whole or in part, no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

along to their children. Because homes are so important, federal and state laws strictly regulate the ability of lenders to use people's homes as security for loans.

Unison, a large financial technology company based in San Francisco, has built a business model around evading those regulations. It has designed a product that functions just like a mortgage loan: Unison offers an advance to homeowners in exchange for the ability to be repaid at a later date, with the home mortgage guaranteeing the homeowner's obligations under the contract. But Unison claims that because of the (deliberately) complex math underlying its product, it is not a loan and homeowners take on no debt. Reassured by these and other misleading claims, homeowners sign up without understanding the complex and opaque economics of the transaction.

That is what happened here. In exchange for an advance payment of $107,715, in the span of a few years the Weingots stand to lose over $419,066 in the value of their home to Unison. That alone is a rate of interest—nearly 42% per year—well over double the legal limit under New York law. On top of that, Unison's contract requires the Weingots to cover what will likely be tens of thousands of dollars in closing costs if they sell their home. And in the meantime, the Weingots are fully responsible for all the costs of maintaining the value of the home to make sure Unison will get paid—on pain of foreclosure.

The Weingots' situation is, unfortunately, not unique. Thousands of homeowners across the country have become ensnared in Unison's contracts by the company's misleading marketing, and thousands more are trapped in similar contracts with companies with similar business models. And in yet another parallel with traditional mortgages, Unison is bundling and securitizing its products in offerings of up to $443 million. Unison also boasts that over $20 trillion in home equity is untapped in the country—*i.e.*, in the hands of homeowners who paid for it—and its goal is to acquire, bundle, and securitize as much of it as possible. The questions at issue in this case are

therefore of nationwide significance. And here, there are—at the very least—genuine disputes of material fact as to whether Unison's product is a loan and whether it is unconscionable. Because significant factual questions remain, summary judgment would be inappropriate at this time.

BACKGROUND

To understand the economics of Unison's product, it is helpful to understand its broader business model. Unison is set up to maximize profits for investors. Unison attracts homeowners with a seemingly large advance of money and claims that Unison is partnering with them in their homes. But that amount of money is so large because the homeowner will ultimately lose much of their home equity and potentially even their home itself. And as to the claims of partnership, Unison requires the homeowners to bear all the burdens and expenses of homeownership, even though Unison (and its investors) will be the primary beneficiaries. In short, despite the fact that Unison has styled its product as an "option," it has structured the product to ensure that Unison will be repaid, with interest.

A. The basic features of Unison's product are as follows:

Cash advance against equity in home. Unison gives the homeowner a cash advance in the form of an "Investment Payment," which is a percentage of the value of their home. Pls. R. 56.1 Counterstatement ¶ 27. In this case, 17.2%. *Id.* [2]

Secured by a mortgage. The contract is secured by a "mortgage" on the home, giving Unison the power of foreclosure. Blumenthal Decl. Ex. 3 at 2.[3]

Payment is triggered by events including sale of the home, moving out, and death. As a general matter, payment is triggered when the homeowner no longer lives in the home because

[2] Because Unison required an initial $7,285 in fees, the actual money the Weingots received was significantly less than the purported "Investment Payment." Blumenthal Decl. Ex. 5 at 2.

[3] All citations to record documents cite to the page in the .pdf document.

of death, sale of the home, or moving out. Haugen Decl. Ex. M at 2, 4, 9, 14. If the homeowner sells within the first three years, Unison is expressly guaranteed repayment (plus even more if the home increased in value). *Id.* at 34. If the homeowner sells after three years, as explained in detail below, Unison cashes in by acquiring a large sum of money equivalent to a significant percentage of the equity in the home. *See infra* 16–20. That is also the result if the homeowner dies, moves out, or the contract's 30-year term expires. *See, e.g.*, Blumenthal Decl. Ex. 5 at 6 ("If you have not sold your [p]roperty or otherwise terminated the Union HomeOwner Agreement by the end of the thirty (30) year Term, *you will need to* sell the Property *or otherwise settle* the Unison Homeowner Agreement *by paying Unison*." (emphases added)).[4]

And if the homeowner seeks to buy out of the contract at any point to stay in their home but get out of this onerous agreement, Unison is again expressly guaranteed repayment, at the very least. Haugen Decl. Ex. M at 10; *see also* Blumenthal Decl. Ex. 2 at 136 ("[T]he minimum they would pay back is the original investment price, the amount we gave them.").

Homeowners must pay for taxes, insurance, and repairs on the home, with failure to do so resulting in default and potential foreclosure. Homeowners are required to shoulder 100% of the costs of maintaining Unison's future payment from the home's equity. The homeowner must maintain insurance that is "acceptable" to Unison, and if they fail to do so, that is a "Default." *Id.* at 13, 26. The same goes for requirements to pay for property taxes, maintenance, and repairs. *Id.* at 13, 17–18. And Unison is permitted to make "Protective Advances" without notice to the homeowner to cover these fees, which must be repaid and accrue interest at a rate of nearly 20

[4] Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

percent a year. *Id.* at 25. Unison can also purchase insurance at the homeowner's expense that "significantly exceed[s] the cost of insurance" the homeowner would have obtained. *Id.* at 26.

B. In order to deliver returns to its investors, Unison has designed this product to ensure that it will be repaid, typically with usurious returns. While the mechanism of Unison's product is discussed in more detail below, *see infra* 16–23, it takes a number of steps to ensure that, even outside of the situations where it is expressly guaranteed repayment, the value of the home will be sufficient to ensure it will always exercise its "option" and be paid back.

