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Local Prosecution of Real-Estate Fraud as a Means to Achieving Social and Economic Justice for Low-Income Victims and Communities: A Case Study

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Housing advocates around the country know the hidden truth about the collapse of the real-estate market: the true victims are not the banks or Wall Street but the millions of Americans who were lured into the promise of low-interest loans with adjustable rate mortgages that ballooned into huge monthly payments just as the market implosion left them with homes that were now worth less than the original loan.

Most of these homeowners were low-income, first-time buyers sold on promises of getting their slice of the “American Dream.” Most of these first-time buyers were unfamiliar with home buying and so fell prey to shady mortgage brokers who told them that artificially inflating income on their home loan application was “common practice.” Banks approved these loans through lax underwriting standards.¹ Lenders told prospective homeowners that they need not worry about the rate adjustment that would occur in one to five years because they could always refinance to a new loan—after all, home values would continue to rise forever, would they not?

Since the collapse of the housing market, the initial fraud committed in signing up low-income, first-time homebuyers has given way to a second wave of fraud targeted at homeowners who are in default on their mortgages. Unscrupulous individuals promise to “save your home from foreclosure” through loan modification, loan mitigation, or bankruptcy proceedings and often require up-front fees to do so.² The con artists running these schemes target low-income homeowners because they believe that these homeowners are less likely to understand that they are being defrauded and that even if the homeowners were to discover the fraud, they are less likely to complain to the authorities.

The rise in real-estate fraud affects not only homeowners but also low-income communities. As foreclosure rates skyrocket in low-income areas, entire communities are decimated by vacant, foreclosed homes that become magnets for trouble. Squatters, drug dealers, gangs, and prostitutes take advantage of abandoned, foreclosed homes by using them as safe havens for their illegal activity.³

¹See generally Gregory W. Brown & Christian Lundblad, *The U.S. Economic Crisis: Root Causes and the Road to Recovery*, JOURNAL OF ACCOUNTANCY, Oct. 2009, http://bit.ly/joa_10_2009.

²See generally Jim Puzzanghera, *Regulators Consider Ban on Upfront Fees for Loan Modification Help*, LOS ANGELES TIMES, Sept. 18, 2009, http://bit.ly/la_times_09_2009.

³Carolyn Said, *Vacant Foreclosed Homes Spawn Blight*, CRIME, SAN FRANCISCO CHRONICLE, May 3, 2009, http://bit.ly/san_fran_chron.

The Alameda County District Attorney's Office in Oakland, California, is taking steps to combat the effects of the downturn in the real-estate market and the accompanying increase in real-estate fraud against low-income victims and communities. I discuss how local prosecution agencies, working in collaboration with federal authorities, can serve a vital function in promoting social justice for low-income victims and communities ravaged by real-estate fraud. Housing advocacy groups can be significant allies by encouraging their local prosecutors to fight aggressively for the rights of low-income homeowners and communities. But potential legal and ethical roadblocks may prohibit close collaboration between housing advocacy groups and local prosecutors.

The Real-Estate Crisis and Oakland, California

The city of Oakland, California, has been hit hard by the real-estate crisis. In 2007 during the height of the mortgage meltdown, Oakland ranked nineteenth in the nation with one out of every seventy homes facing foreclosure.⁴ By 2008 Oakland ranked tenth in the nation in foreclosure rates.⁵

Oakland has a high number of households that are categorized as having low to moderate income. With 399,484 households at the last census, approximately 58 percent—226,794 households—are considered to be low to moderate income.⁶ Fewer than 20,000 households in Oakland—13.2 percent—have a median income of under \$10,000.⁷

Most of the low-income areas of Oakland are in the geographically flat areas of town between the more affluent hills and San Francisco Bay. Known generally as West Oakland and East Oakland, although each contains numerous smaller

neighborhoods, these areas of Oakland suffer from a high crime rate similar to that of many other low-income, urban areas. Over 115 murders were committed in Oakland in 2008, along with 3,323 robberies, 4,129 assaults, and 8,085 auto thefts.⁸

The situation in Oakland created by the real-estate crisis is similar to that of other low-income neighborhoods throughout the country. During the real-estate boom first-time homeowners bought their homes at overinflated prices. As the housing market collapsed, they became “underwater,” that is, the amount of their mortgage was more than the reassessed value of their home.

