UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

IN RE: **Deborah Dee Stone,** **Debtor.**	**Case No. 24-12767-MER** **Chapter 13**
Deborah Dee Stone, **Plaintiff,** **v.** **Real Estate Equity Exchange, Inc.,** **Unison Agreement Corp.,** **Odin New Horizon Real Estate Fund LP,** **and Unison Investment Management, LLC,** **Defendants.**	**Adv. Proc. No. 24-01181-MER**

DEBTOR-PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ADVERSARY COMPLAINT

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Debtor-Plaintiff, Deborah Dee Stone, submits this opposition to Defendants' Motion to Dismiss Adversary Complaint. The Court should deny the Motion because Ms. Stone's Adversary Proceeding Complaint plausibly alleges that the Defendants, Real Estate Equity Exchange, Inc., Unison Agreement Corp., Odin New Horizon Real Estate Fund LM, and Unison Investment Management, LLC (collectively, Defendants or Unison) violated numerous Colorado consumer protection and lending laws in their marketing and sale of Unison's "HomeOwner Agreement."

Unison's HomeOwner Agreement is a predatory residential mortgage loan masquerading as an unregulated "option" contract. As the result of Defendants' deceptive marketing and sales scheme, Ms. Stone had no idea that she would owe Unison over $88,000 and lose all the equity in her home in exchange for Unison's advance of $33,635 only five years ago. If this illegal home equity skimming contract is enforced, Ms. Stone will have no assets and insufficient funds to pay her secured creditors through her Chapter 13 bankruptcy plan. Her complaint contains specific and detailed allegations about how Defendants developed and deployed a business plan to illegally profit off her, and therefore meets the standards under Fed. R. Civ. P. 12(b)(6) and 9(b) and their applicable bankruptcy counterparts.

I. FACTUAL ALLEGATIONS

Home equity is the single largest asset for many American families; it is essential for wealth building and for maintaining financial security. Compl. ¶ 25, ECF No. 1. It is the largest asset class globally and in the United States, making up about 40% of the consumer price index and 16% of the gross domestic product. *Id.* ¶ 20. Ms. Stone, a 67-year-old high school graduate living on a fixed income, alleges that Defendants—as part of their carefully conceived scheme to transfer wealth from homeowners to themselves and institutional investors—used deception and other illegal tactics to dupe her into giving up a majority share of her home value in exchange for a relatively small cash advance. *E.g.*, *id.* ¶¶ 2-5, 10, 15, 40-45. Unison has securitized nearly a billion dollars in HomeOwner Agreements. *Id.* ¶ 39. If Unison's illegal contract is enforced, Ms. Stone will lose all of her home equity and will be left with insufficient funds even to pay off her legitimate mortgage loans when she sells her home through this Chapter 13 bankruptcy proceeding, while Unison will realize a more than 20.7% profit. *Id.* ¶¶ 109, 113. If Ms. Stone had understood the ramifications of this transaction, she never would have done business with Unison. *Id.* ¶ 111.

A. Unison Transfers Wealth From Homeowners to Investors, Using a Thinly Disguised Predatory Mortgage Loan Product.

Unison structures the HomeOwner Agreement to guarantee a high rate of return to investors at homeowners' expense. *E.g.*, *id.* ¶¶ 27-38. Unison drafted the HomeOwner Agreement to be substantially one-sided in favor of Defendants. *Id.* ¶¶ 4, 119(n). Here, Unison advanced $35,000 (minus a transaction fee of $1,365) to Ms. Stone five years ago and now seeks to collect over $88,000 in return. *E.g.*, *id.* ¶¶ 103, 109; Proof of Claim No. 16 at 4. This amounts to an effective annual percentage rate (APR) exceeding 20.7749%, which is usurious under Colorado law. *Id.* ¶¶ 112 (repayment of $84,000 leading to an APR of 20.7749%), 136-62. Unison secured its right to repayment from Ms. Stone by recording a Deed of Trust on her property and obtaining second lien status. *Id.* ¶ 36.

Unison's founder has described the Unison HomeOwner Agreement as "similar to any home financing transaction." *Id.* ¶ 56. When Unison advanced money to Ms. Stone, it expected to get repaid a greater amount at a later date. *See, e.g.*, *id.* ¶¶ 2, 22-24, 28-38, 69, 78, 109. The HomeOwner Agreement is explicit that Ms. Stone has an obligation to repay Unison. *E.g.*, *id.* ¶¶ 77-78. As demonstrated by Unison's "total payoff" quote to Ms. Stone and its Proof of Claim, Unison asserts that Ms. Stone must repay it substantially more than the cash advance it provided to her, calculated as the total of the cash advance plus an additional sum based on a percentage of the increase in the value of her home. *E.g.*, *id.* ¶¶ 28, 69, 78, 109; Proof of Claim No. 16 at 4. Although Unison leads homeowners to believe that they do not need to repay it until they decide to sell their home, Unison's HomeOwner Agreement sets an end date of thirty years for repayment at which time Unison can force a sale. *E.g.*, Compl. ¶¶ 78 ("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* . . . ." (emphasis added)), 17-24, 30, 77. If Ms. Stone fails to pay Unison back or otherwise defaults, Unison has the right to force a sale and recover all amounts that it would be due under the contract, including liquidated damages. *Id.* ¶¶ 37, 103(e), (g). The HomeOwner Agreement also includes a prepayment penalty requiring payment in full plus the initial transaction fee if the house is sold within three years of the contract's origination. *Id.* ¶ 103(h).

Unison has structured its product to guarantee repayment, with interest, because its business model requires it to earn a profit for its investors. *E.g.*, *id.* ¶¶ 23-24, 27-38, 104. As a SEC-registered investment advisor, Defendant UIM is legally required to act in the best interest of its investor clients. *Id.* ¶ 48. Unison's founder created the company, "to provide long term capital assets to investors using residential real estate equity," *id.* ¶ 17, and "uses a 'very specific data infrastructure and pricing structure' to 'turn[] a house into a security." *Id.* ¶ 23. Unison tells its investors that its HomeOwner Agreements have "unlimited upside and limited downside" and promises them "high risk-adjusted net returns." *Id.* ¶ 24. Indeed, Unison's business model has been successful, realizing more than a 20% gain for its investors. *Id.* ¶¶ 38-39. Unison currently holds $8.1 billion in real estate assets and operates in thirty states and Washington D.C., markets that represent more than 82% of the value of all U.S. real estate. *Id.* ¶ 16.

To ensure an outsized return (in Ms. Stone's case, over 20.7%), Unison structures the transaction to hedge against any losses and shift the costs and risks onto homeowners. *Id.* ¶¶ 22-38, 103, 109. Unison uses "sophisticated" projections to determine which housing markets are going to appreciate, like Colorado's, and determine how to price its product to ensure profitability. *See id.* ¶¶ 18, 23. This includes discounting the appraised value of the home at origination to create a falsely lower starting value that is then used to calculate Unison's percentage share, so it immediately realizes a profit when it closes the deal. *Id.* ¶ 34. Unison also ensures profitability through inclusion of terms such as a prepayment penalty, a thirty-year term, the attachment of a deed of trust permitting it to foreclose, and liquidated damages. *Id.* ¶¶ 22, 29-37, 103-04. These terms virtually eliminate the possibility that Unison will lose money on the transaction.

In addition, despite securing a right to a 70% share of the ownership of Ms. Stone's home, Unison does not take on any of the costs of homeownership for the entire term, instead requiring Ms. Stone to bear all costs associated with the transaction to protect Unison's and its investors' interests. *E.g., id.* ¶¶ 28, 33-35, 103(f). Ms. Stone was required to pay all costs related to the transaction's origination, including appraisal and settlement costs; costs related to the maintenance of the home, including the costs of repairs, insurance, taxes and her first mortgage; costs related and to the sale of the home—all of which increases Defendants' payout. *Id.* Meanwhile, Defendants and investors incur no costs associated with maintaining and growing equity in the home and instead treat the home as a passive investment from which they will recover the overwhelming majority of the proceeds of the home's appreciation. Compl., ¶¶ 21-22, 103(f)-(j).

