

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

WILLIAM THORPE, *et al.*,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

Civil Case No. 2:20-cv-00007-JPJ-PMS

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTION TO STRIKE DEFENDANTS’ DISCLOSURE AND
SUPPLEMENTAL DISCLOSURE OF EXPERT TESTIMONY OF DR. TAMA S. CELI**

I. INTRODUCTION

Defendants have improperly relied on Fed. R. Civ. P. 26(a)(2)(C) to avoid serving an expert report from a VDOC employee, Dr. Tama S. Celi. In their Disclosure of Expert Testimony of Dr. Tama S. Celi (the “Disclosure”), Defendants have provided only a high-level summary of the opinions Dr. Celi will supposedly offer at trial, each of which relates directly to and purport to rebut the expert opinions of Mr. Russell Molter, Plaintiffs’ analytics expert. Ex. 1. Mr. Molter’s expert report supports Plaintiffs’ claim that the average Step-Down Program participant spends *years* in solitary confinement, in violation of his constitutional and statutory rights. Defendants’ Disclosure did not provide *any* factual support for Dr. Celi’s opinions. *Id.*

Plaintiffs requested that Defendants serve an expert report on behalf of Dr. Celi as required by Rule 26(a)(2)(B), as Dr. Celi undeniably serves as an expert in the case and falls squarely within the category of experts required to submit a report under that rule. Defendants refused. Ex. 3 at 2. Ignoring the language of Rule 26(a)(2)(B), Defendants argued that the Committee Notes to the 2010 amendments to Fed. R. Civ. P. 26 state that “employees of a party who do not regularly provide expert testimony” are not required to serve an expert report. *Id.* at 4–5. Nevertheless, recognizing that their disclosure of Dr. Celi’s opinions was deficient even under Rule 26(a)(2)(C)—which requires “a summary of the facts and opinions to which the witness is expected to testify”—Defendants served a Supplemental Disclosure of Expert Testimony of Dr. Tama S. Celi weeks later (collectively “the Disclosures”). Ex. 2. Similar to the original Disclosure, the Supplemental Disclosure provides only a high-level overview of the opinions Dr. Celi plans to provide at trial; it does not provide the level of detail required by an expert report or the other information required by Fed. R. Civ. P. 26(a)(2)(B).

Defendants’ failure to provide an expert report from Dr. Celi is improper and prejudicial to Plaintiffs. The language of Fed. R. Civ. P. 26(a)(2)(B) is clear. Even employees of a party who

do not regularly provide expert testimony are required to serve an expert report if those employees are nonetheless “retained or specially employed to provide expert testimony in the case.” Fed. R. Civ. P. 26(a)(2)(B). Dr. Celi falls squarely within that definition, as governing Fourth Circuit case law confirms, because she has no underlying involvement in or prior knowledge about the facts of the case. Rather, all of the opinions she intends to offer are pure expert testimony and respond only to the opinions Mr. Molter has offered.

Given Defendants’ failure to provide an expert report for Dr. Celi, the Court should exclude her opinions. Such a remedy is proper because Plaintiffs have been and will continue to be severely prejudiced by Defendants’ failure to follow Fed. R. Civ. P. 26(a)(2). Plaintiffs were entitled to depose Dr. Celi on the complete scope of her opinions—not high-level summaries—and are entitled to understand Dr. Celi’s criticisms of Mr. Molter’s methodology, data, and conclusions before she takes the stand at trial. Indeed, Defendants have even refused to provide the information underlying Dr. Celi’s opinions—including her source code—arguing instead that the production of source code is not required by Rule 26(a)(2)(C). Ex. 4 at 58:7–9. Defendants should not be allowed to gain a litigation advantage over Plaintiffs by shielding Dr. Celi’s expert analysis from review, and then surprising Plaintiffs with her opinions at trial, simply because Dr. Celi is a VDOC employee. Plaintiffs’ prejudice cannot be cured without excluding Dr. Celi’s opinions because of the advanced stage of the case, including the completion of expert discovery and the filing of dispositive motions.

