



**IN THE 5th JUDICIAL CIRCUIT
MACON COUNTY, ALABAMA**

**PAMELA ADAMS and DONOVAN
SISTRUNK**, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

MAX CREDIT UNION,

Defendant.

Case No. _____

CLASS ACTION

JURY DEMAND

CLASS ACTION COMPLAINT

1. Plaintiffs, on behalf of themselves and all persons similarly situated, allege the following based on personal knowledge as to allegations regarding themselves and on information and belief as to others:

INTRODUCTION

2. Plaintiffs bring this action on behalf of themselves and classes of similarly situated individuals against Defendant Max Credit Union (“Defendant”) for (1) violating Regulation E’s requirement that Defendant clearly and accurately describe its overdraft service and that it do so “segregated from all other information” related to the account (*see* 12 C.F.R. § 1005.17(b)(1)); and (2) reimbursing itself for overdrafts, overdraft fees (“OD Fees”) and other bank fees with social security income (“SSI”).

3. As a result, Plaintiffs bring claims for breach of contract and the duty of good faith and fair dealing, conversion and unjust enrichment.

PARTIES, JURISDICTION, & VENUE

4. Defendant is an Alabama credit union with nearly \$2 billion in assets.

5. This Court has original jurisdiction over this matter because Defendant is at home in this state.

6. Defendant regularly and systematically conducts business and provides retail banking services in this state and provides retail banking services to customers in this state, including Plaintiffs and members of the putative Classes. As such, it is subject to the jurisdiction of this Court.

7. At all times relevant hereto, Plaintiff Adams was a citizen of Alabama and a resident of this County.

8. At all times relevant hereto, Plaintiff Sistrunk was a citizen of Alabama and a resident of Montgomery County.

9. Venue is likewise proper in this district pursuant to Ala. Code § 6-3-7(a)(1) because a substantial part of the events or omissions giving rise to the claims occurred in this County.

BACKGROUND FACTS

10. In 2021, the largest financial institutions in America charged customers almost \$11 billion in overdraft fees. Customers who carried an average balance of less than \$350 paid 84 percent of these fees. *Why Poverty Persists in America* (The New York Times, Mar. 9, 2023), <https://www.nytimes.com/2023/03/09/magazine/poverty-by-america-matthew-desmond.html>.

11. Because of this, industry leaders like Bank of America, Capital One, Wells Fargo, Alliant, and Ally have made plans to end the assessment of OD or NSF fees entirely. *See* Hugh Son, *Capital One to Drop Overdraft Fees for All Retail Banking Customers*, NBC News (Dec. 1, 2021), <https://nbcnews.to/3DKSu2R>; Paul R. La Monica, *Wells Fargo Ends Bounced Check Fees*, CNN (Jan. 12, 2022), <https://bit.ly/3iTAN9k>.

12. Federal regulators have also taken action. For example, the Consumer Financial

Protection Bureau (CFPB) recently fined Regions Bank \$191 million, finding that it “acted unfairly and abusively” in violation of the Consumer Financial Protection Act of 2010 by assessing *the same “surprise” APSN fees at issue in another class action lawsuit against Defendant*. See *Adams v. Max Credit Union*, No. 46-CV-2020-900119.00 (Macon Cnty., Ala. Cir. Ct.) (“*Max I*”). CFPB, Enforcement Actions, Regions Bank (Sep. 28, 2022), available at https://www.consumerfinance.gov/enforcement/actions/regions-bank_2022 (last accessed Mar. 22, 2023). See also FDIC, Financial Institution Letter, Supervisory Guidance on Multiple Re-presentment NSF Fees (Aug. 18, 2022), available at <https://www.fdic.gov/news/financial-institution-letters/2022/fil22040.html> (last accessed Mar. 22, 2023) (recommending that, among other things, institutions “eliminat[e] NSF Fees” or “declin[e] to charge more than one NSF fee for the same *transaction, regardless of whether the item is re-presented*” – *the same practice at issue at issue in another class action lawsuit against Defendant*). See *Max I* (Macon Cnty., Ala. Cir. Ct.).

13. Through the imposition of these fees, Defendant has made substantial revenue to the tune of tens of millions of dollars, seeking to turn its customers’ financial struggles into revenue.

I. DEFENDANT FAILS TO ABIDE BY REGULATION E’S DISCLOSURE REQUIREMENTS

14. Defendant has violated and continues to violate Federal Reserve Regulation E, 12 C.F.R. § 1005.1, *et seq.* (“Reg E” or “Regulation E”), which requires financial institutions to provide complete, accurate, clear, and easily understandable disclosures of their overdraft services and obtain affirmative customer consent before the financial institution can lawfully charge overdraft fees on non-recurring debit transactions and ATM withdrawals.