B. Unison Induces Homeowners Into the HomeOwner Agreement by Intentionally Obscuring Its Terms and Costs.

Unison carries out its illegal scheme to extract exorbitant profits from homeowners like Ms. Stone by intentionally obscuring the nature of its HomeOwner Agreements. *E.g., id.* ¶¶ 40-51, 58, 64-66, 98-103. On its website, Unison falsely advertises its product as an "equity sharing agreement" through which homeowners will incur no debt or interest and make no payments, when in fact homeowners are obligated to pay Unison back on its demand, at an increased amount, and to cover monthly costs of taxes, insurance, and other fees. *Id.* ¶¶ 40-45. Unison's assertion that it will share in the homeowner's equity is also false: Unison will actually assume a majority ownership interest in the home—a much more costly arrangement for homeowners. *Id.* ¶¶ 42-45.

Unison also falsely claims that its HomeOwner Agreements are not loans in order to circumvent regulatory requirements such as cost disclosures and interest rate caps that protect consumers from predatory lending. *E.g.*, *id.* ¶¶ 2-4, 52-58. The Offer and HomeOwner Agreement package provided to Ms. Stone by Unison contains more than 100 pages of contracts and "disclosures" that do not comply with Colorado law. *Id.* ¶ 88; Defs.' Exs. 1, 2-1, 2-2, 2-3, 2-4, ECF Nos. 14-2 to 14-6. These documents are confusing, misleading, contradictory and omit material information about the nature and cost of the transaction in order to grossly underestimate the costs to Ms. Stone and overestimate the purported benefits. *E.g.*, Compl. ¶¶ 70-72, 74-75, 99. For example, Unison uses confusing language to make it appear it is paying homeowners money out of its pocket when the funds already belong to homeowners in the form of equity. Compl. ¶ 103 ("Ms. Stone would never receive any benefit from the $105,000 [Unison said it would 'pay' her], given that this amount would be part of her home equity realized at the time of sale whether or not she entered into an agreement with Unison."). Ms. Stone is not privy to Unison's business operations; as a high school graduate with a career as an administrative assistant, she does not have training or expertise anywhere near comparable to Defendants, with their access to sophisticated modeling, projections, economists, and lawyers. *Id.* ¶¶ 10, 51, 72-73, 102, 119(a). As a result, she did not understand Unison's opaque and complex financial transaction, nor could she in light of Unison's obfuscation of its terms. *Id.* ¶¶ 71, 99- 100, 119(i). Ms. Stone is still confused about

Unison's payoff calculation. *Id.* ¶ 110. Ms. Stone did not and could not understand the contents of the various documents presented to her for signature. *Id.* ¶¶ 89-90.

Unison did not attend the closing when Ms. Stone had to sign the documents. *See id.* ¶ 87. A man came to her home to just get her signatures and could not answer any of Ms. Stone's questions about the stack of nearly 100 pages of documents he presented to her for signing. *Id.* ¶¶ 86-90, 98-100. The first time Ms. Stone began to understand the true cost of the HomeOwner Agreement was after she contacted a Unison representative on October 18, 2023, and the representative provided her with a "payoff" quote of $84,000. *Id.* ¶¶ 109-110. At that time, Ms. Stone learned for the first time that she would gain no proceeds from the sale of the home due to the nature of her agreement with Unison. *Id.* ¶ 108. Unison continues to obscure the cost of the transaction even in this forum, by simultaneously claiming that Ms. Stone owes it both $0.00 and over $88,000. *See* Proof of Claim No. 16.

Ms. Stone would not have entered into Unison's HomeOwner Agreement if she understood its cost. Compl. ¶¶ 110-111. Unison's conduct violates Colorado consumer protection and lending laws, interferes with the proper administration of Ms. Stone's bankruptcy estate, and will financially devastate Ms. Stone. *Id.* ¶¶ 108-109, 113, 117-162.

II. ARGUMENT

The Court must accept well-pleaded allegations in the complaint as true, drawing all inferences in Plaintiff's favor. *See Clinton v. Sec. Benefit Life Ins. Co.*, 63 F.4th 1264, 1275 (10th Cir. 2023). The complaint must include sufficient "facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp., v. Twombly*, 550 U.S. 544, 570 (2007). "There is a low bar for surviving a motion to dismiss, and a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Clinton,* 63 F.4th at 1276 (internal marks and citations omitted). Because Plaintiff's complaint meets and exceeds this this standard, Defendants' motion to dismiss should be denied.

In addition, the extraneous exhibits appended by Defendants are improper and should be stricken and disregarded. *See, e.g.*, *Burnham v. Humphrey Hosp. Reit Tr., Inc.,* 403 F.3d 709, 713 (10th Cir. 2005); *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007).[1]

A. Plaintiff Plausibly Alleges Unconscionability (Count I)

Plaintiff sets forth two alternative bases of unconscionability in her first count—statutory and common law. Defendants' motion only addresses the common law claim; any challenge to the statutory claim has been waived. *See, e.g., Tran v. Trustees of State Colleges in Colorado,* 355 F. 3d 1263, 1266 (10th Cir. 2004); *see also McCausland v. Chater Township of Canton,* Case No. 18-12409, 2020 WL 13499606, at *2 (E.D. Mich. May 11, 2020). Nonetheless, Plaintiff addresses each claim in turn, demonstrating that each claim has been sufficiently alleged to permit the claims to proceed to discovery.

1. *Plaintiff's UCCC claim may not be dismissed pursuant to the statute's terms.*

Ms. Stone asserts a claim of unconscionability under the Uniform Consumer Credit Code (UCCC), C.R.S. § 5-5-109. Pursuant to the express terms of the statute, Ms. Stone's claim must proceed to discovery.

First, the statute covers any "transaction that . . . **leads the consumer to believe** will give rise to a consumer credit transaction." C.R.S. § 5-5-109(1) (emphasis added). Whether or not the Court finds that the subject transaction is a consumer credit transaction, Ms. Stone clearly alleges

[1] Defendants attach fourteen exhibits accompanied by a "certification of counsel" to their Motion. Apart from Exhibits 1, 2, and 14, the exhibits are not referenced in the complaint and have not been properly authenticated. Plaintiff requests that the exhibits be stricken or that the motion be converted to a motion for summary judgment and held in abeyance until after the close of discovery. *See* Fed. R. Civ. P. 12(d).

that she was led to believe that it was such a transaction.[2] Compl. ¶¶ 63, 65, 120. As a result, the statute applies here. The statute goes on to provide: "If it is **claimed** . . . that the agreement or transaction or any term or part thereof **may be** unconscionable . . . the parties **shall** be afforded a reasonable opportunity to present evidence . . . ." C.R.S. § 5-5-109(3) (emphasis added). Because Ms. Stone clearly claims that the transaction "may be unconscionable," pursuant to the statute the motion to dismiss is premature. *See, e.g.*, *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 293 (4th Cir. 1989) (based on identical statutory language, holding that "courts must allow the parties to develop an adequate record" on unconscionability and a decision on the pleadings is improper); *Hatcher v. Bank of Am., N.A.*, No. 2:12-CV-5793, 2013 WL 1776091, at *3-*4 (S.D.W. Va. Apr. 25, 2013).

Even if the Court reaches the substance of the claim, Ms. Stone has plausibly alleged facts supporting the statutory claim. In contrast to common law, the statute provides that the court may refuse to enforce any agreement that was **either** "unconscionable at the time it was made" (i.e., substantively unconscionable) "**or** to have been induced by unconscionable conduct" (i.e., procedural unconscionable). C.R.S. § 5-5-109(1)(a) (emphasis added); *see May Dept. Stores Co. v. State ex rel. Woodard*, 863 P. 2d 967, 976 (Colo. 1993) (en banc) (the General Assembly's use of the disjunctive "or" in legislation "demarcates different categories"). Ms. Stone alleges sufficient facts to make out both claims.