As Unison acknowledges, as a general matter, the price of residential real estate rises over time. *See, e.g.*, Pls. R. 56.1 Counterstatement ¶ 5.[5] Unison is also quite careful about the homes it chooses. Here, Unison's repayment is secured by a home in the desirable Five Towns area of Long Island. Unsurprisingly, the home has not only retained its value, but nearly doubled in price since the parties entered the contract in January 2018.[6] Unison itself touts that: "We have a 10-year forecast on every house in America so we have a very sophisticated data infrastructure and pricing structure [for] what we call turning a house into a security." *Podcast Transcription Session No. 103—Thomas Sponholtz & Jim Riccitelli*, Lend Academy (hereinafter "Unison Podcast") (2017), https://perma.cc/5RZ4-TP2K. Indeed, while in court Unison emphasizes the risk that a home might drop in value, to its investors, Unison emphasizes the "low volatility" of its "reliable, gainful asset[s]." *Unison Announces Securitization of $165 Million Unison Home Equity Agreements*, Newswire (Sept. 20, 2023), https://perma.cc/A9EP-A236.

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[5] *See also generally All-Transactions House Price Index for the United States*, Federal Reserve Bank of St. Louis, (updated Nov. 26, 2024), https://perma.cc/8H6W-9V5V.

[6] The appraised value for the home was $668,000 in December 2017. Pls. R. 56.1 Counterstatement ¶ 17. The home is currently estimated to be worth between $1.06 and $1.25 million dollars. *973 Benton St. 11598*, Redfin, https://perma.cc/4G35-ZPQL.

Unison also ensures that its contract will last a sufficiently long time that these homes' prices will go up. As Unison knows, "home equity tends to increase with the years of homeownership." *2022 Unison Home Equity Report*, Unison (2022), https://perma.cc/2EWT-6Q4H/. The maximum term of the contract is thirty years, and Unison reports that the average length in practice is ten years. *Unison Podcast*. Over the course of this "longer term holding period[]," "real estate tends to perform fairly consistently." *Id.* Unison also protects against homeowners selling their homes too soon by guaranteeing repayment if they sell during the first several years. Haugen Decl. Ex. M at 34. And Unison gives itself considerable control over sales to allow it to effectively prevent sales where it considers the price too low. *Id.* at 7–8.

On top of all this, Unison charges significant fees up front, secures its future payments through a mortgage, and requires the homeowner to cover all the expenses of maintaining the home's value as well as the costs of the sale. All of these things further ensure the company will be paid back, often with exceedingly high returns.

C. This is all by design. Getting homeowners to sign these loans is just the first step in Unison's business model. The company then bundles and securitizes these residential mortgage contracts and sells them to investors. These offerings have sold for hundreds of millions of dollars. *See Unison Eyes up to Three Home Equity RMBS in 2022*, International Financing Review (Feb. 8, 2022), https://perma.cc/Z66W-CFCB. Unison boasts that it holds $8.1 billion dollars in real estate assets through its contracts; it has securitized and manages over $1.6 billion of these assets. Unison Investment Management, https://perma.cc/X53U-FMZR.

This securitization only further belies Unison's claim that it "partners" with homeowners. Blumenthal Decl. Ex. 4 at 11; *see also* Unison, *How It Works*, YouTube (June 30, 2023), https://www.youtube.com/watch?v=KG7ygY6_sWM&t=43s ("This is a partnership, fair and

square."). An essential element of partnership is the sharing of the business losses or expenses. *See* 68 C.J.S. Partnership § 131. Unison, however, has structured this transaction so the homeowner bears all the expenses, and Unison is highly unlikely to share any losses. Indeed, it is core to Unison's business model that it *does not* actually bear the cost of a co-investor or partner in the upkeep of the home. Unison's CEO explains that its product allows it to profit from residential property without the "tremendous amount of administrative cost in maintaining and being a property manager of [] homes." *Unison Podcast*. Partners also owe each other a fiduciary duty. *See* 59A Am. Jur. 2d Partnership § 270; 68 C.J.S. Partnership § 569. However, as a SEC-registered investment advisor, Unison Investment Management, LLC, is required to act in the best interest of its clients—its investors—not the homeowners with whom it purportedly partners.

D. Unison's product therefore operates as a loan and it resembles various traditional loan products. The company advances money, receives a mortgage as a security, and ensures it will be paid back a larger sum down the road—only with worse terms for borrowers and without the protections required by lending laws. This is especially true when it comes to traditional reverse mortgages, a particularly risky form of financial product that has many features that Unison claims prevent its product from being a loan.

1. Just like Unison's product, reverse mortgages are sold as an opportunity "to convert some of the equity in your home into cash while you retain ownership." *Reverse Mortgages: What You Need to Know*, New York Dep't Fin. Servs., https://perma.cc/H4WY-DP6K. However, these complex financial products too often provide the lender a disproportionate payout from the value of the home. And in many cases, people can even lose their homes. This creates a "significant risk of abuse by lenders." *James B. Nutter & Co. v. Namahoe*, 528 P.3d 222, 236 (Haw. 2023). And

"the consequences of reverse mortgages can be unclear at the time of signing, but disastrous for mortgagors." *Id.* The way reverse mortgages work should be familiar based on Unison's product.

Cash advance against equity in home. The homeowner receives cash based on the value of their home. *See, e.g.*, *Reverse Mortgages*, N.Y. Dep't Fin. Servs.

