UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK,	:	
	:	No. 14-cv-00910 (RJA)(LGF)
Plaintiff,	:	
	:	
- against -	:	
	:	
GRAND RIVER ENTERPRISES SIX NATIONS, LTD. and NATIVE WHOLESALE SUPPLY COMPANY INC.,	:	
	:	
Defendants.	:	

DEFENDANT GRAND RIVER ENTERPRISES SIX NATIONS, LTD.'S RESPONSE TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE FOSCHIO'S REPORT AND RECOMMENDATION

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PRELIMINARY STATEMENT

Defendant Grand River Enterprises Six Nations, Ltd. ("Grand River" or "GRE") respectfully submits the following response to the objections of Plaintiff, the State of New York (the "State"), to Magistrate Judge Leslie G. Foschio's Report and Recommendation ("R&R"), which recommends granting GRE's and Defendant Native Wholesale Supply Company Inc.'s ("NWS") motions to dismiss the Second Amended Complaint.

The State, now on its third iteration of its complaint, alleges that GRE has violated the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. § 2341 *et seq.*, the Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), 15 U.S.C. § 375 *et seq.*, and New York Tax Laws §§ 471, 471-e, and 480-b, both directly and vicariously as part of a joint venture with NWS. Judge Foschio correctly recommended that the Defendants' motions to dismiss these claims be granted and that the State's CCTA and PACT Act claims be dismissed with prejudice (and the state law claims be dismissed without prejudice). The State's objections do not remotely merit reconsideration of Judge Foschio's conclusions. With particular regard to the claims against GRE, the State's objection fails to address many of the defects that Judge Foschio identifies, and its brief consists of little more than rehashing its already-rejected arguments. In short, nothing in the State's objections warrants this Court rejecting Judge Foschio's detailed, thoughtful analysis of the pleadings.

For the reasons set forth below, as well as for the reasons set forth in the memorandum of NWS in opposition to the State's objections (which GRE hereby adopts and incorporates in its entirety), the Court should accept the R&R, granting GRE's motion to dismiss the CCTA and PACT Act claims with prejudice, because: (1) the State concedes that GRE cannot be directly liable under either the CCTA or PACT Act; (2) Judge Foschio correctly held that the State fails to adequately allege vicarious liability against GRE, whether as a result of its

insufficiently-pled "joint venture" or otherwise; and (3) the State has already had multiple opportunities to amend its allegations, and cannot demonstrate any reason why further amendment would not be futile.[1]

STATEMENT OF FACTS[2]

As the Second Amended Complaint acknowledges, GRE and NWS are two separate legal entities. (Second Amended Complaint [Docket No. 76] ¶ 10.) GRE is alleged to be a corporation formed under the laws of the Six Nations of Indians; its principal place of business is in Ontario, Canada. (*Id*. ¶ 8.) NWS is a for-profit corporation formed under the laws of the Sac and Fox Nation of Oklahoma; its principal place of business is on Seneca Nations of Indians land (Cattaraugus Reservation) in Perrysburg, New York. (*Id*. ¶ 9.) According to the Second Amended Complaint, "Grand River is the manufacturer of the Seneca brand cigarettes," while "Native Wholesale Supply was Grand River's sole importer and distributor of Seneca brand cigarettes to Indian lands in New York and remains a primary importer of Seneca brand cigarettes to the present." (*Id.*) The Second Amended Complaint alleges no facts establishing that GRE has control over NWS's activities.

Most importantly for purposes of this motion, the Amended Complaint alleges:

> Grand River manufactures Seneca brand cigarettes in Ontario, Canada. In a joint venture,[3] **Grand River then sells, transfers or assigns the cigarettes to Native Wholesale FOB Canada in Canada**. Upon information and belief, **title to the cigarettes transfers from Grand River to Native Wholesale in Canada**. Native Wholesale, holding title for the Grand River cigarettes, then

[1] Given the failure of the State's federal claims, the R&R also appropriately recommends that the Court decline to exercise supplemental jurisdiction over the State's state-law claims.
[2] The facts stated herein are the facts alleged in the Second Amended Complaint. Although GRE assumes all well-pleaded, non-conclusory allegations to be true for the purposes of this brief only, GRE does not in any way concede their truth.
[3] As explained in more detail below and in the R&R, this conclusory claim of a "joint venture" is not factually or legally supported by the allegations of the Second Amended Complaint.

