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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568 for
the Thirty Meter Telescope at the Mauna Kea
Science Reserve, Ka'ohe Mauka, Hāmākua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

THE UNIVERSITY OF HAWAII AT
HILO'S **OPPOSITION** TO FLORES-
CASE 'OHANA'S MOTION FOR FULL
DISCLOSURE RE SPOILIATION OF
EVIDENCE FILED JUNE 2, 2017 [DOC.
NO. 676]; CERTIFICATE OF SERVICE

**THE UNIVERSITY OF HAWAII AT HILO'S OPPOSITION TO
FLORES-CASE 'OHANA'S MOTION FOR FULL DISCLOSURE RE
SPOILIATION OF EVIDENCE FILED JUNE 2, 2017 [DOC. NO. 676]**

Applicant University of Hawai'i at Hilo (the "**University**"), through counsel, submits this Opposition to the *Motion for Full Disclosure Re Spoliation of Evidence*, filed by the Flores-Case 'Ohana's on June 2, 2017 [Doc. 676] ("**Motion**"). This Opposition is made pursuant to Hawai'i Administrative Rules ("**HAR**") §§ 13-1-32, 34, and 35.

I. INTRODUCTION

By the Flores-Case 'Ohana's own admission, its Motion simply rehashes the same

unsuccessful arguments raised in its prior motions. Each of the Flores-Case ‘Ohana’s arguments that were previously stricken as untimely are now doubly so. The Flores-Case ‘Ohana raises no legitimate grounds and cites no rule that would allow it to further reconsider its already-denied motion for reconsideration. To the extent the Flores-Case ‘Ohana seeks to reargue denial of Exhibits B.30 to B.36, the Motion fails to present good cause as to why those could not have been raised earlier. The Motion is procedurally improper and should be denied.

Even if the merits of the Flores-Case ‘Ohana’s arguments were timely or considered again, the Motion should be denied on the merits. The same defects that were fatal to the Flores-Case ‘Ohana’s earlier spoliation arguments remain unaddressed—namely, that the Flores-Case ‘Ohana fails to provide *any* evidence of an intentional destruction of evidence or impairment in the Flores-Case ‘Ohana’s ability to prove its claims. Alleged clerical errors, without more, are insufficient to support a claim for spoliation of evidence. For these additional reasons, the Hearing Officer should deny the Motion.

II. RELEVANT PROCEDURAL HISTORY

On April 20, 2017, the Hearing Officer issued Minute Order No. 44 [Doc. 553], which, *inter alia*, ruled on the parties’ respective motions to admit evidence and responses thereto. Pursuant to Minute Order No. 44, the deadline to file a motion for reconsideration of that order was five business days from the date the Minute Order was filed in the Documents Library—*i.e.*, April 27, 2017. *Id.* at 8. The parties then had five business days to respond to any motions for reconsideration. *Id.* Minute Order No. 44 did not provide for replies or further responses to the motions for reconsideration. *Id.*

On April 27, 2017, the Flores-Case ‘Ohana filed its Motion to Reconsider Minute Order No. 44 and Notice of Spoliation of Evidence [Doc. 577] (“**Motion for Reconsideration**”) alleging, *inter alia*, that certain exhibits were improperly denied as duplicative because they are

supposedly “alternative copies” of several of the University’s exhibits. Aside from Exhibits A-9 and A-48, the Flores-Case ‘Ohana did not identify any alleged discrepancy between its purported “alternative copies” and the exhibits filed by the University. *See Id.* at 4. The Motion for Reconsideration also claimed that clerical errors by the Department of Land and Natural Resources (“**DLNR**”) Office of Conservation and Coastal Lands (“**OCCL**”) when it uploaded exhibits to the Documents Library somehow constituted spoliation of evidence. *Id.* at 6-7.

On May 4, 2017, the University filed its Opposition to the Motion for Reconsideration [Doc. 615], arguing that, *inter alia*, the Motion for Reconsideration failed to explain how “alternative copies” are not duplicative or provide any evidence to support its claim of spoliation. *Id.* at at 5-6, 8-10.