First, the transaction was unconscionable at the time it was made. The product was developed by Defendants to be extremely lopsided, by guaranteeing a usuriously high rate of return to Defendants and an overwhelming loss to Ms. Stone by transferring 70% of the ownership of her home to Defendants in exchange for a relatively small upfront payment—but only *after* she bears

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[2] In addition, Ms. Stone plausibly pleads that the product is, in fact, a consumer credit transaction. *See infra* Section II.C.

the cost of ensuring that it increases its value over the course of many years.[3] *See* Compl. ¶¶ 21-24, 27-38, 103. The transaction mandates that Ms. Stone increase the transfer of her wealth to Defendants by, *inter alia*, requiring her to cover all costs of maintaining the home over up to thirty years to increase its value for Defendants' primary benefit and cover the costs of selling her home to a third party at the end of the contract, all under threat of foreclosure; prohibiting her from accessing her home equity through either selling the home during the first several years or ever obtaining additional financing, regardless of the home's appreciation; and artificially underestimating the home's value at the start of the transaction to inflate the transfer of wealth to Defendants when the transaction comes due. *See, e.g.*, *id.* ¶¶ 21-24, 27-38, 53-54, 58, 81, 103-04, 107-13, 117, 119. The terms of the transaction further benefit Defendants to Ms. Stone's detriment by withholding the vast majority of the "purchase price" of the so-called "option" for up to thirty years, so that the real present value of the funds is actually much lower; only paying this remaining purchase price out of funds that Ms. Stone would receive from the sale of her home, regardless of having entered the contract, such that it is illusory. *See id.* ¶ 103.c-d. As the result, Ms. Stone is trapped with her home, maintaining it for Defendants' benefit, unable to sell it and move in with family as she ages. *Id.* ¶ 117.

Alternatively, Unison induced the contract though its unconscionable conduct, as described in detail below, including through multiple material misrepresentations and omissions in the sales process, voluminous documents rife with confusing fine print and legalese that made it impossible for her to understand the true cost of the transaction, and a closing with someone who could not answer any questions. *See, e.g.*, *id.* ¶¶ 40-51, 58, 63-66, 70-76, 79-85, 88-95, 98-103, 119; *see also*

[3] At the end of the contract, Defendants' portion of the payout from their 70% ownership will be reduced by the second Unison payment (which as described elsewhere is simply comprised of the home equity that Ms. Stone already owns). *See* Compl. ¶ 103.c-d.

infra Sections II.A.2, B. In short, Defendants intentionally misled Ms. Stone about the costs, benefits, and risks of the transaction and obscured its true terms and impact. Ms. Stone would not have entered the transaction, but for Defendants' unconscionable inducement. Compl. ¶ 111.

2. *Plaintiff has plausibly pleaded common law unconscionability.*

In addition, or in the alternative, Plaintiff seeks relief under the common law doctrine of unconscionability.

> In order to support a finding of unconscionability, there must be evidence of some overreaching on the part of one of the parties such as that which results from an inequality of bargaining power or under other circumstances in which there is an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to that party.

Davis v. M.L.G. Corp., 712 P.2d 985, 991 (Colo. 1986) (en banc). The following factors should be considered:

> a standardized agreement executed by parties of unequal bargaining strength; lack of opportunity to read or become familiar with the document before signing it; use of fine print in the portion of the contract containing the provision; absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated; the terms of the contract, including substantive unfairness; the relationship of the parties, including factors of assent, unfair surprise and notice; and all the circumstances surrounding the formation of the contract, including its commercial setting, purpose and effect.

Id. at 991 (internal citations omitted). The analysis requires consideration of the totality of the circumstances surrounding the transaction. *Bonanno v. Quizno's Franchise Co., LLC*, No. 06-cv-02358-CMA-KLM, 2009 WL 1068744, at *18 (D. Colo. Apr. 20, 2009) (citing *Davis*, 712 P.2d at 991). As a result, unconscionability determinations are not appropriate for a motion to dismiss.[4] *See id.* at *9 ("Defendants' argument to dismiss this claim is premature. There is no evidence in

[4] Consistent with this rule, Defendants have cited no cases that dismiss an unconscionability claim on a Rule 12(b)(6) motion. Defendants instead rely on cases rendering decisions after the close of discovery; in the context of arbitration, where federal law creates a strong presumption in favor of enforcement; or that simply do not relate to unconscionability at all.

the record at this stage of the litigation with respect to whether or not the franchise agreements are unconscionable.").

Ms. Stone has plausibly pleaded unconscionability under the *Davis* factors. First, the agreement was a standardized contract of adhesion, consisting of more than 100 pages drafted by Defendants, Compl. ¶¶ 67, 87-88, 199.c-d, and the parties had significantly unequal bargaining power, *see id.* ¶¶ 10, 11-51, 102, 119.a-b. While Defendants prompt the Court to ignore these factors, Defs.' Mot. to Dismiss 11, ECF No. 14 (Mot.), they are central to the inquiry under Colorado law. *See Davis*, 712 P.2d at 991; *see also Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 850 (10th Cir. 1986).

Looking to the second *Davis* factor, Ms. Stone was not provided the opportunity to read or become familiar with the documents before signing. The initial Offer documents incorporated other documents by reference that Defendants did not provide to Ms. Stone before they instructed her to sign to "accept" the contract. Compl. ¶ 80; Defs.' Ex. 1. Defendants apparently believed (as did Ms. Stone) that the deal was consummated at this point, as demonstrated by the fact that Defendants sold the contract to investors after Ms. Stone signed the Offer, but before Defendants provided her with the actual terms of the agreement that were incorporated by reference in the Offer. Compl. ¶¶ 83-85. Only later was the full package provided to her, at a meeting at her home where a man who refused to answer any questions rushed Ms. Stone through the signing of around 100 pages. *Id.* ¶¶ 88-90. Some of the terms, including that the appraised value of the home was discounted to increase Defendants' profits, were omitted from the documents altogether. *Id.* ¶ 70.

Regarding the third *Davis* factor, the terms of the transaction were confusing and embedded in fine print. Some terms could only be located hidden on the website; others were never disclosed; and the contracts themselves are written in small print, are extremely lengthy, contain legalese, repeatedly cross reference other documents, and include extremely difficult to understand terms. *See, e.g., id.* ¶¶ 49, 70-75, 80, 98-99, 101, 102; *see also* Defs.' Exs. 1, 2. Defendants assert that Ms. Stone's signature on lengthy and undecipherable documents containing boilerplate statements and advice obviate the documents' fine print, legalese, length, and intentionally confusing terms. Mot. 12. Defendants cite no caselaw to support this proposition, which would undermine the entire concept of unconscionability, a legal theory that relies on consideration of the totality of the circumstances faced by the parties.

Ms. Stone also meets the remaining factors related to procedural unconscionability: she could not have reasonably anticipated the terms of the agreement; Unison devised the transaction to undermine assent and notice and create unfair surprise; and the circumstances surrounding the formation of the contract, including its commercial setting, purpose, and effect, were unfair. Defendants misrepresented and obscured the terms of the transaction, including falsely stating that she would not incur costs or have to make payments, Compl. ¶¶ 40-42; that the transaction required her to sell a part of her *existing* home *equity*, rather than the *future* partial *ownership* of her home, *id.* ¶¶ 40-45; that Unison operates in partnership with homeowners, when in fact it operates to increase profits for investors at homeowners' expense, *id.* ¶¶ 46-49; and that there was an equal risk of loss or gain for both Ms. Stone and Defendants, *id.* ¶¶ 50-51, 72-75. *See also id.* ¶¶ 63-66, 103, 119. Defendants further withheld essential information, including by failing to provide required lending disclosures and instead providing "disclosures" it drafted to be confusing and misleading to omit fees, costs, and finance charges incurred by Ms. Stone. *Id.* ¶¶ 74, 76, 98-100, 119. The closing took place outside of a professional setting, via email and at Ms. Stone's home with no attorney or knowledgeable person present, only Defendants' agent who refused to answer questions. *Id.* ¶¶ 67, 82, 87-90, 101.[5] By design, Ms. Stone could not and did not understand the nature of the purported agreement at the time it was consummated—indeed, Defendants drafted the documents to both lead Ms. Stone to underestimate the true cost of the transaction, and to make it impossible for her to actually calculate its costs, so that she truly could not anticipate its impact. *Id.* ¶¶ 74, 76, 79, 90, 98-103, 119. Instead, Ms. Stone was unfairly surprised by the terms when, years later, she sought to sell her home and move in with her daughter. *Id.* ¶¶ 105-113, 117.

Ms. Stone also pleads facts supporting the substantive unconscionability factors, including "absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated." *Davis*, 712 P.2d at 991. First, Defendants have provided no evidence that the transaction was commercially reasonable or should have been anticipated; and such evidence would be premature at this time. *See Bonanno*, 2009 WL 1068744, *9. Rather, Ms. Stone sets forth considerable allegations that the terms are unfair, commercially unreasonable, and could not have been anticipated, as set forth in detail above. *See supra* pp. 8-9; Compl. ¶¶ 21-24, 27-38, 53-54, 58, 81, 103-04, 107-19.