> imports and distributes the cigarettes inside the United States, including in New York State.

(*Id*. ¶¶ 55-56 (emphasis added).) As these allegations show – and as Judge Foschio recognized – GRE is simply the manufacturer of the cigarettes at issue here, and it sells the cigarettes in Canada. After doing so, GRE has no control over any sale, shipment, distribution, transfer, possession, or the like with respect to the importation of these cigarettes by NWS into the United States or New York.

ARGUMENT

I.
STANDARD OF REVIEW APPLICABLE TO JUDGE FOSCHIO'S REPORT AND RECOMMENDATION

The Federal Rules provide that when a "specific" objection is made to a portion of a magistrate judge's report and recommendation, this Court should review that portion of the report and recommendation under a de novo review standard. *See* Fed. R. Civ. P. 72(b)(2); *see also O'Brien v. Costello*, No. 11–CV–0956(MAT), 2013 WL 435525, at *1 (W.D.N.Y. Feb. 4, 2013).

However, where, as here, "only a general objection is made to a portion of a magistrate judge's report-recommendation, or the objection merely reiterates the same arguments made by the objecting party in its original papers, the district judge subjects that portion of the report and recommendation to only a clear error review." *See id*. (citing Fed. R. Civ. P. 72(b)(2), (3); Fed. R. Civ. P. 72(b), Advisory Committee Notes: 1983 Addition). The State's objections here do not meet this standard (or the de novo standard) for this Court rejecting Judge Foschio's detailed and well-reasoned R&R.

II.
THE STATE CONCEDES THAT IT LACKS A LEGAL BASIS FOR IMPOSING DIRECT LIABILITY ON GRAND RIVER UNDER THE CCTA OR PACT ACT

Among the claims in the State's Second Amended Complaint is that GRE is directly liable for alleged violations of the CCTA, even though GRE manufactures Seneca brand cigarettes *in Canada only*, sells them *in Canada only*, and transfers title to the cigarettes *in Canada only*. In the R&R, Judge Foschio properly rejected any claim of direct liability based on such factual allegations. Specifically, Judge Foschio concluded that, under *Morrison v. National Australia Bank*, 561 U.S. 247 (2010) and its progeny, the CCTA lacks extraterritorial application, and thus cannot be used to impose liability upon GRE for conduct that occurred "wholly outside the jurisdiction of the United States." (R&R at 13; *see also* R&R at 11-17.)

In its objections to the R&R, the State does not (and cannot) dispute that GRE cannot be directly liable under either the CCTA or the PACT Act, because GRE manufactures, sells, and transfers title to its products solely within Canada, outside the ambit of either federal statute. The State acknowledges that "the focus of the CCTA" is *domestic* conduct, "not the conduct that takes place in Canada …. [It] is the joint venture's sale and distribution of contraband cigarettes in New York that satisfies the 'essential elements' of the CCTA." Plaintiff's Obj. at 18. (This reasoning applies equally to the PACT Act.) In other words, the State concedes that the *only* basis on which it is now seeking to hold GRE liable under the CCTA and PACT Act is GRE's purported vicarious liability for NWS's actions as a result of the so-called "joint venture" between NWS and GRE (which, for the myriad reasons articulated in the R&R and in GRE's briefs, does not exist). The State thus concedes that it has no legal basis on which to allege any direct CCTA and PACT Act claims against GRE; accordingly, this Court should dismiss those claims.

III.
THE R&R CORRECTLY CONCLUDED THAT THE SECOND AMENDED COMPLAINT DOES NOT PLEAD A CLAIM FOR VICARIOUS LIABILITY AGAINST GRE

Although the State does not dispute Judge Foschio's finding that GRE cannot be held *directly* liable for violations of the CCTA and PACT Act, it does object to Judge Foschio's correct conclusion that GRE cannot be *vicariously* liable for NWS's alleged violations of the CCTA and PACT Act by virtue of what the State claims is a joint venture between GRE and NWS.

The State's objections are without merit. Judge Foschio identifies numerous defects in the State's attempt to hold GRE vicariously liable for violations of the CCTA and PACT Act. The State fails even to address most of them, and those which it does address, the State does not and cannot overcome the multiple defects that the R&R highlights.