A. REG E VIOLATION #1: INFORMATION NOT SEGREGATED

15. In addition, Reg E requires Defendant to provide its members with a notice “segregated from all other information” that clearly describes Defendant’s overdraft service. 12 C.F.R. § 1005.17(b)(1).

16. Defendant violates this requirement because the description of its overdraft service is neither “segregated from all other information” and does not completely, accurately or clearly describe that service in easy-to-understand terms.

17. When Plaintiffs opened their accounts, Defendant prompted Plaintiffs to make critical choices about how and when Defendant would assess \$30 OD Fees on the same form that Plaintiffs were making other non-overdraft-related account elections. This violates the Reg E requirement that overdraft opt-in information be segregated from other account information so that customers can make these important decisions with respect to how and when Defendant assesses \$30 OD Fees. *See*, Ex. A, C.

18. In order to highlight the importance of segregating information regarding how and when OD Fees are assessed from other account information, federal regulators have drafted a model overdraft opt-in form for ATM and one-time debit card transactions that banks and credit unions can tailor to their overdraft practices. *See* Ex. D.

19. The model form is publicly available and used by tens of thousands of financial institutions nationwide – yet Defendant refused to utilize the form or otherwise segregate information regarding its overdraft services.

20. Federal law is incorporated by reference into the contract, and this practice breaches the contract. Ex. A-C.

B. REG E VIOLATION #2: DEFENDANT FAILS TO CLEARLY DESCRIBE ITS OVERDRAFT SERVICES

21. In addition to violating Regulation E’s segregation requirement, Defendant’s opt-

in disclosure is unclear, confusing, incomplete and inaccurate.

22. Under Reg E, Defendant's notice *must* include certain information including a brief description of the financial institution's overdraft service and the types of transactions for which a fee or charge for paying an overdraft may be imposed, the dollar amount of the fee, the maximum number of overdraft fees that may be assessed in a day, and an explanation of the Reg E's affirmative consent requirement, for example. 12 C.F.R. § 1005.17(d)(1).

23. Defendant's description includes none of this information:

<p>OVERDRAFT PROTECTION</p>	<p><input checked="" type="checkbox"/> STANDARD OVERDRAFT</p> <p>I AUTHORIZE THE CREDIT UNION TO COVER OVERDRAFTS BY MY CHECKING/SAVINGS ACCOUNT BY AUTOMATICALLY TRANSFERRING THE NECESSARY FUNDS FROM MY LINE OF CREDIT LOAN OR PRIMARY SHARE SAVINGS. TRANSFERS FROM LINE OF CREDIT ARE IN \$25 INCREMENTS. TRANSFERS FROM PRIMARY SHARE SAVINGS ARE IN EXACT AMOUNTS. THE STANDARD OVERDRAFT PROTECTION IS ALLOWED FROM THE PRIMARY SHARE AND/OR LINE OF CREDIT WITHIN THIS MEMBER NUMBER.</p>	<p><input checked="" type="checkbox"/> EXTENDED OVERDRAFT</p> <p>I AUTHORIZE THE CREDIT UNION TO COVER CHECK CARD AND/OR ATM TRANSACTIONS IN MY CHECKING/SAVINGS ACCOUNT WHEN THE NECESSARY FUNDS ARE UNAVAILABLE AND AGREE TO PAY THE PROCESSING FEE ASSOCIATED WITH THE TRANSACTION. THE EXTENDED OVERDRAFT PROTECTION IS ALLOWED FOR THIS MEMBER NUMBER.</p>
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Ex. A.

24. In addition, Defendant's opt-in disclosure does not adequately describe how, for example, how fees are assessed on different types of transactions. For example, under the "Extended Overdraft" section above, the opt-in disclosure states that Defendant will "cover Check Card" (i.e., debit card) transactions "when the necessary funds are unavailable." Ex. A.

25. In breach of this promise, Defendant assesses \$30 OD Fees on debit card transactions when the necessary funds are available. *See Max I* (alleging breaches of contract for the assessment of \$30 OD Fees on debit card transactions authorized on sufficient funds).

26. Because Defendant has adopted a noncompliant opt-in disclosure agreement to obtain consent under Regulation E, it may not assess overdraft fees to its customers on Regulation E transactions. Despite this, Defendant routinely assesses \$30 overdraft fees against its members.