In response, Defendants assert, first, that the terms were clearly disclosed. Mot. 14. In fact, the more than 100 pages of documents and so-called "disclosures" omitted important information and contained material misrepresentations about the cost and financial impact of the transaction. *See supra* pp. 12-13; *infra* Section C. Indeed, Defendants drafted these documents to strategically obscure the most material term of the agreement—the cost. *See* Compl. ¶¶ 99-100. Instead, the disclosures in the Offer provide false figures that do not align with Defendants' own projections of costs, do not use the actual numbers of this transaction, and are extremely confusing. *See* Defs.'

[5] Defendants claim this allegation is "refuted by the record." Mot. 12 n.12. Nothing provided by Defendants refutes the allegations about the closing at Ms. Stone's house. Further, this "record" is prematurely introduced. *See supra* p. 7 & n. 1.

Ex. 1 at Ex. A (estimating equal likelihood of decrease and increase in property value, in contrast to Defendants' internal projections provided to investors); *id.* at Ex. B (purporting to disclose an "estimated annualized percentage cost of the term" but using a fictional "investment payment" and falsely equating its "annualized cost" figures to the regulated definition of annual percentage rate); *see also* Compl. ¶¶ 50-51, 63-66, 72-76, 98-100, 103, 119. If Defendants' offer had been simply that Ms. Stone would get $33,635 in exchange for giving Unison over $88,000 a few years later, she would not have accepted it. Compl. ¶ 111.[6] In short, Ms. Stone clearly alleges that she never would have agreed, if Defendants had clearly and accurately disclosed the transaction's terms, costs, and impact in manner that permitted meaningful comparison with other products, instead of misrepresenting and obfuscating its terms. *See id.*

Defendants next assert that regulators have approved this product, while, at the same time, asserting that this is not the product that regulators have approved. Mot. 14 & n.11. Defendants refer to regulator statements on loans that comply with consumer protection laws, including interest rate caps and disclosure requirements—which Defendants agree they did not comply with in Ms. Stone's transaction. Indeed, if Defendants *had* complied with lending laws, the product would have been less costly, the disclosures would have been accurate, and the transaction might well have been fair. If anything, Defendants' argument further supports Ms. Stone's case.[7]

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[6] Defendants similarly argue that Ms. Stone was not "compelled" into the transaction and that she "does not dispute that she could have sought funds from another source." Mot. 14 (internal marks omitted). But duress is not necessary to make out unconscionability; instead it is a wholly separate contract defense. Rather, Ms. Stone alleges that Defendants obscured the terms of the transaction and made it impossible to compare with other potential sources of funds.

[7] Defendants also urge this Court to rely on an unpublished decision (recently argued on appeal), applying Washington law, that did not raise an unconscionability claim, and that was premised on a wholly different pleading. Defs' Br. 14 (citing *Olson v. Unison Agreement Corp.*, No. 22-1859, 2023 WL 5609251, at *2 (W.D. Wash. Aug. 30, 2023)). *Olson* neither holds that Ms. Stone's contract is fair nor is it applicable here.

B. Plaintiff Plausibly Alleges That Defendants Violated the Colorado Consumer Protection Act (CCPA) (Count II)

The Colorado Consumer Protection Act, C.R.S. §§ 6-1-101 to -116 (CCPA), was enacted to provide "prompt, economical, and readily available remedies against consumer fraud." *Crowe v. Tull*, 126 P. 3d 196, 202 (Colo. 2006) (en banc) (marks and citation omitted). The Colorado Supreme Court has taken "[a]n expansive approach . . . in interpreting the CCPA by reading and considering the CCPA in its entirety and interpreting the meaning of any one section by considering the overall legislative purpose." *May Dept. Stores,* 863 P. 2d at 973 n. 10. "[I]n determining whether conduct falls within the purview of the CCPA, it should ordinarily be assumed that the CCPA applies to the conduct. That assumption is appropriate because of the strong and sweeping remedial purposes of the CCPA." *Crowe,* 126 P. 3d at 202 (marks and citation omitted). The Colorado Supreme Court applies the purposes of the CCPA to an "ever-evolving commercial marketplace." *Id.*

To state a claim for a violation of the CCPA, the plaintiff must allege that: (1) the defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of the defendant's business; (3) the deceptive trade practice significantly impacted the public as actual or potential consumers of the defendant's goods; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the deceptive trade practice caused actual damages or losses to the plaintiff. *See* Mot. 15. Defendants do not dispute that the challenged practices set forth in Ms. Stone's complaint occurred in the course of their business or that Ms. Stone has sufficiently alleged an injury caused by the Defendants' practices. Defendants only argue that Ms. Stone failed to allege that they engaged in an unfair or deceptive act or practice that significantly impacted the public. Mot. 15-17.

The CCPA provides a non-exhaustive list that includes nearly fifty different types of unfair and deceptive trade practices. *See* C.R.S. § 6-1-105. Ms. Stone's complaint plausibly states claims under eight of them. *E.g.*, Compl. at ¶¶ 124–25.[8]

1. *Defendants omitted material information about the HomeOwner Agreement in their sales transaction and in their written disclosures and contract.*

Ms. Stone states a claim under the CCPA that Unison omitted material information about the cost and financial impact of the HomeOwner Agreement when it marketed and sold it to her. *See* C.R.S. § 6–1–105(1)(u); *infra* Section I.B (citing, e.g., Compl. ¶¶ 42, 51-52, 58(b), 64–66, 70). Defendants do not address Ms. Stone's omission claim in their Motion. Under section 6-1-105(1)(u) it is an unfair or deceptive practice when a defendant, "fails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction." CCPA claims challenging material omissions are not subject to Rule 9(b)'s pleading standard. *Faulhaber v. Petzl America, Inc.*, 656 F. Supp. 3d 1257, 1268 (D. Colo. 2023); *O'Connor v. BMW of North America, LLC,* Case No. 18-cv-03190, 2020 WL 2309617, at *12 (D. Colo. Jan. 7, 2020) ("The Rule 9(b) standard is modified for pleading a fraudulent omission claim . . . [such that] a plaintiff must identify 'the particular information that should have been disclosed, the reason the information should have been disclosed, the person who should have disclosed it, and the approximate time or circumstance in which the information

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[8] Defendants' Motion only raised arguments relating to Ms. Stone's claims of false and misleading statements, which relate to subsections 6-1-105(1)(e) and (*l*) of the CCPA. Defendants do not challenge Ms. Stone's claims under subsections 6-1-105(1)(h) (disparaging the goods or services of another), 6-1-105(1)(u) (material omissions), 6-1-105(1)(z) (failure to obtain governmental licenses), 6-1-105(1)(uu) (violations of C.R.S § 38-40-105 governing mortgage lenders), 6-1-105(1)(bbb) (violations of C.R.S. § 12-10-713 governing mortgage loan originators), and 6-1-105(1)(rrr) (knowingly engaging in unfair, unconscionable, deceptive acts or practices), and have therefore waived them. *See supra* p. 7 (citing cases). If Defendants raise any new arguments in a reply brief, Plaintiffs should be afforded an opportunity to submit a surreply.

should have been disclosed.'") (citation and quotation omitted)).

As detailed above, Unison had knowledge of the financial impact of the transaction for Ms. Stone but used deceptive and confusing disclosures to hide it from her. *Supra* Section I.A. For example, Unison failed to disclose information about the cost of the agreement, including accurate estimates of the total amount Ms. Stone would have to repay Unison and, accordingly, an accurate estimated interest rate. Compl. ¶¶ 110-112, 116-117. The cost of any financial product, including the amount of interest the borrower will have to repay, is a material term. *See, e.g.*, C.R.S. § 6-1-105(1)(*l*). Ms. Stone has plausibly alleged that the HomeOwner Agreement is a loan under Colorado law and that Unison did not provide required disclosures that require Unison to disclose these material terms. *See infra* Section II.C; Compl. ¶¶ 98-100. Unison knew what this transaction would cost Ms. Stone; it has sophisticated internal projections including, "10-year forecasts on every house in America" and makes promises and representations to its investors about expected gains (20.7% on its portfolios). Compl. ¶¶ 18, 22-24, 28, 34, 38. Ms. Stone is not privy to Unison's business projections or the information it provides to investors. *Id.* ¶ 73. Unison's over 100 pages of confusing "disclosures" purposefully did not include these basic terms and Ms. Stone therefore did not discover the financial impact of the agreement until she requested a payoff a few years later. *Id.* ¶¶ 109-10. Ms. Stone would not have entered into the transaction if she understood its financial impact. *Id.* ¶ 111. Indeed, the first time she understood the financial impact was when Unison provided her with a "payoff quote." *Id.* ¶¶ 109-10.