On May 7, 2017, without seeking leave from the Hearing Officer, the Flores-Case ‘Ohana filed its Response to Applicant University of Hawai‘i at Hilo’s Doc. Nos. 592 & 615 [Doc. 623] (“**Response**”), in which it, *inter alia*, made conclusory assertions that the exhibits at issue are material, relevant and not unduly repetitions, and reiterated its vague demand for “full disclosure and corrective action” regarding its spoliation claims. *Id.* at 6.

On May 15, 2017, the Flores-Case ‘Ohana, again without seeking leave from the Hearing Officer, filed yet another motion for reconsideration of Minute Order No. 44: *Motion for Clarification or, in the Alternative, Reconsideration Re: Minute Orders No. 43 and 44*, (“**Second Motion for Reconsideration**”) [Doc. 634], in which the Flores-Case ‘Ohana reiterated, among other things, its claim that the clerical error relating to Exhibit R-7 amounted to spoliation. *Id.* at 2-3. That second motion for reconsideration was filed well past the April 27, 2017 deadline and is therefore, untimely.

In Minute Order No. 51 [Doc. 647], the Hearing Officer rejected the Flores-Case

‘Ohana’s “broad accusations” of spoliation and due process violations. *Id.* at 8. Specifically, the Order noted that “the Flores-Case ‘Ohana fails to identify specific exhibits excluded by the Hearing Officer in violation of law, **except** for those exhibits that the Flores-Case ‘Ohana believes are inappropriately excluded as “duplicative” of exhibits A9 [and] A-49.” *Id.* (emphasis in original). Therefore, the Hearing Officer received those exhibits related to alleged discrepancies in Exhibits A-9 and A-48—*i.e.*, B.28, B.37a, B.37b, and B.38—to preserve the arguments set forth by the Flores-Case ‘Ohana, but upheld “all other rulings on the Flores-Case ‘Ohana’s exhibits [as] consistent with HAR § 13-1-35(a).” *Id.* The Hearing Officer also refused to consider the Flores-Case ‘Ohana’s Response because “responses to oppositions are not part of the process established for moving exhibits into evidence.” *Id.* at 9. The Hearing Officer did not consider the Flores-Case ‘Ohana’s late Second Motion for Reconsideration [Doc. 634] in Minute Order No. 51.

On May 26, 2017, the Hearing Officer issued Amended Minute Order No. 44 [Doc. 649], which reflected the Hearing Officer’s rulings on the parties’ respective motions for reconsideration. Amended Minute Order No. 44 stated very clearly that “no further reconsideration of this Amended Minute Order No. 44 (Documentary Evidence) is appropriate.” *Id.* at 8.

III. ARGUMENT

A. THE MOTION IS AN IMPROPER ATTEMPT TO SEEK RECONSIDERATION ON A MOTION FOR RECONSIDERATION AND VIOLATES AMENDED MINUTE ORDER NO. 44

By its own admission, the Motion seeks reconsideration of arguments raised in its already-decided Motion for Reconsideration [Doc. 577] and previously-disregarded Response [Doc. 623]. Motion at 2. Those arguments were raised again in the Flores-Case ‘Ohana’s Second Motion for Reconsideration [Doc. 634]. *Id.* at 2-3. In other words, the Flores-Case

‘Ohana is seeking a *fourth* bite at the proverbial apple. Such attempts at further reconsideration were explicitly barred by the clear, unambiguous language of Amended Minute Order No. 44. [Doc. 649 at 8 (“no further reconsideration of this Amended Minute Order No. 44 (Documentary Evidence) is appropriate”).] For this reason alone, the Motion is untimely, procedurally improper, and should be stricken.