Secured by a mortgage. This means that the lender has the power of foreclosure in the event of a default. *See* Nick Penzenstadler & Jeff Kelly Lowenstein, *Seniors Were Sold a Risk-free Retirement with Reverse Mortgages. Now They Face Foreclosure.*, USA Today (June 11, 2019), https://perma.cc/28FB-JSDS. Particularly relevant here, "[r]everse mortgages are 'non-recourse' loans, which means that if you default on the loan, or if the loan cannot otherwise be repaid, the lender cannot look to your other assets … to meet the outstanding balance on your loan." *Reverse Mortgages*, N.Y. Dep't Fin. Servs. In other words, "the borrower … will not owe more than the loan balance or the value of the property, whichever is less." Sarah B. Mancini & Odette Williamson, *Reversing Course: Stemming the Tide of Reverse Mortgage Foreclosures Through Effective Servicing and Loss Mitigation*, 26 Elder L.J. 85, 93 (2018). As a result, if the value of the home drops, then the reverse mortgage lender is at risk of not being paid back.

Payment is triggered by certain events, such as sale, moving out, or death. Other than a default, "[n]o payments are due on a reverse mortgage until some trigger event." *Reverse Mortgages*, N.Y. Dep't Fin. Servs. These triggering events are typically selling, moving out, or death of the homeowner. *Id.* Some reverse mortgages also have a term of years. N.Y. Real Prop. Law § 280(1)(b). Payments can take the form of "equity participation" where "the lender 'participates,' or has the right to a share in any increase in the value of [the] home." *Reverse Mortgages*, N.Y. Dep't Fin. Servs. (answer to question "What is shared appreciation and equity

participation?”). Or the lender can receive “shared appreciation,” where “[t]he lender receives an agreed-to percentage of the appreciated value of the loan when the loan is terminated.” *Id.*

Homeowners must pay for taxes, insurance, and repairs on the home, with failure to do so resulting in default and potential foreclosure. If the homeowner fails to cover such costs, the lender can make “advance[s]” that drive the homeowner even further into debt or foreclose on the home. Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 87–88, 92, 100–02, 104.

2. “This transaction for cash at the expense of ownership of one’s home—the largest and most significant asset most Americans possess—has significant ramifications.” *Namahoe*, 528 P.3d at 236. Too often, people take out these loans without fully understanding how these products work. *See, e.g.*, Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 86, 102–03. Reverse mortgages can also end up forcing people out of their homes. These homeowners “are deprived of the chance to pass on their homes and other property to their children and other heirs, leading to gutted city blocks, and less overall wealth.” *Namahoe*, 528 P.3d at 236.

Because of the “significant risks of abuse by lenders and inadequate understanding of reverse mortgage agreements,” these products “are subject to stringent rules and regulations promulgated by both federal and state authorities.” *Id*. New York law generally imposes strict limits on the interest rates that can be charged for loans, which are capped at 16% annually. N.Y. Gen. Oblig. Law § 5-501(1); N.Y. Banking Law § 14-a(1). New York law also contains a host of requirements to ensure homeowners are fully informed before entering into risky products like these. *See, e.g.*, N.Y. Real Prop. Law § 280-b(7) (“Both the authorized lender and the mortgagor shall be represented by an attorney or attorneys at the time of the closing on the reverse mortgage, and each such party shall have at least one attorney present to conduct the closing.”)

These regulations provide needed protection for homeowners, but they also cut into profits. So companies try to create novel products to skirt the rules. Unison's product poses the same risk as traditional reverse mortgages that homeowners will lose a highly disproportionate amount of value in their home. And if homeowners fail to keep up with their taxes, insurance, or fees, Unison's product functions identically to a traditional reverse mortgage, and these individuals face the same risk of foreclosure. Yet Unison doesn't follow the rules that protect against these harms.

ARGUMENT

NCLC agrees with the plaintiffs that summary judgment should be denied. At summary judgment, a court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor, and may grant summary judgment only when no reasonable trier of fact could find in favor of the nonmoving party." *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995). That standard is not met here.

This brief will focus on Unison's public-facing statements, its business model, and its impact on homeowners across the country. *First,* Unison misleadingly claims that its product is not a loan when its entire business model is established to ensure repayment. *Second*, Unison's contract is unconscionable because Unison aggressively and deceptively markets the one-sided contract to homeowners, obscuring the fact that it is structured to place all the costs on homeowners while Unison takes the lion's share of the benefits. Viewing the evidence in the light most favorable to the Weingots on both these highly fact-bound questions, a reasonable juror could conclude that Unison's product is a loan under New York law and that it is unconscionable.

I. There are genuine disputes of material fact as to whether Unison's product is a loan.

The Weingots' fraud claim is based in part on Unison's repeated assertion that its product is not a "loan." Like in many other states, under New York law, the question of whether something

is a loan requires a detailed, fact- and context-specific analysis of how the product operates in practice. This ensures that companies cannot use complex financial schemes to evade laws protecting borrowers. Here, there are—at the very least—genuine disputes of material fact on this point. And viewing the substance of Unison's product in the light most favorable to the Weingots, Unison simply hasn't shown that no reasonable juror could conclude it was a loan.

A. Under New York law, courts must look to substance rather than form to determine whether something is a loan, and this is a question of fact that is ill-suited for resolution on summary judgment.