2. *Defendants made false and misleading statements to Ms. Stone that she relied on when she entered into the HomeOwner Agreement.*

Ms. Stone adequately alleges that Unison made material misrepresentations to her when they marketed and sold her their HomeOwner Agreement, in violation of subsections 6-1-105(1)(e) (knowingly making false representations of the characteristics and benefits of a transaction) and

6-1-105(1)(*l*) (making false or misleading representations of fact concerning the price of services). To sufficiently allege a misrepresentation, the plaintiff must show the defendants made a "false statement of fact that either induces the recipient to act or has the capacity to deceive the recipient," even if it did not. *Rhino Linings USA, Inc., v. Rocky Mt. Rhino Lining, Inc.*, 62 P. 3d 142, 144 (Colo. 2003). The representation must be material. *Id.* CCPA claims related to false representations are subject to Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements, which requires a plaintiff to allege "the time, place and contents of the false representation, the identity of the party making the false statements, and the consequences thereof." Mot. 15-16.

Ms. Stone's complaint states claims under subsections 6-1-105(1)(e) and (*l*) because she identifies a number of misrepresentations that Unison representatives made to her orally and in writing, and for each one, she states approximately when and where they occurred and the consequences to her. *Supra* Section I.B. For example, Unison misrepresented the term of the HomeOwner Agreement to Ms. Stone. Specifically, Ms. Stone alleges that, in or around December 2018, she had telephone conversations with Unison representatives and understood from those conversations that she was not obligated to pay Unison back until she sold her house. Compl. ¶¶ 63, 66. Ms. Stone relied on these representations. *E.g.*, Compl. ¶ 66 ("Based on these representations, Ms. Stone decided to move forward with the transaction.") However, the agreement contains a definite maturity date. *Id.* ¶¶ 30, 78.

After the telephone conversations, on or about December 19, 2018, a Unison representative emailed Ms. Stone a nineteen page "Offer to enter into a Unison HomeOwner Agreement." Compl. ¶¶ 67-68. The Offer reinforces what Ms. Stone understood from her telephone conversations with Unison—that she would only be obligated to pay Unison when and if she decided to sell her home. *Id.* ¶ 69 ("Unison will pay the balance of the Unison Purchase Price to You . . . when your Unison

HomeOwner Agreement ends, which typically is when you sell your home."). While Unison points out that several pages later, the agreement sets forth the events that result in termination of the agreement, Mot. 6 n.5, its emphasis on the event that is most favorable to Ms. Stone— "when [she] sells [her] home" was an intentional choice to overshadow the less favorable termination terms provided in the agreement, like a forced sale. *See*, *e.g.*, Compl. ¶¶ 36-37, 62, 66. 69, 103(g).

Next, Unison misrepresented the profits it would realize from the transaction. For example, the Offer includes a statement that the "Original Agreed Value" of Ms. Stone's property is $200,000. Compl. ¶ 68. However, this value did not represent the true value of Ms. Stone's home, but rather a discounted amount that would immediately increase Defendants' future profits. *Id.* ¶¶ 70, 75, 124. Using fictitious pricing to obfuscate the cost of a product violates the CCPA. *See, e.g., May Dept. Stores*, 863 P.2d at 970-71. In addition, the Offer implies that there is an equal chance of Ms. Stone's home value increasing and decreasing over the term of the contract, and since Unison indicated that it shares in any profit or loss with Ms. Stone, it induced her into entering the transaction. *E.g.*, *id.* ¶ 72. However, unbeknownst to Ms. Stone, Unison's own internal projections were that her home would increase in value. *Id.* Ms. Stone is not privy to Unison's business projections. Compl. ¶ 73.

As another example, Unison's contracts and disclosures misrepresented the financial impact of the transaction to Ms. Stone. Compl. ¶¶ 98-112. Specifically, the HomeOwner Agreement states that Ms. Stone is not required to pay back the $33,635 she received from Unison. *E.g.*, Mot. 6-7 (quoting the agreement as stating: "The Unison Investment Payment [i.e., the $33,635] is not a principal amount which [Unison] is contractually or otherwise entitled to recover at Term or at Option Exercise. The Investor Proceeds . . . may be greater than, equal to, or less than the Investment Payment or zero, depending upon the change in the value of the Property.").

However, as alleged in the Complaint, Unison structures its HomeOwner Agreements to ensure it always exercises its option and gets repaid. Compl. ¶¶ 53, 75; *see also supra* Section I.A. Indeed, Unison sought a $84,000 payoff from Ms. Stone and has filed a proof of claim for over $88,000. Compl. ¶¶ 44, 109, 112. In addition, Unison used confusing language to make it appear it was paying Ms. Stone $105,000 out of its own pocket, when the funds already belonged to her in the form of equity. Compl. ¶ 103 ("Ms. Stone would never receive any benefit from the $105,000 [Unison said it would "pay" her], given that this amount would be part of her home equity realized at the time of sale whether or not she entered into an agreement with Unison.").

Unison knew that its representations about the risk and cost of the transaction to Ms. Stone were false, because it structured its business model to ensure a high rate of return for it and its investors.[9] *E.g.*, Compl. ¶ 28. As explained above, these terms are material to Ms. Stone, and she relied on them in entering the agreement. Ms. Stone has therefore stated a misrepresentation claim under the CCPA. *See Weingot v. Unison Agreement Corp.*, 21-CV-4542, 2024 WL 1191106, at *4-6 (E.D.N.Y. Mar. 20, 2024) (finding plaintiffs plausibly alleged fraud based on Unison's misrepresentations of the terms of the HomeOwner Agreement).

3. *Defendants' unfair and deceptive practices have significant public impact.*

The CCPA "was enacted to regulate commercial activities and practices which, 'because of their nature, may prove injurious, offensive, or dangerous to the public.'" *Crowe,* 126 P. 3d at 208 (citation omitted). In determining whether a plaintiff adequately alleges a public impact as a result of a defendant's practices under the CCPA, courts look at: (1) the number of consumers directly affected by the challenged practice; (2) the relative sophistication and bargaining power

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[9] Because Unison had or should have had knowledge of its unfair, unconscionable, and deceptive practices, its conduct also violates subsection 6-1-105(1)(rrr) (prohibiting "[e]ither knowingly or recklessly engag[ing] in any unfair, unconscionable, deceptive . . . act or practice").

of the consumers affected by the challenged practice; and (3) evidence that the challenged practice has previously impacted other consumers or has the significant potential to do so in the future. *Rhino Linings USA, Inc.*, 62 P.3d at 146-47. No single factor is determinative. *One Creative Place, LLC v. Jet Ctr. Partners, LLC*, 259 P.3d 1287, 1290 (Colo. App. 2011) (noting that the public impact analysis "more akin to a balancing test than a checklist"). Instead, the factors "represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact." *Shekarchian v. Maxx Auto Recovery, Inc.*, 487 P.3d 1026, 1034 (Colo. App. 2019) (citation omitted).

A plaintiff does not need to specify the number of consumers impacted to make a showing that defendants' challenged practices have a significant public reach. *E.g., Ivar v. Elk River Partners,* 705 F.Supp.2d 1220, 1242 (D. Colo. 2010). Allegations of a broad scheme, such as directing misrepresentations at the market generally in the form of widespread advertisements or deception of actual and prospective purchasers is sufficient to show public impact. *Id.* As set forth above, Ms. Stone has plausibly alleged that Defendants engage in a sophisticated home equity skimming scheme, by using widespread deceptive marketing tactics, to sell unwitting homeowners an unfair and unconscionable financial product that costs them the vast majority of their home equity. This practice not only impacts individual homeowners, but the real estate market as a whole and other lienholders by restraining the sale and financing of real property. Compl. ¶ 126.