Two types of real-estate fraud have become prevalent in low-income communities, such as Oakland, since the real-estate crisis began. The first type of fraud affects the individual homeowner; the second type, the community at large.

Homeowners. Homeowners whose mortgage payments are increasing even as the value of their properties are decreasing face a daunting choice: lose their home through foreclosure or seek a loan modification. In the stressful atmosphere of trying to save their piece of the American Dream many of these homeowners fall prey to con artists posing as saviors. These con artists make cold calls, send mass mailers, or even go door-to-door pitching loan-modification programs that they say will help the homeowners save their homes from foreclosure.

Many of these loan-modification offers are in fact scams: simple “bait and switch” schemes common since the dawn of time. After collecting a “small fee” of \$1,000 to \$2,500 in exchange for loan-modification services, the con artists cut off all contact with the homeowner and leave the homeowner \$1,000 to

⁴Les Christie, *California Cities Fill Top 10 Foreclosure List*, CNNMONEY.COM, Aug. 14, 2007, http://bit.ly/cnnmoney_christie.

⁵*Which U.S. Cities Rank Highest in Foreclosure Rates?*, INTERNATIONAL BUSINESS TIMES, Oct. 23, 2008, http://bit.ly/ibt_10_2008.

⁶U.S. CENSUS BUREAU, ECONOMICS AND STATISTICS ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, CENSUS 2000 SUMMARY FILE 3—SAMPLE DATA, Matrices P52, P53, P54, P79, P80, P81, PCT38, PCT40, and PCT41 (2000).

⁷*Id.*

⁸Oakland Police, City of Oakland, Summary of Part I Crime Offenses, 1969–2008 (2009).

\$2,500 poorer yet no closer to solving the homeowner's mortgage problems. The con artists package the scams under different terms: "loan modification," "loan servicing," and "bankruptcy protection." But the goal of each scam is the same: to separate the homeowner from the homeowner's money as quickly as possible and to skip town before the homeowner is aware that anything has happened.

Two characteristics make this crime particularly insidious. First, the amount of the loss is too small to meet the \$1 million "minimum loss" threshold required for federal prosecution. At \$2,500 per household, 400 victims would be needed to meet that threshold. And even if 400 victims were found, a case of that size would take years to investigate and prosecute. Second, these types of crimes are perpetrated most often against those least likely to report the crimes to law enforcement. These con artists engage in "affinity fraud" by preying upon their own communities so that, for example, Spanish-speaking criminals prey on other Spanish speakers and African American criminals target other African Americans. Complicating the investigation of these scams is the reluctance of some victims to talk to law enforcement personnel because immigration status may be an issue in the victimized household. Not uncommonly victims tell law enforcement that they were afraid to make a report because the con artists told them, "If you tell the police, they will not help you—they will deport you!"

The Community. The real-estate meltdown also affects low-income communities as a whole. As homes are foreclosed or abandoned by homeowners, the resulting spike in vacant homes leaves entire neighborhoods abandoned. Criminals exploit the neighborhoods. Drug dealers, gangs, and prostitutes begin to use the empty homes as bases from which to launch criminal enterprises.⁹

Low-income communities are hit harder by real-estate fraud than suburban areas for two reasons. First, low-income areas in general have a higher crime rate and therefore are more likely to have criminals exploit the vacant homes and loss of community in the neighborhoods. Second, banks that buy foreclosed homes in low-income areas have less incentive to ensure that the houses are maintained. In suburban areas, bank-owned foreclosed homes are sold quickly, or the banks hire property management companies to maintain the homes properly. In low-income neighborhoods, where property values have declined steeply, homes stay on the market longer and often no buyer is found. The banks that own these homes often do not spend the resources necessary to secure the homes from individuals who trespass and create nuisances around the homes. Because the neglect of these homes makes them less marketable for resale, this practice is a form of redlining.¹⁰

The Case for Local Prosecution of Real-Estate Crimes

Real-estate fraud and "white-collar" crime have traditionally been seen as in the realm of federal prosecutors. A 2008 recruitment poster for Treasury agents for the Internal Revenue Service proudly proclaimed, "Only an accountant could catch Al Capone."¹¹ The implication of the poster is that federal agents are best suited to bring down white-collar criminals. Recent headlines touting successful federal prosecutions involving white-collar cases such as the prosecution of Bernard Madoff also serve to reinforce the stereotype that real-estate fraud is the exclusive realm of the federal government.¹²

Conversely in popular culture the role of local prosecutors—district attorneys—is to go after violent "blue-collar" criminals. The opening scene of almost every episode of the popular television show

⁹Said, *supra* note 3.