Even if further reconsideration was not expressly barred by Amended Minute Order No. 44, the Motion is plainly improper under the well-established standards for reconsideration. “Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding.” *Sousaris v. Miller*, 92 Hawai‘i 505, 513, 993 P.2d 539, 547 (2000) (internal brackets and citations omitted). The Motion clearly runs afoul of this rule by reiterating the *same allegations and arguments previously raised* in its Motion for Reconsideration and Response. Not only did the Flores-Case ‘Ohana have the opportunity to raise these arguments earlier in the proceeding, it did so *repeatedly*. See generally Motion for Reconsideration; Response; Second Motion for Reconsideration. Indeed, the Flores-Case ‘Ohana’s unfounded allegations of evidence tampering and destruction were already raised in the earlier Motion for Reconsideration. Those arguments have been addressed and fully briefed in the University’s opposition thereto, which the University hereby incorporates by reference. After considering the parties’ timely-filed briefings, the Hearing Officer rejected the Flores-Case ‘Ohana’s spoliation arguments. [Doc. 647 at 8],

Furthermore, the Flores-Case ‘Ohana’s basis for filing the Motion is the Hearing Officer’s alleged failure “to address this issue prior to the deadline of May 30, 2017 for submittal of findings of fact, conclusions of law, and decision [and] order.” Motion at 2. However, the

Flores-Case ‘Ohana cites no legal authority for its assertion that the Hearing Officer was somehow required to rule on the Motion for Reconsideration prior to May 30, 2017. Rather, the Hearing Officer has already rejected that same argument in the Motion for Reconsideration—which also lacked citation to any authority. *See* Motion for Reconsideration at 7 (arguing due process required the Hearing Officer to rule on its Motion for Reconsideration prior to submittal of proposed findings); Minute Order No. 51[Doc. 647] at 8 (rejecting the Flores-Case ‘Ohana’s due process arguments). Indeed, the Board of Land and Natural Resources has already ruled that “[n]o authority mandates a deadline for issuing orders on motions in contested cases....” Minute Order No. 39 [Doc. 406] at 3. Even if such a deadline exists, Minute Order No. 51, which resolved the Motion for Reconsideration, was issued on May 25, 2017 and served on the parties on May 26, 2017—*i.e.*, before the May 30, 2017 deadline for submitting proposed findings of fact, conclusions of law, and decision and order. Because the Flores-Case ‘Ohana’s alleged basis for filing is legally and factually incorrect, and no other good cause basis exists to justify its attempt to seek further reconsideration, the Hearing Officer should deny the Motion.

B. BARE ALLEGATIONS ARE INSUFFICIENT TO SUPPORT SPOILIATION

Even if the Hearing Officer were to consider the merits of the Motion, she should nonetheless deny the Motion because it fails to provide any credible support for its spoliation claim. As previously briefed, spoliation of evidence generally requires proof of impairment to the aggrieved party’s ability to prove its claim. *See* University’s Opp. to Motion for Reconsideration [Doc. 615] at 9. Moreover, the Flores-Case ‘Ohana’s claim of tampering and corruption of evidence requires affirmative evidence of the intentional destruction of evidence. *See id.* The Hearing Officer previously rejected those same claims as nothing more than “broad accusations.” Minute Order No. [Doc. 647] at 8. That same defect is present again here. While the Flores-Case ‘Ohana goes into detail into its theory regarding the purported “switch” of

certain exhibits, the Flores-Case ‘Ohana provides no actual evidence of any *intent* by OCCL to tamper with or corrupt evidence. Nor does it attempt to make *any* showing that the purported switch in exhibits hinders its ability to support its case. Though the Flores-Case ‘Ohana mischaracterizes R-7 as a “totally different copy” of the OCCL staff report, it concedes that the only difference between Exhibit A-7 and R-7 are the approval stamp and a four-page correspondence attached to the staff report. Motion at 3. The Flores-Case ‘Ohana offers no explanation as to how these differences prevent it from making its case. Instead, the Flores-Case ‘Ohana’s argument rests on the fact that the University and TIO cited to R-7 for the proposition that the OCCL recommended approval of the CDUA in their joint proposed findings of fact. *See* Motion at 4. However, whether the OCCL recommended approval of the CDUA in its staff report is not in dispute. The Flores-Case ‘Ohana’s own witness, Mr. Samuel Lemmo, confirmed that OCCL did, in fact, recommend approval of the CDUA, and that he himself signed the OCCL staff report making that recommendation. Ex. A, Tr. 2/27/17 at 220:6-15; 221:24-222:22; 222:23-223:5. Because the Flores-Case ‘Ohana provides no other explanation as to how the alleged exhibit discrepancy would hinder its ability to prove its claims, its spoliation claims fail as a matter of law. *See Matsuura v. E.I. du Pont de Nemours & Co.*, 102 Hawai‘i 149, 166-67, 73 P.3d 687, 704-05 (2003).