27. Federal law is incorporated by reference into the contract, and this practice breaches the contract. Ex. A-C.

II. DEFENDANT REIMBURSES ITSELF FOR BANK FEES, INCLUDING OD FEES, WITH SOCIAL SECURITY INCOME

28. Plaintiff Adams receives SSI. Ex. A.

29. Defendant engages in the practice of seizing and siphoning off federal benefit funds directly deposited by the Social Security Administration into the bank accounts of SSI recipients.

30. This practice violates the contract, which does not permit this practice.

31. SSI provides a cash benefit to retired or disabled wage earners and to dependents of retired, disabled or deceased wage earners.

32. The purpose of SSI is to assure a minimum level of income for eligible individuals who otherwise do not have sufficient income and resources.

33. Upon information and belief, Plaintiffs allege that thousands of Defendant's members receive their SSI payments by direct deposit in a bank account.

34. Banks and credit unions of all sizes that engage in the punitive practice of seizing SSI funds make their customers agree to the punitive practice – Defendant does no such thing.

35. For example, Chase makes its customers agree to the following:

You authorize us to use the money from any subsequent deposits to your account (including but not limited to a direct deposit of Social Security or any other state or federal benefit payment) to pay any overdraft and resulting fees in that account.

Chase, Deposit Account Agreement at 10, *available at* <https://rb.gy/4to2>.

36. Ohio University Credit Union similarly makes its members agree to the following:

We may use subsequent deposits, including direct deposits of social security or other government benefits, to cover such overdrafts and overdraft fees.

Ex. E at 4.

37. Defendant makes no such promise and therefore breaches the contract when it reimburses itself for \$30 bank fees. Ex. A-C.

III. NONE OF THESE FEES WERE ERRORS.

38. The improper fees charged by Defendant to Plaintiffs' accounts were not errors by Defendant, but rather were intentional charges made by Defendant as part of its standard processing of transactions.

39. Plaintiffs therefore had no duty to report the fees as errors because they were not; instead, they were part of the systematic and intentional assessment of fees according to Defendant's standard practices.

40. Moreover, any such reporting would have been futile as Defendant's own contract admits that Defendant made a decision to charge the fees.

IV. THE IMPOSITION OF THESE IMPROPER FEES BREACHES DEFENDANT'S DUTY OF GOOD FAITH AND FAIR DEALING

41. Parties to a contract are required not only to adhere to the express conditions of the contract but also to act in good faith when they are invested with a discretionary power over the other party. This creates an implied duty to act in accordance with account holders' reasonable expectations and means that the bank or credit union is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, the bank or credit union has a duty to honor transaction requests in a way that is fair to its customers and is prohibited from exercising its discretion to pile on even greater penalties on its account holders.

42. Here—in the adhesion agreements Defendant foisted on Plaintiffs and its other customers—Defendant has provided itself numerous discretionary powers affecting customers' accounts. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, Defendant abuses that discretion to take money out of consumers' accounts without their permission and contrary to their reasonable expectations that they will not be charged improper fees.

43. Defendant abuses its discretion in its own favor—and to the prejudice of Plaintiffs and its other customers—when it assesses fees in this manner. By always assessing these fees to the prejudice of Plaintiffs and other customers, Defendant breaches their reasonable expectations and, in doing so, violates its duty to act in good faith. This is a breach of Defendant’s implied covenant to engage in fair dealing and to act in good faith.

44. It was bad faith and totally outside Plaintiffs’ reasonable expectations for Defendant to use its discretion in this way.

45. When Defendant charges improper fees in this way, Defendant uses its discretion to interpret the meaning of key terms in an unreasonable way that violates common sense and reasonable consumers’ expectations. Defendant uses its contractual discretion to set the meaning of those terms to choose a meaning that directly causes more fees.

CLASS ALLEGATIONS

46. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to AL ST RCP 23. This action satisfies the numerosity, typicality, adequacy, predominance, and superiority requirements of AL ST RCP 23.

47. The proposed Classes are defined as:

All citizens of Alabama who, during the applicable statute of limitations, were checking account holders of Defendant and were assessed an overdraft fee on an ATM or one-time debit card transaction during the applicable statute of limitations (the “Reg E Class”).

All citizens of Alabama who, during the applicable statute of limitations, had a Defendant checking account, received income from the Social Security Administration and were assessed fees (“SSI Class”).

48. Plaintiffs reserve the right to modify or amend the definition of the proposed Classes before the Court determines whether certification is appropriate.