¹⁰California Reinvestment Coalition, *From Foreclosure to Re-Redlining: How America's Largest Institutions Devastated California Communities* (2010), http://bit.ly/cal_reinv_org.

¹¹Pete Williams, *To Catch a Thief*, MSNBC DAILY NIGHTLY, Feb. 21, 2008, http://bit.ly/msnbc_williams.

¹²Diana B. Henriques & Jack Healy, *Madoff Goes to Jail After Guilty Pleas*, NEW YORK TIMES, March 12, 2009, http://nyti.ms/nytimes_madoff.

Law and Order begins with the murder of an individual, followed by sixty minutes of District Attorney Jack McCoy working hand in hand with New York police detectives to bring the killers to justice.¹³ The message is that local prosecutors are best suited to bring down murderers, robbers, and the like.

These stereotypes belie what local prosecutors can do to turn back the rising tide of real-estate fraud, especially for low-income homeowners and communities. Consider the Alameda County District Attorney's Office. It is responsible for the criminal prosecution of crimes within a county containing fourteen incorporated cities. The County of Alameda covers rural areas to the east, suburban centers to the south, and urban, low-income areas in the larger cities of Oakland and Hayward.¹⁴ With approximately 150 deputy district attorneys in its employ, the district attorney's office qualifies as one of the largest law firms in the county.

Members of the Alameda County District Attorney's Office prosecute all misdemeanor and felony crimes in Oakland and bring consumer protection actions in civil court. The office has a real-estate fraud unit that prosecutes local real-estate fraud and collaborates with state and federal agencies such as the Federal Bureau of Investigation (FBI) and the California Department of Real Estate. The real-estate-fraud unit is also a member of the U.S. Northern District of California Mortgage Fraud Task Force,

which is headed by the United States' Attorney's Office of the Northern District of California.

By contrast, federal law enforcement agencies are limited in their ability to tackle local real-estate fraud by a lack of resources and high threshold requirements for the prosecution of real-estate-fraud cases. Despite their best efforts, federal law enforcement agencies are overwhelmed by the current real-estate-fraud crisis. In December 2009 the FBI reported having 3,000 pending mortgage-fraud investigations, up from only 150 such cases in 2004.¹⁵ Of those 3,000 pending investigations, fewer than 1,000 mortgage-fraud prosecutions were initiated.¹⁶ The low prosecution rate is caused in part by the allocation of limited resources—a reality of the world in which we live. Following the terrorist attacks of September 11, the FBI devoted a large number of white-collar-crime investigators to terrorism-related investigations.¹⁷ In real-estate cases federal agencies often have a “minimum-loss” threshold—though not a formal policy—that must be met before they will open an investigation. The threshold amount is deemed to be approximately \$1 million.¹⁸ In other areas such as Internet fraud, the FBI sets clear threshold standards for federal prosecution.¹⁹

Both the lack of resources and minimum-loss thresholds can hinder the administration of justice for low-income homeowners and communities on the federal level.

¹³See Nbc.com, *Law & Order*, http://www.nbc.com/Law_and_Order.

¹⁴Alameda County Community Development Agency, Pub. No. 07-01, 2007 Population and Housing Estimates for Alameda County and Its Cities (2007), http://bit.ly/acgov_org.

¹⁵Tim McGlone, *FBI Deluged by Fraud Cases from Real Estate Bubble*, PILOTONLINE.COM, Dec. 28, 2009, http://bit.ly/virginian_fbi_mortgagefraud.

¹⁶*Id.*

¹⁷Daniel Wagner, *AG Holder Pressed on FBI's Mortgage Fraud Focus*, PHILADELPHIA TRIBUNE, Jan. 14, 2010, http://bit.ly/phil_trib_mortgagefraud.