The Flores-Case ‘Ohana’s recitation of portions of the Supreme Court’s *Mauna Kea Anaina Hou v. Board of Land and Natural Resources* decision is also unavailing. *See* Motion. at 4-5. Neither the quoted language nor the facts of the *Mauna Kea* case involve spoliation of evidence. The mere inclusion of a block quote, without any explanation as to how it applies to its Motion, is insufficient to support a claim of spoliation. Similarly, the repeated invocation of the specter of due process violations—without *any* evidence to support such allegations—is also

insufficient to sustain a spoliation claim. For these additional reasons, the Hearing Officer should deny the Motion.

IV. CONCLUSION

For all of the foregoing reasons, the University respectfully requests that the Hearing Officer DENY the Motion.

DATED: Honolulu, Hawai'i, June 9, 2017.



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Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568 for
the Thirty Meter Telescope at the Mauna Kea
Science Reserve, Ka'oho Mauka, Hāmakua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

DECLARATION OF COUNSEL;
EXHIBIT "A"

DECLARATION OF COUNSEL

I, IAN L. SANDISON, declare:

1. I am an attorney with Carlsmith Ball LLP, counsel for Applicant University of Hawai'i at Hilo ("**University**") in the above-captioned matter.
2. I am authorized and competent to testify to the matters set forth herein, and unless otherwise indicated, I make this declaration based upon personal knowledge.
3. Attached hereto as **Exhibit A** is a true and correct copy of excerpts from the transcript prepared by Laura Savo of the evidentiary hearing held on February 27, 2017 in the above-captioned matter, presided over by Judge Riki May Amano (Ret.). The highlighting included in the excerpt was added by our law firm for ease of reference.

This declaration is made upon personal knowledge. I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, June 9, 2017.



IAN L. SANDISON

EXHIBIT A

1 BOARD OF LAND AND NATURAL RESOURCES

2 STATE OF HAWAI'I

3
4 IN THE MATTER OF) CASE NO. BLNR-CC-002
5 Contested Case Hearing)
6 Re Conservation District)
7 Use Application (CDUA))
8 HA-3568 For The Thirty) VOLUME 41
9 Meter Telescope at the)
Mauna Kea Science)
Reserve, Ka'ohe Mauka,)
Hamakua, Hawai'i TMK)
10 (3)4-4-015:009)
11 -----)
12
13

14 CONTESTED CASE HEARING

15 Held on Monday, February 27, 2017, commencing at
16 9:04 a.m., at the Grand Nanihoa Hotel, Crown Room,
17 93 Banyan Drive, Hilo, Hawaii 96720.
18
19
20
21
22
23

24 BEFORE: Laura Savo, CSR #347
25

1 You go through a number of drafts, and then at some 03:37:23
2 point, we agree on a final draft and then that is 03:37:26
3 submitted to the chair. 03:37:30

4 Q Okay. How is this agreement -- so when 03:37:32
5 you say "we," are you referring to you and Mr. Cain 03:37:36
6 coming to some type of agreement regarding the final? 03:37:39

7 A Yes. 03:37:42

8 Q And is there any particular sections that 03:37:43
9 you recall that had to be redone or revised? 03:37:47

10 A This was seven years ago. So it's not 03:37:52
11 easy to recall exactly what parts of the report that 03:37:57
12 I had, you know, so-called significant concerns over, 03:38:01
13 but, generally, I do -- I do get very much involved 03:38:07
14 in the -- in the work of the planners and offer 03:38:11
15 suggestions on changes. 03:38:16