A. Judge Foschio Properly Identifies Multiple Defects In the State's Attempted Imposition of Vicarious Liability on GRE

Judge Foschio recommends rejection of the State's effort to impose vicarious liability on GRE as a joint venturer on several independent grounds. *First*, because a suit against an "Indian in Indian country" is prohibited under the CCTA, a suit against a joint venture that includes an Indian in Indian country must be similarly prohibited. *Second*, because the State's PACT Act claim does not allege that untaxed cigarettes are shipped "into … Indian country of an Indian tribe taxing the sale or use of cigarettes," as the PACT Act statute requires, the State cannot state a claim against the so-called joint venture (even if one existed) under the PACT Act. *Third*, because NWS is exempt from suit under the CCTA or PACT Act, GRE cannot possibly be vicariously liable for NWS's actions or inactions where no direct liability against NWS exists.

The legal principles underlying the first and second grounds – *i.e.*, whether the CCTA prohibits suits against an "Indian in Indian country," and whether the PACT Act

allegations against NWS here are sufficient – are addressed in NWS's brief in opposition to the State's objections (filed today), and GRE adopts those arguments herein. And with respect to the third, the State does not appear to dispute that if NWS were exempt from liability, GRE could not be vicariously liable for NWS's actions. The State does, however, dispute Judge Foschio's further holding that because the State failed to plausibly plead the existence of a joint venture between GRE and NWS, GRE still could not be vicariously liable as a joint venturer *even if* NWS could somehow be directly liable under either the CCTA or PACT Act (which it cannot be, and which he did not find). But although the State objects to that conclusion, the State does not support those objections with any facts or authority that warrant overturning the conclusions in the R&R.

The Magistrate Judge (in the R&R) and the State (in its objections) agree that a plaintiff pleading the existence of a joint venture must establish five elements:

> (a) two or more parties enter into an agreement to carry on a venture for profit; (b) the agreement evinces their intent to be joint venturers; (c) each contributes property, financing, skill, knowledge, or effort; (d) each has some degree of joint control over the venture; and (e) provision is made for the sharing of both profits and losses.

(R&R at 21 & Plaintiff's Obj. at 19) (both citing, *inter alia*, *SCS Commc'ns., Inc. v. Herrick Co.*, 360 F.3d 329, 341 (2d Cir. 2004)). Furthermore, as the R&R notes, "[a]t the motion to dismiss stage, the absence of any one of these elements is fatal to the establishment of a joint venture." (R&R at 21 (citing *Slip-n-Slide Records, Inc. v. Island Def Jam Music Grp.*, 13-CV-04450, 2014 WL 2119857, at *2 (S.D.N.Y. May 21, 2014)).)

The Second Amended Complaint falls well short of meeting these pleading requirements, and the R&R identifies no fewer than <u>*eleven*</u> separate flaws in the State's assertion

that a joint venture existed between GRE and NWS, any single one of which by itself could be fatal to the State's case.

- *First*, Judge Foschio found that the State's joint venture allegations – in particular, that Defendants "purposefully act as a single enterprise" and that "each of their principals share in the profits of both entities" – "fail to plausibly allege that GRE and NWS, in contrast to their shareholders, i.e., 'principals,' intended to create a joint venture in connection with their on-going business." (R&R at 22 (first emphasis in original).)
- *Second*, Judge Foschio also held that those same conclusory allegations fail to allege "that the putative joint venturers, GRE and NWS, agreed to share in the profits of such joint venture." As Judge Foschio noted, the State asserts only that the "principals" of each entity allegedly so agreed, "but not GRE and NWS, the Indian tribe chartered corporations, which are the only defendants in this action." (R&R at 22.)
- *Third*, the R&R holds there is no "allegation specifying that GRE and NWS had any agreement with respect to the sharing of any losses arising from the business operations of the alleged joint venture." (R&R at 22.)
- *Fourth*, Judge Foschio concluded that the State's joint venture theory "fails at the threshold" because the Second Amended Complaint "unambiguously alleges that GRE sells the Seneca cigarettes to NWS F.O.B. upon NWS taking delivery of the cigarettes," and the law is clear that "a joint venture cannot be predicated on a buyer-seller relationship as it is contrary to the requirement that the putative joint-venturers contribute

property to the joint venture[,] over which the joint venturers have joint control." (R&R at 22-23.)