"When determining whether a transaction is a loan, substance—not form—controls." *Adar Bays, LLC v. GeneSYS ID, Inc.*, 179 N.E.3d 612, 621 (N.Y. 2021). This is an age-old principle, and the reason for it is simple: The New York Court of Appeals "has recognized for more than a century that the economy changes and with it, the ability of lenders to extract unlawful interest rates through novel and increasingly sophisticated instruments." *Id.* at 627. The techniques companies have used to evade lending laws "have taken every shape and form that the wit of man could devise," "but no matter what the disguise, if the court can see that the real transaction was the loan or forbearance of money … its plain and imperative duty is to so declare." *Id.* at 627–28. As a result, "New York law is clear that '[w]hen determining whether a transaction constitutes a usurious loan it must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it.'" *Fast Trak Inv. Co. v. Sax*, 962 F.3d 455, 465 (9th Cir. 2020) (quoting *Ujueta v. Euro-Quest Corp.*, 814 N.Y.S.2d 551, 552 (N.Y. App. Div. 2006)).[7]

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[7] Many New York cases concern not just the question of whether something is a loan, but the additional showing that it is a *usurious* loan. For the purposes of the Weingots' claims, however, the fact that Unison's product is a loan is sufficient to render the company's marketing misleading.

Lenders will often try to evade lending laws by arguing that there is a risk that they will not be repaid. But the mere existence of some risk is insufficient to make something not a loan. New York courts recognize that every lender faces some risk that they won't be repaid: Any "borrower may go bankrupt or otherwise cease doing business and be unable to repay a loan." *Adar Bays*, 179 N.E.3d at 624. Courts "should exclude contingencies or risks that are part of any loan transaction," *id.*, and will not credit "purported hazards attached to the borrower's promise to repay … where the pretended contingencies do not in substance change the lender's risk or the borrower's obligation from the usual promise to repay," *Vee Bee Serv. Co. v. Household Fin. Corp.*, 51 N.Y.S.2d 590, 600 (N.Y. Sup. Ct. 1944), *aff'd*, 55 N.Y.S.2d 570 (N.Y. App. Div. 1945).

In one early case, a lender advanced money in exchange for a mortgage on an automobile, and the borrower could in certain instances satisfy his repayment obligations by tendering the automobile—such that "the lender assumed the risk of the loss of the automobile" or its loss in value. *Stuback v. Sussman*, 8 N.Y.S.2d 141, 142 (N.Y. Sup. Ct. 1938), *aff'd*, 10 N.Y.S.2d 240 (N.Y. App. Div. 1939), *aff'd*, 23 N.E.2d 544 (N.Y. 1939). The court noted that "[i]f the payment of the principal of a debt depends upon a bona fide contingency, there can be no usury in the transaction," but "[i]f, however, the purpose is to evade the statute against usury, the arrangement will not be upheld." *Id.* The Court of Appeals affirmed the trial court's determination that this was not only a loan, but a usurious loan, as in the circumstances, "[t]he risk assumed was so unsubstantial as to bear no reasonable relation to the amount charged." *Stuback*, 8 N.Y.S.2d at 143.

This principle applies just as strongly today. The Ninth Circuit recently canvassed New York caselaw on this point, explaining that an advance of money can be a loan if it "provide[s] for repayment absolutely and at all events *or* [if] the principal in some way be secured as distinguished from being put in hazard." *Fast Trak*, 962 F.3d at 465 (quoting *Rubenstein v. Small*, 75 N.Y.S.2d

483, 485 (N.Y. App. Div. 1947) (emphasis added)). Even if "there is *some* possibility that the assets listed in the agreements will not yield full payment," a product can still be treated as a loan if an analysis of its substance reveals that "repayment … is all but guaranteed." *Id.* at 466–67. Similarly, courts must conduct a fact-bound analysis to determine whether "the 'real purpose' of these transactions is a loan rather than the purchase of contingent assets," such as if "future payment" is sufficiently "secured" by valuable assets. *Id.* at 467 (quoting *Donatelli v. Siskind*, 565 N.Y.S.2d 224, 226 (N.Y. App. Div. 1991)). "New York courts have affirmed this principle numerous times, usually in the mortgage context." *Id.* at 466. But it applies elsewhere too: Where a company provides an advance payment in exchange for a portion of a merchant's accounts receivable, courts look beyond the formalities, conducting an "economic analysis" of the "substance" to determine if it is a loan. *See, e.g.*, *Haymount Urgent Care PC v. GoFund Advance*, LLC, 609 F. Supp. 3d 237, 241, 247 (S.D.N.Y. 2022). This includes a wide range of factors, including "whether the agreement has a finite term," whether the lender has any protection "should the [borrower] declare bankruptcy," and "objective indicia" of "the defendants' alleged usurious intent." *Id.* at 247–50.

In the usury context, the Court of Appeals has also emphasized that courts can and must calculate the value of nontraditional forms of repayment. That includes evaluating the actual value of a future option to purchase property. In *Adar Bays*, for example, the lender could seek payment through an "option" to purchase stocks. 179 N.E.3d at 623–24. The borrower argued this option would allow usuriously high returns. The lender countered that the "option's value" was too "uncertain" because it depended on the market and it was "far from a guarantee" that exercising the option would result in any value. *Id.* at 623–24, 625 n.8. The Court of Appeals disagreed, holding that courts can and should determine "the valuation of a contingent future payment" in calculating the payment obligation the contract secured. *Id.* at 623–24. Indeed, "the valuation of

options is widespread," and "[m]ore generally, a technical concern about valuation methods and the certainty of these options should not facilitate evasion of the usury laws." *Id.* at 625–27.