16 Q Okay. Thank you. So it's fair to say 03:38:18
17 that -- it's accurate to say that OCCL was 03:38:23
18 responsible for compiling the staff report dated 03:38:29
19 February 25th, 2011, for CDUA HA-3568? 03:38:34

20 A Yes, I would agree. 03:38:40

21 Q So was this staff report prepared for 03:38:45
22 members of the Board of Land and Natural Resources? 03:38:48

23 A Yes. 03:38:51

24 Q And was it prepared for the 03:38:52
25 February 25th, 2011, meeting? 03:38:54

1 A Yes.

03:38:56

2 Q So prior to submitting this staff report
3 to BLNR, was it signed by you?

03:38:57

03:39:08

4 A Yes. My signature does appear on the
5 staff report.

03:39:14

03:39:17

6 Q Okay. And so the document that you have
7 before you is Exhibit R-7. Can you turn to page 66,
8 please, which is that last page of that document? Is
9 your signature on there?

03:39:19

03:39:21

03:39:28

03:39:36

10 A There's no signature.

03:39:37

11 Q And so your signature, it's not on the
12 document. Then it's just considered -- it's still in
13 draft form?

03:39:39

03:39:42

03:39:48

14 A I don't know why my signature is not on
15 this document.

03:39:54

03:39:56

16 Q Okay. And so I'm going to just -- I'd
17 like to present Exhibit B-70 to Mr. Lemmo. I'm
18 actually just presenting him with the first page and
19 the last page of Exhibit B seven zero -- seventy.

03:39:57

03:40:04

03:40:14

03:40:18

20 MS. ALULI: B seven zero?

03:40:23

21 MR. FLORES: Yes.

03:40:28

22 Q And so what I have before you is, once
23 again, Exhibit B-70, and then on the bottom
24 right-hand -- excuse me -- the bottom right -- bottom
25 corner, there's -- it's typed "Item K-1." Does that

03:40:32

03:40:38

03:40:42

03:40:45

1	look familiar to you?	03:40:51
2	A Yeah, it looks familiar.	03:40:54
3	Q So the one I just handed to you?	03:41:01
4	A Yeah.	03:41:03
5	Q Okay. But on the Exhibit R-7, it doesn't	03:41:04
6	have "Item K-1" on it; is that correct?	03:41:08
7	A It does not appear to have the item	03:41:11
8	count.	03:41:14
9	Q So what does that reference "Item K-1"	03:41:14
10	refer to?	03:41:18
11	A That's a numbering system that the DLNR	03:41:18
12	uses to number staff reports. K is assigned to OCCL.	03:41:22
13	And so K-1 would mean that that was our first item	03:41:34
14	that we are presenting at that particular board	03:41:36
15	meeting. K-2 would be -- that's a different board	03:41:40
16	submit -- board report.	03:41:44
17	Q Thank you. And so this reference is that	03:41:45
18	this document is going beyond the agenda of the board	03:41:49
19	meeting of February 21st -- I mean, excuse me,	03:41:53
20	February 25th, 2011; is that correct?	03:41:57
21	A Yeah.	03:42:05
22	Q Okay.	
23	A That's what it says, yeah.	03:42:07
24	Q And then looking at the same exhibit I	03:42:10
25	just handed to you, the last page 66 -- this is	03:42:12

1 Exhibit B-70 -- is there a -- is your signature on 03:42:16
2 this particular document? 03:42:20

3 A Yes. 03:42:22

4 Q And then how come -- I mean, I know that 03:42:24
5 the document states and has "Michael Cain, staff 03:42:28
6 member of OCCL." So why did you sign on this 03:42:34
7 document that was presented to BLNR instead of 03:42:39
8 Michael Cain? 03:42:43