First, the geographic scope of Defendants' business and the size of the assets it handles underscores the wide breadth of its conduct. Unison currently holds $8.1 billion in real estate "assets" through its HomeOwner Agreements, deceptive form contracts that Ms. Stone alleges are unconscionable and unfairly cost homeowners the majority share of their homes. *E.g.*, Compl. ¶¶ 16, 119, 124. According to Defendants' website, there are 10,000 "Unison Homeowners" across the country and Unison has a "wide geographic presence." UnisonIM, https://www.unisonim.com (last visited Dec. 9, 2024). Unison operates in thirty states (including Colorado) and Washington D.C., including over 200 metro areas. Compl. ¶ 16. These markets represent 82% of the value of all U.S. real estate. *Id.* ¶ 16. Unison has identified Colorado as one of its growth areas to target, based on its projections of home appreciation in the market. *See id.* ¶¶ 10, 16, 23, 72, 75. In addition, Ms. Stone alleges that Defendants' sale of its HomeOwner Agreements is part of a larger scheme to transfer wealth from homeowners to themselves and investors. *Id.* ¶ 4.

Directing false statements to the market generally also has a significant public impact. *Edwards v. ZeniMax Media Inc.*, Case No. 12-cv-00411, 2013 WL 5420933 at *6 (D. Colo. Sept. 27, 2013) (allegations of misrepresentations made in online advertising sufficient to establish public impact); *One Creative Place, LLC,* 259 P.3d at 1290 (public impact could be established by evidence that defendant's extensive advertising campaign had significant potential to impact consumers in the future). Here, Defendants sell their unfair and unconscionable HomeOwner Agreement using a deceptive national marketing and sales campaign. Compl. ¶¶ 40-58, 126.a. In their public advertising, including on their website; their oral representations; and their written disclosures and contracts, Defendants omit material information and misrepresents the financial impact of the HomeOwner Agreements in the same manner that they did with Ms. Stone. *Id.* ¶¶ 2-3, 40-45. Defendants advertise their HomeOwner Agreements on their website as "equity sharing agreements," but under the terms of their agreements with homeowners, Defendants take a majority interest in the entire home. *Id.* ¶¶ 40-42, 69, 103.b. Defendants obfuscate the cost of their agreements by omitting material information about their cost when they sells them to homeowners by failing to provide required lending disclosures that contain material terms such as the interest rate. *Id.* ¶¶ 58.b, 98, 119.h. Homeowners who enter into HomeOwner Agreements with Defendants will be financially impacted by this deception now and in the future because Defendants record liens on their properties to secure payoff. *See Shekarchian*, 487 P. 3d at 1035 (engaging in the same unfair or deceptive practice in every interaction with consumers sufficient to show public impact); *Ivar,* 705 F.Supp.2d at 1242 (public interest prong satisfied where plaintiff alleged that defendant concocted a scheme to fraudulently inflate the value of real estate lots it was selling by making false statements in a widespread advertising campaign that the lots contained a million dollars of "built in equity" to mislead the plaintiffs into thinking the lots were worth substantially more than they were). Here, Ms. Stone alleges that Defendants engaged in a widespread scheme, including through a false and misleading advertising campaign, to dupe property owners into giving up their home equity plus a share of their homes. Compl. ¶ 126(a).

The relative sophistication and bargaining power of the consumers affected also supports a finding of public impact. The focus of the CCPA is to protect vulnerable consumers and the public as a whole. *See, e.g., Martinez v. Lewis,* 969 P.2d 213, 222 (Colo. 1998) (CCPA's provisions prohibiting false and misleading statements "protect the public as consumers in situations where consumers do not have and cannot reasonably gain access to truthful information relevant to a contemplated transaction unless it comes from the person offering the good, service, or property."). Challenged practices "primarily directed at 'single family residential mortgages' . . . generally seems to indicate consumers of normal sophistication with little bargaining power." *Christenson v. CitiMortgage, Inc.*, Case No. 12-cv-02600, 2015 WL 1757076, at *13 (D. Colo. Apr. 14, 2025). Here, Defendants are sophisticated entities, comprising Delaware corporations, a SEC-registered investment advisor, and "real estate opportunistic fund." Compl. ¶¶ 11-15. Unison is an "institutional investment management firm," with sophisticated "model systems, and processes [it] build[s] to make investments." *Id.* ¶ 18. Unison's founder previously worked at Bear Stearns and then at Barclays Global Investors. *Id.* ¶ 19. On the other hand, as will be true of many other individual homeowners targeted by Unison, Ms. Stone does not have knowledge of complex secured financial transactions. *Id.* ¶¶ 10, 102. Unison takes advantage of this power imbalance by not providing required lending disclosures that comply with Colorado's lending laws that would allow average homeowners to actually understand the true cost of its HomeOwner Agreements. *Id.* ¶¶ 98-100. Instead, Unison provides voluminous complicated documents that are designed to be confusing and misleading to obscure the true cost. *Id.* ¶¶ 88, 98-100. Indeed, Unison's HomeOwner Agreement and related documents would be extremely difficult for anyone to understand. *Id.* ¶ 102.

C. Plaintiff Plausibly Alleges That the Contract Is a Loan (Counts III, IV, V)

Next, Defendants assert that the HomeOwner Agreement is an option, and as a result, not subject to Colorado's lending laws. However, Ms. Stone has plausibly alleged that the product is a loan as defined by Colorado law in her third, fourth, and fifth claims, as described below.

Ms. Stone alleges that Unison's HomeOwner Agreement is subject to C.R.S. § 38-40-105 (mortgage lending), C.R.S. §§ 5-1-101 to -5-302 (consumer lending generally), and (in the alternative) C.R.S. § 11-38-101 (reverse mortgage lending). In *Oasis Legal Finance Group, LLC v. Coffman*, 361 P.3d 400 (2015), the Colorado Supreme Court directly addressed the definitions of "loan" and "debt" under the UCCC, and its holdings are instructive as to the other statutory regimes. As is relevant here, "loan" is defined in the UCCC as:

> (I) The creation of debt by the lender's payment of or agreement to pay money to the consumer or to a third party for the account of the consumer;
> (II) The creation of debt by a credit to an account with the lender upon which the consumer is entitled to draw immediately; . . . .

C.R.S. § 5-1-301(25)(a). In *Oasis*, the Court considered whether a product developed by national litigation funding companies that purchased "interests in potential proceeds" of ongoing litigation fell within this definition. 361 P.3d at 401. The Court considered the question in an appeal of a summary judgment ruling, in which the record was fully developed. In concluding that the product was a loan, the Court emphasized, "we focus on how [the products] are designed to work and how they actually work most of the time" rather than a formulaic review of the documents. *Id.* at 408; *see also Reitze v. Humphreys*, 125 P. 518, 520 (1912) (holding that a product was a loan, not an option, and emphasizing the requirement to examine "the substance and reality of a transaction—not the form and appearance which it may be made to assume.").[10]

In *Oasis*, the companies (like Defendants here) argued that the transactions were asset purchases, while the plaintiffs (like Ms. Stone) asserted that they were loans governed by the UCCC. 361 P.3d 400. After reviewing the evidence and the law, the Court held that the transactions were loans "even if the plaintiffs do not have an obligation to repay any deficiency if the litigation proceeds are ultimately less than the amount due." *Id.* at 401. In reaching this conclusion, the Court considered whether the evidence demonstrated that the products were designed so that "most the time," the advances would be repaid—whether or not they always were. *Id.* at 408. The Court further held that non-recourse obligations could still constitute a loan. *Id.* Finally, the Court found it "significant" that—in general, not in every transaction—the amount that the company would be paid back increased over time. *Id.*

Ms. Stone has sufficiently pleaded that the Unison product is a loan under these standards. As Ms. Stone alleges: "The HomeOwner Agreement at issue . . . is an advance of funds to be repaid at a later date, with substantial interest, secured by a home, otherwise known as a mortgage loan." Compl. ¶ 2. This allegation is supported throughout the Complaint. The Unison product was

[10] Defendants claim that Colorado law requires "clear and convincing evidence" to demonstrate that a product is a loan. Mot. 21 n.17 (citing cases decided at trial, not on the pleadings). *Oasis* makes clear that this is not the case.