As all these cases illustrate, these questions are highly fact dependent. That is why "[t]he New York Court of Appeals has held that whether a transaction constitutes a cover for usury raises a triable issue of fact precluding summary judgment." *Fast Trak*, 962 F.3d at 467 (citing cases).

B. Viewing the evidence in the light most favorable to the Weingots, a reasonable juror could conclude that Unison's product is a loan.

Applying these principles here, the fact that Unison's contracts "are described by their language as ['options'] and not as loans is not dispositive; it is their real character, when they are considered in their totality, that matters here." *Id.* at 465. Indeed, as the Court of Appeals has recognized, many loans can include option mechanisms of one form or another. *Adar Bays*, 179 N.E.3d at 621–22. Instead, it is "the duty of the court in each case presented to examine into the substance of the transaction between the parties." *Fast Trak*, 962 F.3d at 466 (quoting *Hartley v. Eagle Ins. Co. of London, Eng.*, 118 N.E. 622 (N.Y. 1918)). And here there are, at the very least, genuine disputes of material fact as to whether Unison's "option" product is in substance a loan.

1. Under New York law, courts look to whether the contract "provide[s] for repayment absolutely and at all events *or* [if] the principal in some way be secured as distinguished from being put in hazard." *Fast Trak*, 962 F.3d at 465 (quoting *Rubenstein*, 75 N.Y.S.2d at 485 (emphasis added)). Both these things are true here.

First, in evaluating the payment lenders will receive, courts look to how the product actually operates. Here, there is a genuine dispute as to the "relevant factual issue [of] whether" Unison's likelihood of repayment is "sufficiently certain so as to constitute a 'loan' or a 'cover for usury.'" *Fast Trak*, 962 F.3d at 468. In other words, there are a number of facts that, viewed in the light most favorable to the Weingots, could allow a reasonable juror to conclude that Unison has

made sure its "repayment … is all but guaranteed." *Id.* at 467. That's because Unison has structured its product in a number of ways to ensure repayment. If the homeowner sells during the first three years of the agreement, Unison is expressly guaranteed repayment. If at any point the homeowner wants to stay in their home but get out of this one-sided contract, Unison is expressly guaranteed repayment. If the homeowner sells their home after three years, Unison is paid out of the proceeds, and Unison ensures in practice that those proceeds will always be sufficient to provide Unison not only its money back but a sufficient return. Finally, if the homeowner dies, moves out, or the 30-year term expires, Unison is either paid directly from the value of the home or forces the sale of the home with the same result.

Indeed, the company itself touts that its "portfolio has a proven 10-year track record with net annualized return of 20.7%." *Residential Real Estate Generates Strong Returns*, Unison Investment Management, https://perma.cc/X53U-FMZR. That is because, in the company's words: "Residential Real Estate Generates Strong Returns." *Id.* This case illustrates the point:, The Weingots were given $107,715 and after a few years they stand to lose $419,066 in the value of their home to Unison.[8] That works out to a nearly 42% annual rate of interest, well over double the legal limit in New York.[9]

The details of the product show why. To begin, there are the scenarios where Unison is expressly guaranteed repayment. If the homeowner sells within three years, Unison is guaranteed its advance payment back (plus its initial fees, ensuring a profit) and even more if the house rose

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[8] The home is currently estimated to be worth $1,109,571. *973 Benton St. 11598*, Redfin, https://perma.cc/4G35-ZPQL. If the home were sold today, Unison would receive 68.86% of the value of the home (which is $764,051), discounted by its purported "second payment" (which is $344,985). *See* Pls. Rule 56.1 Counterstatement ¶ 33. The result is simply that Unison would receive a check for $419,066.

[9]*See Simple Interest Calculator*, Calculator.net, https://perma.cc/2674-WCKQ.

in value. Haugen Decl. Ex. M at 34. The same is true if, at any point, the homeowner wants to buy out of this onerous contract (which gets more expensive every year) without having to sell their home. *Id.* at 11. In this case, as Unison's executive testified: "the minimum they would pay back is the original investment price, the amount we gave them." Blumenthal Decl. Ex. 2 at 136. In these cases, Unison's product functions like a very traditional loan.

Then, if the house is sold at any point after three years and its value has increased or held steady, Unison is paid just like a mortgage lender with a shared equity or appreciation mortgage. The homeowner pays Unison back along with a further percentage of the value of the home. Haugen Decl. Ex. M at 6–7; Blumenthal Decl. Ex. 2 at 105. Unison has created exceedingly complex math to style this as the exercise of an "option" where the company makes a "second payment" for a portion of the equity in the home. Pls. R. 56.1 Counterstatement ¶ 33. But there is never any actual "second payment." No money leaves Unison's account. Blumenthal Decl. Ex. 2, 132–33. The "second payment" is an accounting trick—it represents an amount of money from the sale the homeowner would have gotten even if they'd never entered into a contract with Unison.

There's the same result at the expiration of the 30-year term. In Unison's own words: "You can use the funds provided by Unison for up to 30 years. After 30 years, you will need to either sell your home or buy us out." *FAQ*, Unison, https://www.unison.com/faq (answering question "What happens at the end of the agreement?"). This operates just like a loan where payment is tied to the value of equity in the home: the lender gives an advance and later, receives repayment tied to the value of the home. *See* Haugen Decl. Ex. M at 8–9; *see also* Blumenthal Decl. Ex. 5 at 6.