49. Excluded from the Classes are Defendant, its parents, subsidiaries, affiliates,

officers, directors, legal representatives, successors, and assigns; any entity in which Defendant has a controlling interest; all customers members who make a timely election to be excluded; governmental entities; and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

50. The members of the Classes are so numerous that joinder is impractical. The Classes consist of thousands of members, the identities of whom are within the exclusive knowledge of Defendant and can be ascertained only by resort to Defendant's records.

51. Plaintiffs' claims are typical of the claims of the Classes in that Plaintiffs, like all members of the Classes, was charged improper fees. Plaintiffs, like all members of the Classes, have been damaged by Defendant's misconduct in that they have been assessed unlawful fees. Furthermore, the factual basis of Defendant's misconduct is common to all members of the Classes and represents a common thread of deceptive and unlawful conduct resulting in injury to all members of the Classes. Plaintiffs have suffered the harm alleged and have no interests antagonistic to the interests of any other members of the Classes.

52. The questions in this action are ones of common or general interest such that there is a well-defined community of interest among the members of the Classes. These questions predominate over questions that may affect only individual class members because Defendant has acted on grounds generally applicable to the Classes.

53. Among the questions of law and fact common to the Classes include:

- a. Whether Defendant violated its contract by violating Regulation E and reimbursing itself for bank fees with SSI;
- b. Whether Defendant breached its covenant of good faith and fair dealing by engaging in these practices;
- c. Whether these practices amount to unlawful conversion;
- d. Whether Defendant was unjustly enriched by these fee assessment

practices;

- e. The proper method or methods by which to measure damages; and
- f. The declaratory and injunctive relief to which the Classes are entitled.

54. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual Class member's claim is small relative to the complexity of the litigation, no Class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the members of the Classes will continue to suffer losses and Defendant's misconduct will proceed without remedy.

55. Even if Class members themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a class action presents far fewer management difficulties, allows for the consideration of claims which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

56. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in the prosecution of class actions, particularly on behalf of consumers and against financial institutions. Accordingly, Plaintiffs are adequate representatives and will fairly and adequately protect the interests of the Classes.

57. Plaintiffs suffer substantial risk of repeated injury in the future. Plaintiffs, like all members of the Classes, are at risk of additional improper fees. Plaintiffs and the Classes are entitled to injunctive and declaratory relief as a result of the conduct complained of herein. Money

damages alone could not afford adequate and complete relief, and injunctive relief is necessary to restrain Defendant from continuing to commit its illegal actions.

FIRST CLAIM FOR RELIEF
(Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing)
(On Behalf of Plaintiffs and the Reg E Class)

58. Plaintiffs incorporate the preceding allegations by reference as if fully set forth herein.

59. Plaintiffs and Defendant have contracted for bank account deposit, checking, ATM, and debit card services. See Exs. A-C.

60. Defendant mischaracterized in the account documents its true fee practices and breached the express terms of the account documents.

61. No contract provision authorizes Defendant to charge \$30 OD Fees in violation of Regulation E.

62. Under Alabama law, good faith is an element of every contract pertaining to the assessment of overdraft fees. Good faith is also mandated by the Uniform Commercial Code (“UCC”), which covers banking transactions. Whether by common law or statute, all contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

63. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes their conduct to be justified. A lack of good faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of violations of

good faith and fair dealing are willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

64. Defendant has breached the covenant of good faith and fair dealing through its overdraft policies and practices as alleged herein.

65. Defendant harms consumers by abusing its contractual discretion in a number of ways that no reasonable customer would anticipate.

66. Plaintiffs and members of the Reg E Class have performed all, or substantially all, of the obligations imposed on them by the account documents.

67. Plaintiffs and members of the Reg E Class have sustained damages as a result of Defendant's breach of the contract and breach of the covenant of good faith and fair dealing.

SECOND CLAIM FOR RELIEF
(Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing)
(On Behalf of Plaintiff Adams and the SSI Class)

68. Plaintiff Adams incorporates the preceding allegations by reference as if fully set forth herein.

69. Plaintiff Adams and Defendant have contracted for bank account deposit, checking, ATM, and debit card services. See Exs. A-B.

70. Defendant mischaracterized in the account documents its true fee practices and breached the express terms of the account documents.

71. No contract provision authorizes Defendant to reimburse itself for fees with SSI.

72. Under Alabama law, good faith is an element of every contract pertaining to the assessment of overdraft fees. Good faith is also mandated by the Uniform Commercial Code ("UCC"), which covers banking transactions. Whether by common law or statute, all contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in

connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

73. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes their conduct to be justified. A lack of good faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of violations of good faith and fair dealing are willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

74. Defendant has breached the covenant of good faith and fair dealing through its overdraft policies and practices as alleged herein.