developed to realize tremendous gain for investors derived from individual homeowners' home equity, without the investors actually purchasing or investing in homes. *Id.* ¶¶ 21-24. The product provides a cash payment to homeowners (the loan) that homeowners are obligated to pay back on Unison's demand, at substantial increased cost (the loan, plus interest). *Id.* ¶¶ 27-28. While Unison claims that in certain circumstances the advance might not be repaid, like the product in *Oasis*, the HomeOwner Agreement is designed to almost uniformly be paid back with interest. *Id.* ¶¶ 28-37, 47, 51-54, 57. It achieves this through various mechanisms, including, notably, by placing a deed of trust on the borrower's home, so that it can foreclose in the event of a borrower's default—just like in a typical mortgage. *See id.* ¶¶ 36, 37; Defs.' Ex. 2-4. It further ensures repayment through various terms such as a due on sale clause, prepayment penalty, requirements that homeowners pay all costs and maintain the home, discounting original appraised value, liquidated damages in the event of homeowner default, and financially structuring the amount of the initial payment in relation to the value of the home and market forces to ensure that Defendants will recover. Compl. ¶¶ 28-37, 103, 104. Under this structure, in Ms. Stone's transaction, Defendants are guaranteed to be paid back something even if the house depreciates over 25% in value—which did not occur in her market even during the housing market collapse in 2008. *Id.* ¶ 103.e. That these products are nearly uniformly paid back with interest is verified by Defendants' own reports of a 20.7% annualized net return. *Id.* ¶ 38. Other factors demonstrate that the product is a loan: the product is securitized in the same manner as residential mortgage backed securities and analyzed using the same credit rating system as these securitized mortgage loans, *id.* ¶ 55; Defendants' founder has publicly confirmed that the product is "similar to any home financing transaction," *id.* ¶ 56; the documents provided to Ms. Stone at origination state explicitly that Ms. Stone would be required to pay Defendants back for the debt, *id.* ¶¶ 77-78 ("you will need to . . . settle the Unison

HomeOwner Agreement by paying Unison . . . ."); and Defendants provided what they termed a "payoff" of the loan when Ms. Stone sought to sell her house, using a formula that assumes that they will be paid back at a gain (i.e., with interest), *id.* ¶¶ 109, 114-15.

In short, Ms. Stone clearly incurred a debt to Defendants—that is, an obligation to repay Defendants for the advance. *See Oasis*, 361 P.3d at 407. Despite Defendants' assertion to the contrary, Ms. Stone's *obligation* does not change in relation to the contingency of Defendants' conduct—she is required, under threat of foreclosure, to pay Defendants according to the contract. That debt constituted a loan because the product was developed to ensure that "most of the time" it results in the initial loan amount being repaid to Defendants, usually at a substantially increased amount. *Id.* at 408.

Defendants' attempts to distinguish *Oasis* are unavailing. Defendants first quote Black's Law Dictionary's definition of debt as "a specific sum of money due," Mot. 21, 23, rather than the actual definition adopted in *Oasis* that a debt simply "is an obligation to repay," 361 P.3d at 407. Indeed, contrary to Defendants' assertion, *Oasis* expressly holds that the sum of money need not be certain and immutable, and its facts bear this out. For the product at issue there, the calculations of amounts due changed both depending on the amount of time that elapsed and the outcome of the underlying case. *Oasis*, 361 P.3d at 408-10. As the Court explained, "in approximately fifteen percent of cases, the litigation proceeds are less than the amount due, forcing the companies to adjust plaintiffs' repayment obligations," *id.* at 408—an identical situation to where a homeowner's property declines in value under the Unison scheme (which the Complaint makes clear happens far less than fifteen percent of the time). In fact, the product at issue here, unlike in *Oasis*, *does* have a set sum for repayment based on the calculations set forth in the contract, which do not change. Moreover, as Ms. Stone alleges, the product in this case was designed by

Defendants to lead to the option always being exercised, and nearly always at a gain, i.e., a "growth in the repayment obligation over time." *Id.* at 410; *see supra* pp. 25-27.

Defendants nonetheless argue that the product is an option to purchase an asset and thus not a loan, mirroring the defendants' argument in *Oasis* that the product was an asset purchase rather than a loan. Defendants' argument is a red herring. Because Plaintiff has adequately pleaded that the product satisfies the definition of a loan under Colorado law, the inquiry is over—it is simply irrelevant that the product also contains a purported option mechanism. In fact, Colorado law has long recognized that option contracts can be used to disguise mortgage loans. *See, e.g., Reitze*, 125 P. 518. Moreover, Defendants' own citations fail to support its argument. For instance, while *Shull v. Sexton*, 390 P.2d 313 (1964), discusses neither loans nor mortgages whatsoever, it does indicate that Defendants' product is not an option as commonly understood. *Shull* dealt with a true option contract—a payment for the right to purchase a piece of land within *a few months* by a date certain for a set price, resulting in transfer of ownership to the purchaser—in stark contrast to the contract at issue in this case, which contemplates none of these terms typical of an option to purchase real estate. *Id.* The most Defendants' authorities demonstrate is that options exist under Colorado law. *Cf.* C.R.S. § 38-35-111 (stating that a recorded option to purchase provides notice solely for one year, indicating that—in contrast to the Unison product's thirty year term—options to purchase real property contemplate short terms); C.R.S. § 38-38-100.3(5.3) (providing an inclusive list of undefined terms); C.R.S. § 38-35-127(2)(b) (same); *Province v. Johnson*, 894 P.2d 66, 68 (Colo. App. 1995) (like *Shull*, relating to enforcement of an option). They do not demonstrate that Defendants' product is in fact an option (and instead indicate that it is not), nor do they demonstrate that a loan as defined by Colorado law cannot include option language. To the contrary, Colorado law expressly holds that there is no magic language—including framing a transaction as an option—that automatically avoids application of consumer lending laws. Instead, the design and function of the product is key. *Oasis*, 361 P.3d at 408; *Reitz*, 125 P. at 520.

Finding little support in Colorado law, Defendants suggest that this Court look to unpublished decisions in other jurisdictions that consider unrelated laws,[11] and address complaints with different allegations.[12] *See* Mot. 22. These cases are simply not applicable here. *See Weingot*, 2024 WL 1191106, at *1 n.1. While Defendants cite cases that are not on point, they ignore the ones that are. In *Singhal v. Unison Agreement Corp.*, the court declined to entertain Defendants' identical argument that "the agreements at issue are not subject to the usury loans as they do not constitute a loan." No. 22-60656-CIV, 2023 WL 2734230, at *5 (S.D. Fla. Mar. 31, 2023). Instead, the court held that, like with Colorado law, "the substance of the transaction rather than the form is examined to determine whether the transaction should be considered a loan." *Id.* As a result, the issue could not be decided on a motion to dismiss prior to development of a record. *Id.* (denying Unison's motion to dismiss); *see also Odyssey Reinsurance Co. v. Unison Agreement Corp.*, No. 3:21-CV-011-BTM-WVG, 2021 WL 2588859, at *1 (S.D. Cal. June 24, 2021) (referring to Unison's product as a "loan").

D. The Recorded Agreements Were Not Properly Executed (Count VI)

In addition to circumventing state consumer protection and lending laws, Unison abuses Colorado's formal and official processes to effectuate Unison's home equity stripping scheme, including Colorado's notary process, Compl. ¶¶ 92-95, 163-170, and its registry of deeds recording

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[11] Defendants' attempt to shoehorn the Truth in Lending Act into Plaintiffs' claims is misplaced. Defs.' Br. 22 n.18 (citing *Oasis*, 361 P.3d at 406). As both the UCCC and *Oasis* state, Colorado law supports the *policies* of the Truth in Lending Act to protect consumers; it does not conform Colorado law to the language, terms, and interpretations of TILA. Moreover, for reasons that are not relevant here, the Unison contract does, in fact, qualify as credit under TILA and does not fall into any exception.

[12] Defendants also fail to mention that the *Olson* case was recently argued on appeal. *See* Oral Argument, 23-2835 Olson v. Unison Agreement Corp., https://www.youtube.com/watch?v=rBY0wjVOoHg.

process, *id.* ¶¶ 83-85, 96-97. While Plaintiff agrees that these practices alone do not void the contract,[13] they underscore Defendants' broader scheme to take advantage of homeowners by ignoring state laws.