And Unison has taken many steps to ensure that the house will rise in value. As regulators in other states have explained, "Unison makes the investor payment to a homeowner, and secures the Agreement with a deed of trust, with the expectation that property values will increase, as they

typically do over time." Br. of Wash. State Dep't of Fin. Insts., *Olson v. Unison*, No. 23-2835 (9th Cir. 2024) ("Wash. DFI Br."), at 4; *see also* Unison IM, https://perma.cc/X53U-FMZR. ("Residential Real Estate Generates Strong Returns."); *2022 Unison Home Equity Report*, Unison (2022), https://perma.cc/2EWT-6Q4H/ ("[H]ome equity tends to increase with the years of homeownership."); Pls. R. 56.1 Counterstatement ¶ 5.

But that's certainly not all, since Unison is quite careful about the homes it chooses. Unison touts that: "We have a 10-year forecast on every house in America so we have a very sophisticated data infrastructure and pricing structure and what we call turning a house into a security." *Unison Podcast.* Unison targets owner-occupied homes, since other properties "carry additional risk." *FAQ*, Unison, https://www.unison.com/faq (answering question "What is the Owner Occupancy Requirement?"). And while Unison emphasizes to courts the risk that the home value might drop, to its investors Unison emphasizes the "low volatility" of its "reliable, gainful asset[s]." *Unison Announces Securitization*, Newswire, https://perma.cc/A9EP-A236.

The length of Unison's contracts further ensures this. The maximum term of the contract is thirty years, and Unison reports that the average length in practice is ten years. *Unison Podcast*. Over the course of this "longer term holding period[]," "real estate tends to perform fairly consistently." *Id.* Indeed, reviewing housing price data for both New York and the United States as a whole, there is *not a single* period over the past fifty years where homes lost in value over a ten-year period (much less thirty years).[10] That even includes the scenario where Unison entered a contract at the peak of the housing market right before the 2008 crash.

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[10] *See generally All-Transactions House Price Index for the United States*, Federal Reserve Bank of St. Louis, (updated Nov. 26, 2024), https://perma.cc/8H6W-9V5V; *see also All-Transactions House Price Index for New York*, Federal Reserve Bank of St. Louis, (updated Nov. 26, 2024), https://perma.cc/6F9Y-6CT3.

In addition, to ensure that the home will rise in value, Unison requires that the homeowner maintain the property, pay all real estate taxes, homeowners' association fees, and all other costs of protecting the value of the home during the term of the contract. *See supra* 4–5. And when courts are determining the degree of risk a lender has taken on, they also look to whether the lender has partially shielded themselves against that risk through insurance. *See, e.g.*, *Adar Bays*, 179 N.E.3d at 623–624. Here, Unison requires that the *homeowner* pay for homeowners' insurance with *Unison* as the beneficiary. Haugen Decl. Ex. M at 26.

Finally, to make sure that Unison will receive pure profit from any sale of the home, the company requires that the homeowners pay what will likely be tens of thousands of dollars in closing costs, including "all sales commissions," "federal, state, local and documentary, transfer taxes" and "recording fees and costs, reconveyance fees, Escrow fees, [and] title insurance fees." Haugen Decl. Ex. M at 6–7. The Weingots must cover 100% of these costs—even though Unison will be the primary beneficiary of the sale.

Taking all of these facts together and viewed in the light most favorable to the Weingots, a reasonable juror could certainly conclude that Unison has ensured its "repayment … is all but guaranteed." *Fast Trak*, 962 F.3d at 467.

Second, under New York law a contract can also "constitute a loan if 'the principal is in some way secured as distinguished from being put in hazard.'" *Id.* at 467. There is no dispute that Unison has secured is product through a mortgage on the Weingots' home. As the Court of Appeals has recognized, "a mortgage" is a "traditional loan instrument[]." *Seidel v. 18 E. 17th St. Owners, Inc.*, 598 N.E.2d 7, 11–12 (N.Y. 1992). That is certainly the case here, where Unison's mortgage on the Weingots' home secures all their payment obligations under the contracts—including in the

situations where Unison is expressly guaranteed repayment of its advance, such as the homeowner buying them out. Blumenthal Decl. Ex. 3 at 3–4.

Like any other secured creditor, this mortgage protects Unison against any default or bankruptcy by the borrower. Indeed, even Unison acknowledges that "The document we use for this lien is very similar to what a mortgage lender would use to secure its investment in your home." *FAQ*, Unison https://www.unison.com/faq (answering question "How does Unison secure its interest in the property?"). If a homeowner defaults on their obligations—such as failing to pay taxes or insurance, failure to maintain the property, or declaring bankruptcy—Unison can seek a variety of financial remedies from the homeowner to ensure that it does not incur a loss, including advances that accrue interest at a usurious rate, liquidated damages, and acceleration of the contract and foreclosure. Haugen Decl. Ex. M at 13–14, 25, 28. This security is—at the very least—significant evidence of a loan. *See, e.g.*, *Seidel*, 598 N.E.2d at 11–12; *Fast Trak*, 962 F.3d at 467. So is treating a "bankruptcy filing as an event of default." *Haymount*, 609 F. Supp. 3d at 247.

2. In addition, Unison took many further steps to ensure it would be paid back even in the quite unlikely event that the Weingots' Woodmere home dropped in value over the medium term.