- *Fifth*, the R&R also finds that the State's reliance on GRE's status as a secured creditor of NWS (on GRE's $19,200,000 loan to NWS) to satisfy the required element of sharing losses is "far-fetched," because, among other things, "a secured creditor most certainly does not [] agree to 'share in debtor's losses'; quite the contrary, as the very purpose of obtaining the status of a secured creditor is to minimize the risk that such creditor will be forced to absorb a loss on its loan." (R&R at 23-24.)
- *Sixth*, Judge Foschio rejects as "frivolous" the State's notion that the possibility that GRE and NWS would both suffer "[a]dverse financial outcomes" if this litigation were decided against them is a substitute for a prior agreement to share in a putative joint venture's operating losses. (R&R at 24-25.)
- *Seventh*, the R&R recognizes that the Second Amended Complaint is devoid of "any allegation with respect to an agreement between GRE and NWS regarding management of the joint venture." At most, the Second Amended Complaint alleges a "managerial overlap" that, as Judge Foschio notes, consists solely of two NWS checks signed six years earlier by a now-deceased former director of GRE; Judge Foschio properly concluded that this stale and attenuated connection is "insufficient to demonstrate actual day-to-day managerial involvement in the joint-venture by either GRE or NWS." (R&R at 25.)

- *Eighth*, Judge Foschio held that because the State proffers a joint venture with a period of continuing operation for more than one year, New York's Statute of Frauds requires a writing evidencing the existing of such a joint venture. Accordingly, the State's failure to allege any writing between GRE and NWS sufficient to satisfy the Statute of Frauds is an independent basis for rejecting the purported joint venture. (R&R at 25.)
- *Ninth*, the court rejects the State's argument that statements filed (back in 2004 and 2008) by GRE and its principal shareholders in support of an arbitration (the "NAFTA Arbitration") seeking compensation from the United States pursuant to the North American Free Trade Agreement support the State's joint venture theory. On this issue, the R&R correctly notes, among other things, that (a) the Arbitration Panel determined that there was *no* formal partnership or joint venture between GRE and NWS, and that the Arbitration Panel in fact determined that GRE had *no* intention of forming a joint venture, (b) in any event, the prior "joint venture" proffered in that arbitration was distinct from the joint venture proffered by the State here, and (c) the Arbitration Panel's determination "further demonstrates Plaintiff's joint venture theory lacks plausibility" and "are in fact contrary to such allegation and as such, fatal to its plausibility." (R&R at 26-28.)
- *Tenth*, Judge Foschio found that NWS's recent Chapter 11 petition in U.S. Bankruptcy Court – which the State cited in its papers below to avoid dismissal of its claims – in fact reinforces the conclusion that GRE and

NWS engage in precisely the sort of buyer/seller relationship that is "at odds with the notion of a joint-venture as Plaintiff alleges." (R&R at 28-29.)

- *Eleventh*, the court found no validity in the State's "alternative argument" that even though the State utterly fails to establish the elements of a joint venture, the Court should nevertheless accord special "deference" and allow the State's claims to proceed because evidence of a joint venture is peculiarly in Defendants' possession. As Judge Foschio properly recognized, the State's argument ignores the pleading requirements mandated by the Supreme Court in the *Iqbal* case, and would "effectively turn *Iqbal's* requirement on its head." (R&R at 29-31.)

B. The State Fails to Demonstrate that Rejection of Judge Foschio's R&R Is Appropriate

Despite the extensive flaws that Judge Foschio exposes in the State's joint venture argument, the State disregards many of Judge Foschio's findings and presents no specific objections to almost any of them. Instead, the State simply relies upon the same arguments it raised in its original papers in defending its pleading of the five requisite elements of a joint venture.