Unison recorded two documents (the Memorandum of Homeowner Agreement and Deed of Trust) with the Weld County Clerk and Recorder. These documents cloud Ms. Stone's title. Both contain a notary section, but a notary was not present in the execution. Compl. ¶¶ 92-95, 166-172 While there is no requirement under Colorado law for a deed that conveys property to be acknowledged, *see Burr v. Moyer,* No. 10-1503, 2012 WL 364072 (D. Colo. Feb. 2, 2012), Unison chose to include an acknowledgement (notary provision) in the agreement and deed of trust pursuant to C.R.S § 38-30-113(b). Once Unison made this election, the notary acknowledgement section must be completed truthfully and accurately. If a notary section is present in an agreement, the fraudulent execution of this section calls into question the validity of the agreement. Further, the recorded deed of trust states that the consideration is $35,000 and provides no other information regarding the amount of Unison's lien on the property. This statement in the deed of trust directly contradicts the proof of claim filed by Unison in this case. *Compare* Defs.' Ex. 2-4 *with* Proof of Claim No. 16.

The purpose of notarization is to verify the executing party's identity and voluntary intention to be bound by the terms of the document. Mot. 25. C.R.S. § 24-21-505 defines the role of a notarial officer, which is to verify the identity of the individual appearing before the officer and that the signature on the record is that of the individual. Despite the notary assertion to this effect in the agreements between Ms. Stone and Unison, these notarial duties did not occur. The

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[13] Plaintiff withdraws the request in Count VI to void the contracts on this basis. Plaintiff remains entitled to a declaration that the notarization was not proper and that the contracts were thus not validly executed.

purpose of a notary acknowledgement is to "prove the execution of the conveyance, so as to insure its authenticity when presented for registration, and to enable it to be used in evidence without further proof of its execution by the grantor." *Friend v. Stancato*, 342 P.2d 643, 646 (Colo. 1959). This presumed authenticity based on a notary acknowledgement fails when the notary acknowledgement is fraudulently executed.

Unison filed the agreements knowing that the documents were not properly notarized, contained an inaccurate amount, and would cloud the property's title. Ms. Stone is therefore entitled to declaratory relief for these violations of the statute and the filing of fraudulent documents. *People v. Marston*, 772 P.2d 615 (Colo. 1989).

E. The Agreement Is an Executory Contract and Rejection Benefits the Estate (Count VII)

As set forth above, Ms. Stone has plausibly alleged that Unison's HomeOwner Agreement is a predatory loan product that violates state consumer protection and lending laws. However, if the Court disagrees, Ms. Stone is entitled to relief on her alternative claim that the agreement is an executory contract, because it places significant future obligations on both parties. An executory contract exists when "the obligations of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." *In re Baird*, 567 F. 3d 1207, 1210-11 (10th Cir. 2009).

Here, numerous obligations under the HomeOwner Agreement remain unperformed. For example, Defendants are obligated to release the deed of trust once all of Ms. Stone's obligations are met; Defendants must either exercise its option or decline to do so; and Defendants must decide if Ms. Stone violated the deed of trust provisions and the appropriate remedy for an alleged violation. Defs.' Ex. 2. These are significant obligations on behalf of Defendants and not ministerial as argued in the motion to dismiss. Defendants' obligations directly affect Ms. Stone's interest and equity in the property, as well as that of other creditors. A failure by Defendants to fulfill these obligations would either be a breach by Defendants or would relieve Ms. Stone of her duties under the agreement.

In re Baird, 567 F.3d 1207, cited by Defendants, is a fundamentally different factual scenario than presented here. Unlike in *Baird,* if Unison fails to perform certain obligations as listed above—release of the deed of trust and notify the homeowner whether the option is exercised—this is a breach of the entire agreement and would excuse Ms. Stone from further performance. *Baird* held that a contract is executory if there are significant future obligations unfulfilled. *Id.* at 1211. The future unfulfilled obligations of Unison are significant as these obligations impact performance under the contract and thus meet the standard in *Baird.*

In re Yang, No. 23-75, 2023 WL 7104764 (Bankr. S.D. Ind. Oct. 23, 2023), has no binding or precedential weight on this Court. The court in *Yang* held that if Unison's option is not exercised, nothing happens and neither party commits a breach. This is not accurate in the current case. If Defendants' do not exercise their option, then they must release the deed of trust and agreement with the Weld County Clerk and Recorder. A failure to release the deed of trust means that Defendants still have a property interest recorded against Ms. Stone's property. Defendants' deed of trust is not automatically removed from Ms. Stone's title if the option expires and is not exercised. In Colorado, the holder of an evidence of debt must affirmatively release a deed of trust on a property through certain specified steps. *See* C.R.S. § 38-39-102. Compliance with this statute is necessary to effectively release a deed of trust. *See Himes v. Schiro*, 711 P.2d 1281 (Colo. App. 1985). Defendants' lien on Ms. Stone's largest asset is clearly significant to Ms. Stone, her creditors, and other current and potential lienholders. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 11 (1991). In addition, Unison retains the unperformed obligation to tender its acceptance of a proposed sale of the property by Ms. Stone. If Unison unreasonably withholds that consent by improperly rejecting the proposed sale price or otherwise failing to comply with Article Three of the Homeowner Covenant Agreement, its actions would amount to a material breach of the agreement.

Ms. Stone's complaint plausibly alleges that the HomeOwner Agreement is an executory contract under the Bankruptcy Code, and she is entitled to exercise her right to reject this executory contract. Rejection of the executory contract benefits the estate because Unison's claim is for zero dollars. Proof of Claim No. 16 § 9 (listing secured claim of $0 and unsecured claim of $0). If the executory contract is rejected, and even if Unison is a secured creditor, no money is owed to it by Ms. Stone. Thus, any distribution under the plan is for no money and benefits the estate.

F. Unison's Proof of Claim Is Contradictory and Must Be Disallowed (Count VIII)

For a claim or interest to be allowed under Federal Rule of Bankruptcy Procedure 3002, a secured creditor must file a proof of claim. The purpose of a proof of claim is to provide notice to the Court and debtor of how much is allegedly owed, and it must be consistent and clear on the face of the document for the trustee to process the claim and administer the estate. *See, e.g.*, *In re Bernadin*, 610 B.R. 787, 803 (Bankr. E.D. Pa. 2019); *In re Milliman*, Case No. 17-10393, 2018 WL 1475937, at *3 (Bankr. D. Kan. Mar. 23, 2018) ("Accurately reporting information on a proof of claim is critical in every case because Fed. R. Bankr. P. 3001(f) accords properly prepared claims the presumption of validity."). Proofs of claim that are internally inconsistent are not entitled to a presumption of validity under Federal Rule of Bankruptcy Procedure 3001(f). *See, e.g.*, *In re Lewis*, Case No. 13-11557, 2013 WL 5687779, at *2 (Bankr. D.N.J. Oct. 18, 2013).

Defendants' proof of claim is not clear or consistent. Defendants' proof of claim asserts a claim for $0. The deed of trust filed by Defendants to support the proof of claim states that Ms.

Stone owes $35,000. In another attachment to the proof of claim, Defendants "estimates" the amount owed as $88,352.60. Defendants' refusal to attach an amount to its claim, while still asserting that it has a substantial claim, is internally inconsistent and abuses the bankruptcy process by failing to put creditors on notice and allow Ms. Stone a fresh start. This conduct further highlights Defendants' deceptive practices in relation to their HomeOwner Agreements.

If an objection to a proof of claim is filed, the creditor bears the burden to prove the validity of the claim. *Agricredit Corp. v. Harrison,* 987 F.2d 677, 680 (10th Cir. 1993). "Once a claim objection is filed, a claim will be disallowed if the claimant does not either produce documents to support its claim or explain its failure to provide supporting documents, regardless of whether the claim amount was also scheduled by the debtor." *In re Kirkland,* 572 F.3d 838, 840-841 (10th Cir. 2009). Defendants produced documents to support its claim, but these documents do not resolve the contradictory nature of the claim; rather, they further confuse what Defendants are seeking from Ms. Stone in her bankruptcy case. Based on Defendants' improper conduct set forth in Ms. Stone's complaint and her objection to Defendants' proof of claim, the Court should disallow Defendants' proof of claim and deny their request to amend as futile and declare that Defendants' lien is void under 11 U.S.C. § 506(d).

III. CONCLUSION

For the reasons set forth herein, Defendants' motion to dismiss should be denied on all grounds.

Respectfully submitted,

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CERTIFICATE OF SERVCE

The undersigned certifies that on December 9, 2024, a copy of the foregoing *Response to Motion to Dismiss Adversary Complaint* was electronically filed and served via e-mail on the following:

VIA CM/ECF:

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