To begin, Unison automatically takes thousands of dollars of opaque fees out of the advance it gives the homeowners. Blumenthal Decl. Ex. 5, at 2. Under New York law, courts "show strict attention to additional fees exacted sometimes creatively through loan instruments" since these are often cover for padding the lender's repayment. *Adar Bays*, 179 N.E.3d at 623. That's exactly what is happening here. Unison's own executive was unable to clearly explain how this amount of fees is calculated. Blumenthal Decl. Ex. 2 at 180–81. By giving the homeowner less money up front, Unison ensures that it will get its money back even in the unlikely event that the

Weingots' home experiences a moderate drop in value over the term of the contract. In this case, Unison charged the Weingots initial fees amounting to $7,285. Blumenthal Decl. Ex. 5, at 2.

Further, as noted, to safeguard against short-term drops in the housing market, Unison's contract provides that if a homeowner sells in the first three years of the agreement the company is guaranteed its money back *plus* the initial transaction fee *even if* the home has dropped in value. Haugen Decl. Ex. M at 34. On top of that, homeowners will be least likely to sell when the value of their property is low—since they would also lose money.

To further protect against homeowners selling when prices are low, Unison also gives itself significant power over sales. If Unison doesn't like the price, it can in its "discretion" take steps that will effectively scuttle the sale, such as requiring repeated appraisals (at the homeowners' expense) or requiring the owner, potential buyer, and real estate brokers to "execute an affidavit under oath" along with "supporting written documentation." *Id.* at 7–8. Unison will also be held "harmless" for "any and all liability or loss" caused to the Weingots by the "delay or postponement." *Id.* at 8. It is evidence of a loan if the mechanism for the borrower to reduce their payments is subject to procedural hurdles at the lender's "discretion"—such as a "contractual right to obtain … further documentation"—that in practice would allow the lender to prevent the borrower from availing themselves of that mechanism. *Haymount*, 609 F. Supp. 3d at 249.

3. Nor are these the only ways in which the contract functions like a loan. As other state's regulators have noted, "[e]ven the application process Unison employs invokes the process used to apply for a mortgage" and is "virtually identical" to the process for applying for a traditional regular mortgage. Wash. DFI Br. 9–10. Indeed, some of the documents that Unison itself sent the Weingots to sign even refer to the transaction as a "home loan" and Unison as "the lender." Blumenthal Decl. Ex. 1 at 2.

There is also evidence from which a reasonable juror could conclude that Unison's product was intended "as a mere device or subterfuge to conceal a loan of money." *Fast Trak*, 962 F.3d at 466. When viewing the evidence in the light most favorable to the Weingots, there are a number of "objective indicia" that Unison intended to lend money. *Haymount*, 609 F. Supp. 3d at 247. These include Unison's conflicting statements about its likelihood of repayment to different audiences. *See supra* 5, 17. The fact that certain documents Unison provided refer to the product as a loan are similarly telling. And a reasonable juror could view all of the above ways Unison has structured its product to ensure repayment (often with usurious gains) as "objective indicia" that the company is seeking to engage in lending. *Haymount*, 609 F. Supp. 3d at 247, 250.

Unison's product also has a term of years, another sign of a loan. *Haymount*, 609 F. Supp. 3d at 247. And the mere fact that payment could be triggered before that term through certain maturity conditions (such as the homeowner's decision to sell the home) just tracks features of a reverse mortgage, which is unquestionably a loan. *See supra* 8–9.

4. Unison's whole argument is that the purported "option" it receives is not a loan because it might not exercise its option and the value of its option is "contingent on the success of the real estate market." Unison Mot. to Dismiss Br., Dkt. 33 at 14. But generic assertions about contingencies and risk simply are not dispositive. Instead, this is question of fact, and as explained in detail above, Unison selects homes and structures its product to ensure that it *will* receive repayment. The fact that the specific amount will depend upon the value of the home does not distinguish this product from equity-sharing or shared appreciation loans, including reverse mortgages. Furthermore, the Court of Appeals has made clear that courts *are* able to ascertain the value "of a contingent future payment," even if it is an "option" to purchase "property." *Adar Bays*, 179 N.E.3d at 622, 624. "[T]he valuation of options is widespread," and "a technical concern about

valuation methods and the certainty of … options should not facilitate evasion of the usury laws." *Id.* at 625–26, 625 n.8, 627.

This makes perfect sense. Otherwise, a lender could give a homeowner an advance of money for a future option to purchase 70% of the home's value for $1. That would clearly be a loan, even if the value of the home will depend on the fluctuations of the housing market. Or any payday lender could give someone a small advance for an "option" to later "buy" most of her paycheck. If these schemes could evade lending laws, "the ability of lenders to extract unlawful interest rates through novel and increasingly sophisticated instruments" would "prevail" over the protections enshrined in New York law. *Id.* at 627.

In the past, Unison has relied on examples from the 2008 housing crisis to try to show that it could lose money on the transaction if the house were to dramatically fall in value. As an initial matter, speculative calculations about a hypothetical house during a different time period are not dispositive of the economic analysis required. *See, e.g.*, *Hartley*, 118 N.E. at 624–25 (where payment tied to life expectancy of actual individual, general actuarial tables not dispositive). More fundamentally, the fact that Unison could have lost money during the 2008 financial crisis does not distinguish it from the "contingencies or risks" that accompany other mortgage loans. *Adar Bays*, 179 N.E.3d at 624. Unsurprisingly, many mortgage lenders went bankrupt or needed to be rescued by the government during the 2008 crash. *See, e.g.*, John V. Duca, *Subprime Mortgage Crisis*, Fed. Reserve, https://perma.cc/DZG6-XJSS. Further, recall that because reverse mortgage loans are "non-recourse," "the borrower … will not owe more than the loan balance or the value of the property, whichever is less." Mancini & Williamson, *Reversing Course*, 26 Elder L.J. at 93. This means that any reverse mortgage lender risks losing money if the value of the home drops.