75. Defendant harms consumers by abusing its contractual discretion in a number of ways that no reasonable customer would anticipate.

76. Plaintiffs and members of the SSI Class have performed all, or substantially all, of the obligations imposed on them by the account documents.

77. Plaintiffs and members of the SSI Class have sustained damages as a result of Defendant's breach of the contract and breach of the covenant of good faith and fair dealing.

THIRD CLAIM FOR RELIEF
(Unjust Enrichment)
(On Behalf of Plaintiffs and the Classes)

78. Plaintiffs incorporate the preceding allegations by reference as if fully set forth herein.

79. Plaintiffs, individually and on behalf of the Classes, assert a common law claim for

unjust enrichment. This claim is brought solely in the alternative to Plaintiffs' breach of contract claims and applies only if the parties' contract is deemed unconscionable or otherwise unenforceable for any reason. In such circumstances, unjust enrichment will dictate that Defendant disgorge all improperly assessed fees.

80. By means of Defendant's wrongful conduct alleged herein, Defendant knowingly assessed fees upon Plaintiffs and the members of the Classes that are unfair, unconscionable, and oppressive.

81. Defendant knowingly received and retained wrongful benefits and funds from Plaintiffs and the members of the Classes. In so doing, Defendant acted with conscious disregard for the rights of Plaintiffs and the members of the Classes.

82. As a result of Defendant's wrongful conduct as alleged herein, Defendant has been unjustly enriched at the expense of, and to the detriment of, Plaintiffs and the members of the Classes.

83. Defendant's unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

84. Under the common law doctrine of unjust enrichment, it is inequitable for Defendant to retain the benefits it received, and is still receiving, without justification, from the fee practices alleged herein on Plaintiffs and members of the Classes in an unfair, unconscionable, and oppressive manner. Defendant's retention of such funds under circumstances making it inequitable to do so constitutes unjust enrichment.

85. The financial benefits derived by Defendant rightfully belong to Plaintiffs and the members of the Classes. Defendant should be compelled to disgorge in a common fund for the benefit of Plaintiffs and members of the Classes all wrongful or inequitable proceeds collected by

Defendant. A constructive trust should be imposed upon all wrongful or inequitable sums received by Defendant traceable to Plaintiffs and the members of the Classes.

86. Plaintiffs and the members of the Classes have no adequate remedy at law.

**FOURTH CLAIM FOR RELIEF
(Conversion)
(On Behalf of Plaintiffs and the Classes)**

87. Plaintiffs incorporate the preceding allegations by reference as if fully set forth herein.

88. Plaintiffs, on behalf of themselves and the Classes, assert a common law claim for conversion.

89. Plaintiffs and members of the Classes owned the funds deposited in their accounts with Defendant. By means of Defendant's wrongful conduct alleged herein, Defendant assessed \$30 fees upon Plaintiffs and the members of the Classes in violation of the rights of Plaintiffs and the members of the Classes to those funds.

90. Defendant's wrongful conversion of the property of Plaintiffs and members of the Classes is traceable to, and resulted directly and proximately from, the conduct alleged herein.

91. Defendant should be compelled to return to Plaintiffs and members of the Classes an amount equal to the improper fees assessed against the accounts of Plaintiffs and members of the Classes to a common fund for the benefit of Plaintiffs and members of the Classes. A constructive trust should be imposed upon all wrongful or inequitable sums received by Defendant traceable to Plaintiffs and members of the Classes.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the members of the Classes, respectfully requests the Court to enter an Order:

- a. certifying the proposed Classes, appointing Plaintiffs as Class Representatives, and appointing Plaintiffs' counsel as Class counsel;
- b. declaring Defendant's fee policies and practices alleged in this Complaint to be wrongful and unconscionable in light of its contractual promises;
- c. enjoining Defendant from breaching its contract;
- d. awarding Plaintiffs and the Classes restitution in an amount to be proven at trial;
- e. awarding actual damages in an amount according to proof;
- f. awarding pre-judgment and post-judgment interest at the maximum rate permitted by applicable law;
- g. awarding costs and disbursements assessed by Plaintiffs in connection with this action, including reasonable attorneys' fees and costs pursuant to applicable law; and
- h. awarding such other relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs, by counsel, demand trial by jury.

Dated: April 10, 2023

Respectfully submitted,

/s/F. Jerome Tapley

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* *Pro Hac Vice* applications to be submitted

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TO CLERK: PLEASE SERVE DEFENDANT VIA CERTIFIED MAIL

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