9 A To the best of my recollection, Michael 03:42:44
10 submitted this -- we have to submit the report 03:42:59
11 several weeks before the meeting so it can get vetted 03:43:02
12 by the chair and then can get photocopied and then 03:43:06
13 get "agendized" and the agenda's got to go out. So 03:43:10
14 you need several weeks to accomplish that. Michael 03:43:15
15 had a long vacation planned, something like a 03:43:18
16 month-long vacation. And so I asked him to give me 03:43:21
17 an unsigned report because the report could undergo 03:43:26
18 changes or there could be changes requested, and if 03:43:31
19 he wasn't there, we wouldn't be able to get him to 03:43:34
20 re-sign the application if it had been modified or 03:43:39
21 reformatted, and so I asked him if I could sign it 03:43:44
22 for him and he said I could. 03:43:47

23 Q And so once you signed it, then it's 03:43:48
24 forwarded to the chair of BLNR to be put on the 03:43:55
25 agenda? Is that the process? 03:43:58

1 A That's correct.

03:43:58

2 Q And so the document that you also have,
3 is it also signed off by the chair at the time,
4 William Aila?

03:43:59

03:44:01

03:44:06

5 A Yes.

03:44:06

6 Q So it's fair to say that this -- from
7 Exhibit B-70, from the first page and the page 66
8 that was handed to you, that's the actual copy, at
9 least the front part and the back part? Is that
10 actually what was submitted to --

03:44:07

03:44:13

03:44:17

03:44:23

03:44:25

11 A Yeah.

12 Q -- on the agenda for that particular
13 meeting date; is that correct?

03:44:27

03:44:30

14 A Sure. If I can imagine, you know, 66 --
15 64 pages in between that --

03:44:31

03:44:34

16 Q There's a lot of pages in there.

17 A -- that would be it.

03:44:36

18 Q So a follow-up to that, so the report is
19 dated February 25th, 2011, but that's not the date it
20 was actually finalized; is that correct?

03:44:38

03:44:43

03:44:46

21 A No.

03:44:51

22 Q And that's because that's the date when
23 it's being presented at the BLNR meeting; is that
24 correct?

03:44:51

03:44:54

03:44:57

25 A That's correct.

03:44:57

1 Q Thank you. And so are you aware that in 03:44:58
2 addition to this particular report, and you have the 03:45:07
3 copy identified in Exhibit R-7, that it also included 03:45:10
4 several exhibits along with it? 03:45:18

5 A Yeah. 03:45:20

6 Q And those exhibits end the document 03:45:28
7 library for the contested case that's been referenced 03:45:34
8 as R-8. 03:45:38

9 So in the preparation of this particular 03:45:45
10 staff report, who compiled the information for this 03:45:48
11 staff report? 03:45:53

12 A Michael Cain. 03:45:54

13 Q And who -- who actually authored this 03:45:58
14 staff report? 03:46:02

15 A Michael Cain. 03:46:02

16 Q Where was the information for this staff 03:46:06
17 report obtained from? 03:46:09

18 A Lots of different sources. In this case, 03:46:10
19 many sources. 03:46:19

20 Q And do you know which sources in 03:46:21
21 specific? 03:46:26

22 A Yeah. I would, you know, start with the 03:46:27
23 application itself. I would then suggest that 03:46:33
24 information was garnered from the final environmental 03:46:38
25 impact statement. I understand that information was 03:46:43

C E R T I F I C A T E

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

I, LAURA SAVO, a Certified Shorthand Reporter in and for the State of Hawaii, do hereby certify:

That the foregoing proceedings were taken down by me in machine shorthand at the time and place herein stated, and was thereafter reduced to typewriting under my supervision;

That the foregoing is a full, true and correct transcript of said proceedings;

I further certify that I am not of counsel or attorney for any of the parties to this case, nor in any way interested in the outcome hereof, and that I am not related to any of the parties hereto.

Dated this 17th day of March 2017 in Honolulu, Hawaii.

/S/ Laura Savo
LAURA SAVO, RPR, CSR NO. 347

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568 for
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Science Reserve, Ka'ohe Mauka, Hāmakua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the
following parties by email unless indicated otherwise:

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