Indeed, any second mortgage lender with a lower-priority lien risks losing their money if the home drops in value and the remaining value is used to pay off higher priority liens.

The risk that Unison could lose money if the value of the home drops significantly is thus "simply [the] attribute[] of a non-recourse loan" and a "non-recourse nature does not make the transaction at issue any less of a loan." *Island Leasing, LLC v. Kane*, 2020 WL 6326101, at *6 (D. Haw. 2020), *aff'd sub nom. In re Hawaii Island Air, Inc.*, 2023 WL 4785508 (9th Cir. 2023). Unison cannot rely on "contingencies or risks that are part of any loan transaction" in the non-recourse lending context, *Adar Bays*, 179 N.E.3d at 624, or "pretended contingencies" that "do not in substance" change Unison's risk from that of other non-recourse mortgage lenders, *Vee Bee Serv.*, 51 N.Y.S.2d at 600. Unison's market-beating returns bear this out, and even the company touts that it has "low volatility and high risk-adjusted net returns compared to other major asset classes." *About Us*, Unison Investment Management, https://perma.cc/JW36-CPSE.

At the very least, there are genuine disputes of material fact as to this highly fact-specific inquiry. This is unsurprising, since "whether a transaction constitutes a cover for usury raises a triable issue of fact precluding summary judgment." *Fast Trak*, 962 F.3d at 467 (citing cases). The Weingots have presented evidence that Unison designed these products to operate like loans and to ensure its repayment. Pls. R. 56.1 Counterstatement ¶¶ 1, 5, 7, 29, 32, 35. Unison disputes that point. *Id.* That is a classic genuine dispute of material fact. And in resolving this factual question later in the litigation, the Court of Appeals has provided guidance for "fact finders" on how to value a future "option[]" to purchase property. *Adar Bays*, 179 N.E.3d at 624. These would include Unison's own "modeling and analysis to justify or evaluate the expected returns" which could "provide evidence going directly to usurious intent and valuation at the time the loan was entered

into." *Id.* at 624–26; *see also Unison Podcast* (describing the company's "very sophisticated data infrastructure and pricing structure" including "a 10-year forecast on every house in America").

II. Similarly, there are genuine disputes of material fact as to unconscionability.

There are also genuine disputes of material fact as to whether the contract is unconscionable, a basis for the Weingots' recission claim. "The doctrine of unconscionability, which is rooted in equitable principles, is a flexible one that generally requires a showing that the contract was both procedurally and substantively unconscionable when made." *Green v. 119 W. 138th St. LLC*, 37 N.Y.S.3d 491, 494 (N.Y. App. Div. 2016).

Procedural unconscionability requires a holistic analysis of "such matters as the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the experience and education of the party claiming unconscionability, and whether there was a disparity in bargaining power." *Id.* "No one procedural factor can be relied upon," and "[s]uch claims are most often fact sensitive and dependent upon the particular circumstances surrounding a transaction, which, at the very least, mandate the opportunity for an evidentiary hearing." *Id.* at 495. Here, that includes Unison's deception (including claiming that its product is not a loan and does not involve debt) and high-pressure sales tactics. Yisroel Weingot Decl. ¶¶ 3–9. The financial mechanisms of the contracts are exceedingly complex and confusing and spread across dozens of pages of dense text in several different documents filled with cross-references, legalese, and extremely difficult to understand terms. Yet the Weingots did not receive the kinds of assistance or counseling that the New York legislature has determined are necessary when homeowners are putting their homes on the line with complex mortgage products like these. *See, e.g.*, N.Y. Real Prop. Law § 280-b(7). Additionally, the contract was not signed in a commercial setting, there was a clear "disparity in bargaining power" between the parties, and the Weingots did not have any

real chance to negotiate the contract's terms. *Green*, 37 N.Y.S.3d at 494. Taken together, this is sufficient evidence that "[t]hese issues cannot be resolved by summary judgment." *Id.* at 495.

Similarly, as to "substantive unconscionability," "there must be an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable." *Id.* As explained in detail above, Unison locks homeowners into highly one-sided transactions where in exchange for a comparatively small lump sum, Unison receives far more than the permissible rate of interest out of the equity in their homes. In this case, Unison's nearly 42% annual rate of interest on the Weingots' home is astronomical in the context of mortgage lending, far beyond what states with usury caps, like New York, would allow. To safeguard Unison's returns, the Weingots must cover all the expenses of maintaining the home for years on pain of foreclosure. *See supra* 4–5. Then when the Weingots do sell their home, they will be completely responsible for likely tens of thousands of dollars in sellers' costs and fees, even though Unison will be the primary beneficiary of the sale. *See supra* 18. In other words, Unison outsources the expenses and costs to the homeowner, while reserving the lion's share of the upside for itself. Viewing this evidence in the light most favorable to the Weingots, a reasonable juror could certainly conclude that the terms of the contract were "unreasonably favorable" to Unison.

Taken together, this is sufficient—at the very least—to deny summary judgment.

CONCLUSION

Unison's motion for summary judgment should be denied.

Respectfully submitted,

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