¹⁸While the Federal Bureau of Investigation (FBI) does not formally acknowledge that it has a “minimum-loss” threshold, the threshold is well known in the law enforcement community. The FBI Miami field office is the only office known to have acknowledged that such a threshold exists (see Glenn Theobald, *Attacking Mortgage Fraud in Florida*, COMMUNITY POLICING DISPATCH (Office of Community Oriented Policing Services, U.S. Department of Justice), June 2009, http://bit.ly/cops_usdoj_enews).

¹⁹*On-Line Fraud and Crime: Are Consumers Safe?: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 107th Cong. 10 (2001), http://bit.ly/h_comm_energy (statement of Thomas T. Kubic, Deputy Assistant Director, Criminal Division, Federal Bureau of Investigation, U.S. Department of Justice).

For low-income homeowners, reaching the minimum-loss requirement is often impossible. Loan-modification scams targeted at low-income homeowners involve thousands of dollars, not tens or hundreds of thousands of dollars.

Local prosecutors such as those in the Alameda County District Attorney's Office are in many ways best suited to help administer justice to low-income residents or communities who are victimized by real-estate fraud. First, local prosecutors are closer to their communities, cover a smaller jurisdiction than their federal counterparts, and are not under as much public scrutiny to prosecute high-profile cases. Second, local prosecutors use state law, local juries, and community resources to investigate and prosecute their cases—a unique set of tools not available to federal prosecutors. In California, for example, the threshold that must be met to charge a count of felony grand theft is \$400.²⁰ Crimes in which a homeowner is the victim of a forged signature or identity theft can also be charged through simple felony statutes.²¹

And, in promoting social justice, local courts are often less intimidating than federal courts. Local courts more closely reflect the demographic and socioeconomic mix of the neighborhoods they serve. Court staff members and victim witness advocates from local agencies are more likely to be able to help victims feel more comfortable with criminal justice proceedings. And local court rules and procedures are often less formal than in the federal court setting.

Clearly local prosecutors have a vital role to play in prosecuting real-estate crimes, especially for low-income victims or communities. Note, however, that the case for local prosecution of real-estate crimes is not an “either-or” proposition with federal agencies. Victims and housing advocates should not feel that by choosing to work with local prosecu-

tors they are shutting the door on federal prosecution, or vice versa. In fact, as discussed below, local and federal collaboration often proves to be the best of both worlds.

Providing Social Justice for Low-Income Homeowners

A study of cases undertaken by the Alameda County District Attorney's Office highlights the way in which local prosecutors can ensure justice for low-income homeowners and communities.

Individual Homeowners. The Alameda County District Attorney's Office charged and convicted defendants Sonia Alburez and Verena Silva with running a “foreclosure-rescue” scam against members of the Hispanic community.²² Defendants used public “notice of default” records found at the county recorder's office to target homeowners, predominantly Mexican or Guatemalan immigrants, who had fallen behind on their mortgage payments.

In carrying out the scam, the defendants promised to rescue their victims from foreclosure by stopping the foreclosure process. The defendants collected \$2,500 per month in advance fees from the victims and had the homeowners file a 2 percent interest in the property through a grant deed. The 2 percent title was held in the name of one of many fictitious companies created by the defendants, who told the homeowners that these companies were legitimate companies designed specifically to help them save their home. The defendants then filed false bankruptcy papers in the name of the fake companies. This effectively stopped the foreclosure for four to six months, during which the defendants continued to collect \$2,500 per month from the homeowners. When the banks and bankruptcy courts eventually figured out that the companies were not legitimate, the foreclosure went forward. Homeowners remained unaware that the

²⁰CAL. PENAL CODE § 487 (2010).

²¹See CAL. PENAL CODE §§ 470, 530.5 (2010).

²²The case was adjudicated in open court and all information contained is public record (see Complaint, *People v. Alburez*, No. 409331AB (Cal. App. Dep't Super. Ct. March 26, 2008), and other court documents).

foreclosure-rescue scam was not working to their benefit until eviction proceedings were started to remove them from the property.