With respect to the first element (the requirement that there be an agreement to carry on a joint venture for profit), the State relies entirely on selected statements made by the Claimants in the NAFTA Arbitration, which the State claims support its conclusory argument that "the parties continued to conduct themselves as a joint venture and thus implicitly agreed to remain a joint venture to the present time." (Plaintiff's Obj. at 20.) But the State points to no plausible evidence to support this proposition. Furthermore, as Judge Foschio made clear in the

R&R, the statements by Claimants in that separate NAFTA Arbitration are *not* indicative of any joint venture agreement. (R&R at 26-28.) Nevertheless, the State's objections to the R&R's rejection of a joint venture repeatedly rely almost exclusively on allegations in the Second Amended Complaint that are derived from that NAFTA Arbitration. (*See* Plaintiff's Obj. at 20-23 (citing SAC ¶¶ 70(a), 71(a), 72(a), 74(b), 74(c) [twice], 75(b) [twice], and 76(a), all of which derive from the NAFTA Arbitration.)) That the State has simply doubled down on these insufficient allegations underscores that the State has nothing else on which to rely.

Similarly, on the second element (the requirement that the agreement evinces the Defendants' intent to be joint venturers), the State's objection neglects to address the multiple defects the R&R identified. Rather, the State's argument on this element is limited to citing two of the same citations to the Claimants' NAFTA Arbitration submission that the State relied upon in its initial briefing (see Plaintiff's Obj. at 22), and which Judge Foschio properly rejected.

On the third element (the requirement that each party must *contribute* to the joint venture), the State does not confront the myriad flaws that the R&R identifies. For example, the R&R concluded that the Second Amended Complaint "fails at the threshold" because the sale by GRE of Seneca cigarettes to NWS F.O.B. upon NWS taking delivery of the cigarettes " is contrary to the requirement that the putative joint-venturers contribute property to the joint venture[,] over which the joint venturers have joint control." (R&R at 22-23.) The State presents no reason why this well-reasoned conclusion should be reversed. Instead, the State's defense of its pleading of this element reduces again to a handful of allegations drawn from the NAFTA Arbitration, along with a conclusory statement drawn from the Second Amended Complaint that merely restates that element of the joint venture. (Plaintiff's Obj. at 22 (citing

Second Amended Complaint ¶¶ 69, 75(b)).) That is far from enough to justify reconsideration of Judge Foschio's determination.

The State's half-hearted objection to the R&R on the fourth element of a joint venture (the requirement that the parties have joint control over the venture) contains no substantive argument at all. In the R&R, Judge Foschio found, among other things, that the State's sole allegation of joint control – two NWS checks signed many years ago by a now-deceased former GRE director – is the kind of allegation that is "insufficient to demonstrate actual day-to-day managerial involvement in the joint-venture by either GRE or NWS." (R&R at 25.) The State's response is nothing more than a bald insistence that the Court was wrong. (Plaintiff's Obj. at 23 ("[T]his factual allegation is the kind of action showing that GRE was involved in managing the joint enterprise. The State has satisfied the fourth element of a joint venture.").) That is hardly sufficient to establish the "clear error" necessary to warrant rejection of the R&R.

On the fifth element (the requirement that there be a provision made for sharing of profits and losses), the State's argument falls well short here as well. As GRE detailed further in its motion to dismiss and reply brief, the State has failed to plead facts to demonstrate these required elements of a joint venture. First, the Second Amended Complaint is devoid of any allegations that GRE and NWS had an agreement to share losses. This flaw is fatal. *See, e.g.*, *Slip-n-Slide Records, Inc. v. Island Def Jam Music Grp.*, 13-CV-04450, 2014 WL 2119857, at *3 (S.D.N.Y. May 21, 2014) ("a joint venture did not exist because there was no agreement to share losses"). The State asserts that because GRE is a secured creditor of NWS on a loan GRE gave to NWS, GRE has impliedly agreed to "avail[] itself to losses suffered by NWS," Second Amended Complaint ¶ 76. Judge Foschio disagreed, holding that:

> Such amorphous allegation fails to satisfy the required element for a joint venture because (1) a secured creditor most certainly does not thereby agree to 'share in debtor's losses'; quite the contrary, as the very purpose of obtaining the status of a secured creditor is to minimize the risk that such creditor will be forced to absorb a loss on its own, and (2) the allegation on its face refers only to the debtor, as it must, as NWS, not the joint-venture alleged by Plaintiff.