The Alameda County District Attorney's Office and the FBI collaborated to prosecute Alburez and Silva because the scam was part of a nationwide foreclosure-rescue scam. The FBI worked to identify suspects and victims throughout the United States and ultimately brought federal charges against a number of individuals.²³ But the FBI action was complex and required the FBI to invest a great deal of time to investigate and bring charges.

By contrast, the Alameda County District Attorney, working with the FBI, moved quickly to help over forty victims who had been targeted by Alburez and Silva. Within thirty days of receiving the initial complaint the county charged the defendants with committing state felonies. Defendants were arrested, convicted, and sentenced to serve jail time and make restitution payments to many of the victims.

The case against Alburez and Silva highlights the different ways in which local and federal prosecutors can help victims: state prosecutors concentrated on the local foreclosure-fraud scheme, while federal prosecutors focused on larger cases and ultimately brought down a complex real-estate-fraud ring spanning a number of states.

From a social justice perspective the role of the local prosecuting agency was as crucial as that of federal prosecutors. First, the Alameda County District Attorney's office was able to act within days, not months or years, to file a complaint and issue an arrest warrant. This helped stop the illegal activity quickly resulting in better public protection because the con artists were arrested quickly. Second, the local prosecution of those running the foreclosure scam helped the victimized low-income homeowners obtain monetary restitution.

Communities. To reduce the blight that results from criminals using vacant homes in low-income neighborhoods, the Alameda County District Attorney's Office utilizes state criminal nuisance statutes.²⁴ Working with the Oakland Police Department, local prosecutors identify vacant, bank-owned homes that are a source of constant neighborhood complaints or criminal activity. The district attorney's office then sends the banks owning the property a letter informing them of their requirement to abate the nuisance or face criminal nuisance charges.²⁵ In the cases undertaken by the district attorney's office thus far, all have been resolved without the need to file a formal criminal complaint.

Local prosecutors, through these types of actions, are able to help promote social justice by helping low-income communities remove blighted homes from their neighborhoods and helping banks to live up to their responsibilities as responsible members of the community.

Role of Community Advocacy Groups

Notwithstanding that local prosecutors, using criminal and nuisance law, can make great strides in ensuring social justice for low-income homeowners and communities, many local prosecutors remain resistant to handling white-collar crimes. An oft-cited reason for the reluctance to tackle real-estate fraud is a lack of resources. Community advocacy groups can aid local prosecutors by advocating before state and national leaders the need for resources and tools to allow local prosecutors to fund real-estate-fraud units.

Many states already offer money to local law enforcement jurisdictions to fund the creation of units to fight real-estate fraud. In California, for example, state law allows counties to charge a fee of up to \$3 for all real-estate instruments recorded with the County Recorder's Office

²³See Indictment, *United States v. Alburez*, No. CR08-00914 (N.D. Cal. Dec. 12, 2008).

²⁴CAL. PENAL CODE § 370 (2010).

²⁵*Oakland DA Enforces Cleanup of Blighted Properties*, KTVU.com, Dec. 24, 2009, http://bit.ly/ktvu_news_story.

to fund the Real Estate Prosecution Trust Fund.²⁶ This trust fund money has been the impetus for many local jurisdictions to create and fund real-estate-fraud units. Currently twenty-six of fifty-eight counties in California receive funding through the Real Estate Prosecution Trust Fund.

Federal stimulus money, in the form of grants, has been offered for the creation of real-estate-fraud units. In 2009 the U.S. Department of Justice through the American Reinvestment and Recovery Act awarded \$10 million in grants to local and state prosecution agencies to combat mortgage fraud and crimes related to vacant properties.²⁷ However, only eight agencies received this funding, and the continuation of the grant is not assured given the current economic climate.

Community advocacy groups can also reach out to local prosecutors and offer to help train and advise local prosecutors in real-estate-fraud issues. While most prosecutors are comfortable handling theft and fraud cases, that first real-estate case, with its thousands of pages of documents, may be intimidating. Assistance in learning the complexities of real-estate law is needed.

But perhaps the best way that community advocacy groups can assist local prosecutors is by referring cases to them, helping their clients fill out the complaint forms, and continuing to stress to local prosecution offices the scope of the problem in their neighborhood.