R&R at 23-24. In support of this conclusion, Judge Foschio cites two cases – *Hannah Bros. v. OSK Marketing & Communications, Inc.,* 609 F. Supp. 2d 343, 350 (S.D.N.Y. 2009) and *Atlanta Shipping Corp. Inc. v. Chemical Bank*, 631 F. Supp. 335, 351 (S.D.N.Y. 1986) – that each articulate the well settled New York principle that "[a] transaction involving a loan and creating a debtor-creditor relationship does not of itself make the lender and borrower joint venturers." (R&R at 24.)

The State focuses its objection on attempting to distinguish *Atlanta Shipping*, by noting that the court in that case *also* found that the plaintiff had failed to plead that the alleged joint venturers "shared their skill, knowledge, property, or effects," and that the defendant bank "stood to share in the losses only to the extent that [the loan] was not repaid." Plaintiff's Obj. at 24 (quoting *Atlanta Shipping*, 631 F. Supp. at 351). However, as explained above, the plaintiff must plead facts to establish *each* of the five elements of a joint venture. It is no answer that the plaintiff in *Atlanta Shipping* also failed to plead a different element of joint venture *in addition to* its failure to show an agreement to share losses. The State also claims that its case is distinguishable from *Atlanta Shipping* because "GRE stands to lose more than just its investment; both GRE and NWS stand to share great losses if their joint venture flounders." Plaintiff's Obj. at 24. However, the State fails to plead any facts to demonstrate this alleged loss-sharing beyond the loan between the parties.

In addition, the State fails to plead sufficient facts regarding the purported joint venture's sharing of profits. In its objections, the State merely repeats the conclusory statement that it "alleged that the principals [of NWS and GRE] shared in the profits of both entities and correspondingly shared in any losses of the joint venture." Plaintiff's Obj. at 23, citing Second Amended Complaint ¶¶ 75-76. This conclusory statement is insufficient to demonstrate the requirement that a joint venture share profits.

Further, as Judge Foschio noted, "a joint venture cannot be predicated on a buyer-seller relationship as it is contrary to the requirement that the putative joint-venturers contribute property to the joint venture over which the venturers have joint control." R&R at 22-23, citing *Slip-N-Slide Records*, *Inc.*, 2014 WL 2119857, at *2. In response to the damning legal principle that neither a buyer-seller nor debtor-creditor relationship can create a joint venture, the State maintains that "the relationship between GRE and NWS is not simply that between a lender and borrower, nor between a buyer and seller." (Plaintiff's Obj. at 24.) The State offers no explanation whatsoever of how this arrangement differs from a mere buyer-seller (or debtor-creditor) relationship, in which each party "focuses" on either buying or selling the products, beyond the State's insistence that the Defendants' relationship is "sophisticated." (Plaintiff's Obj. at 24.) As Judge Foschio correctly concluded, that is far from enough to plausibly sustain the State's allegations.

IV.
JUDGE FOSCHIO CORRECTLY RECOMMENDED THAT THE STATE SHOULD NOT BE PERMITTED FURTHER OPPORTUNITY TO AMEND ITS PLEADING

The R&R appropriately recommended that the State's claims be dismissed with prejudice because the State will be unable to overcome the legal flaws in their claims. The State objects, arguing that if the Court finds that it has not sufficiently pled the existence of a joint venture, it should be given an opportunity to amend its pleading.

There is no reason to believe that the State could plausibly remedy all of the numerous fatal defects in its Second Amended Complaint, many of which the State does not (and cannot) even address in its opposition to the R&R. The State has already had multiple opportunities to amend its pleading; indeed, as a comparison of the first Amended Complaint with the Second Amended Complaint reveals (compare Docket No. 33 with Docket No. 76), the State's latest amendment focuses largely on trying to bolster its joint venture argument. But because no such joint venture exists, that effort has not and cannot succeed. That claim, like the State's other claims, is legally deficient, and the State has offered no reason why it will be able to rescue any of the claims dismissed with prejudice with yet another opportunity to amend its complaint.

CONCLUSION

Accordingly, this Court should accept the Magistrate Judge's Report and Recommendation, and dismiss the CCTA and PACT Act claims against GRE with prejudice, and dismiss the state claims as well.

Dated: New York, New York
November 23, 2016

Respectfully submitted,

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