Roadblocks to True Collaboration Between Advocacy Groups and Local Prosecutors

Local prosecutors fit a need in local communities to protect low-income individuals who are victims of real-estate fraud. A close collaboration between local

prosecutors and advocacy groups serving these low-income individuals would seem natural. Various legal and ethical roadblocks, however, make true collaboration difficult, if not impossible.

Duty to Client Versus Duty to Society. Advocacy groups and local prosecutors each have different duties, creating tension in any collaboration between the two groups. A community advocate's duty is to represent the client. Thus advocates can do everything within their power to advocate in their client's best interest. But a prosecutor's duty is to the state and society at large, and not to an individual victim:

The district attorney is not an "attorney" who represents a "client" as such. He is a public officer, under the direct supervision of the Attorney General, who "represents the sovereign power of the people of the state, by whose authority and in whose name all prosecutions must be conducted."²⁸

There are times when an advocate's duty to a client and a prosecutor's duty to promote justice for society as a whole are in conflict. For example, an advocacy group may bring to the local prosecutor's attention one homeowner who has been victimized by mortgage fraud. The prosecutor may believe that the real-estate fraud that the homeowner experienced is part of a larger and more complex fraud. The prosecutor may have a duty to conduct a thorough, sweeping investigation of the larger fraud, even at the risk of not helping the initial homeowner immediately.

Burden of Proof. A local prosecutor is under an ethical duty to promote justice and not merely obtain convictions.²⁹ Consistent with that duty is the legal standard of being able to prove a case by "proof be-

²⁶CAL. GOV'T. CODE § 27388 (2010).

²⁷The grants were made under the Edward Byrnes Memorial Competitive Grant Program: Reducing Mortgage Fraud and Crime Related to Vacant Properties (see OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, FISCAL YEAR 2009 RECOVERY ACT AWARDS 15 (n.d.), http://bit.ly/arra_grants_mortg_fraud).

²⁸*Shepherd v. Superior Court*, 17 Cal. 3d 107, 122 (Cal. App. Dep't Super. Ct. 1976) (citing *Fleming v. Hance*, 153 Cal. 162, 167 (1908)) (citation omitted).

²⁹CAL. RULES OF PROFESSIONAL CONDUCT R. 5-110 (2010), http://bit.ly/cal_rules_prof_conduct; AM. BAR ASS'N MODEL RULES OF PROFESSIONAL CONDUCT R. 3.8 (2009), http://bit.ly/aba_model_rules.

yond a reasonable doubt.”³⁰ These standards often conflict with the standards of advocacy groups, whose civil legal standard is proof by a “preponderance of evidence.” Thus there are times when a local prosecutor lacks the evidence to proceed with a case, while a housing advocate may file suit or otherwise move the case forward.

Privacy Right of Suspect. A suspect has an absolute right to privacy during the pendency of criminal investigations. Even after a suspect has been charged with a crime, the police reports, investigative notes, and criminal “rap” sheet remain confidential and are not subject to release.³¹ Thus almost all of the information gathered by local prosecutors is confidential and may not be shared with advocates or other third parties. For example, information gathered by a search warrant is obtained by court order for the specific purpose of conducting a criminal investigation. As such, the fruits of the search warrant may not be shared with outside parties. Even commenting on the existence of such material may be problematic for local prosecutors.

Ethical Consideration for Community Advocates. Community advocates who are attorneys must abide by ethics rules when seeking to collaborate with local prosecutors. In almost every state, professional rules of conduct for attorneys state that an attorney “shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.”³² Attorneys must take care when referring cases to local prosecutors that they not be seen as attempting to gain an advantage in their pending civil matter. The best practice is to refer the case to the local prosecutor and take no further action in the criminal proceedings.



Local prosecutors can help community advocacy groups in achieving social and economic justice for low-income victims and communities. Through collaboration and cooperation with community advocacy groups and federal agencies, there is much that local prosecutors—though not necessarily thought of as the primary arm of enforcement of real-estate fraud—can do to assist in stemming the tide of real-estate fraud.

³⁰*In re Winship*, 397 U.S. 358, 364 (1970).

³¹CAL. GOV'T CODE ch. 3.5 (2010).

³²CAL. RULES OF PROFESSIONAL CONDUCT R. 5-100(A) (2010).



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