II. BACKGROUND

A. Factual background

In August 2021, Plaintiffs served discovery requests regarding, among other things, the length of time inmates spend in the Step-Down Program. In response to these requests, Defendants produced a spreadsheet that provides dates, locations, and Step-Down Program

levels for hundreds of inmates from August 2012 to July 2021. Defendants have since produced a number of updated spreadsheets, both to correct erroneous data in earlier spreadsheets and to provide data on inmates through the start of expert discovery (hereafter, collectively, the “Inmate Data Spreadsheet”).

Plaintiffs submitted an expert declaration at the class certification stage that used the Inmate Data Spreadsheet to calculate the average time inmates spend in the Step-Down Program. ECF No. 174-59. Defendants rebutted that expert declaration with the Declaration of Dr. Tama S. Celi, which criticized Plaintiffs’ calculations. ECF No. 194-2. VDOC subsequently designated Dr. Celi as its Rule 30(b)(6) witness on topics related to the Inmate Data Spreadsheet and Dr. Celi’s class certification declaration. When Plaintiffs also attempted to serve a Rule 30(b)(1) notice on Dr. Celi prior to her corporate deposition, Defendants objected, representing that “Dr. Celi has little relevance to the litigation other than with respect to [the Inmate Data Spreadsheet].” Ex. 5 at 1.

In her Rule 30(b)(6) deposition, Dr. Celi explained that the Inmate Data Spreadsheet was “created solely for the purposes of this litigation,” Ex. 6 at 24:17–19, and does not exist in the same form in VDOC’s computer system. The data that Dr. Celi’s department uses to produce reports is stored in CORIS, the Correctional Offender Record Information System. *Id.* at 25:7–16 (“CORIS does not exist in an Excel spreadsheet.”).

B. Dr. Tama Celi’s background

Dr. Tama Celi holds a Bachelor of Arts degree in economics from the University of South Florida, a Master’s degree in public policy from the College of William and Mary, and a Ph.D. in public policy and administration from Virginia Commonwealth University. Ex. 1 at 2. For over five years in the early 2000s, Dr. Celi served as a Senior Research & Evaluation Associate at the Virginia Criminal Sentencing Commission. *Id.* From 2005 to 2010, she worked

as a Research and Reporting Supervisor at VDOC, where she “established the research agenda, created methodologies, and organized and managed research projects and staff.” *Id.* From 2010 to 2016, Dr. Celi worked as the Statistical Analysis and Forecast Manager where, *inter alia*, she managed and developed data “for research, outcomes, performance measures and forecasting.” *Id.* Since 2016, Dr. Celi has been the Research Director, Policy and Planning at VDOC, where she heads the Statistical Analysis and Forecast, Program Fidelity and Quality Assurance, and Special Projects and Evaluation units. *Id.*

C. Dr. Celi’s disclosed expert testimony

Defendants disclosed Dr. Celi as an expert to rebut Plaintiffs’ expert report from Mr. Molter. The Disclosures state that Dr. Celi is expected to testify as an expert on four topics:

1. The use of measures of central tendency in statistics.
2. Whether the measure of central tendency included in Mr. Molter’s reports was appropriate.
3. Whether the exhibits provided by M. Molter [sic] have a data-analysis-associated reason.
4. Apparent inconsistencies between the steps that Mr. Molter asserts in his reports that he took to analyze the data and his results.

Ex. 1 at 1; Ex. 2 at 1. In other words, the Disclosures specify that Dr. Celi intends to rebut Mr. Molter’s analysis and conclusions. There is no other stated purpose, and the Disclosures do not set forth any underlying facts regarding the case about which Dr. Celi has knowledge.

III. LEGAL STANDARD

Fed. R. Civ. P. 26(a)(2)(B) and (C) set forth the rules specifying when a witness must serve an expert report or, alternatively, a summary of expert testimony, and the requirements of each. “If a party fails to provide information or identify a witness as required by Rule

26(a) . . . the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”

Fed. R. Civ. P. 37(c)(1). “This automatic sanction” was designed as “a strong inducement for disclosure of material that the disclosing party would expect to use as evidence.” Fed. R. Civ. P. 37(c) Advisory Committee Notes, 1993 amendment. “The party seeking to avoid producing a written report bears the burden of demonstrating that the witness” falls outside the definition of Rule 26(a)(2)(B). *Holmes v. Maersk A/S, Co.*, 2022 WL 686791, at *6 (D.S.C. Mar. 8, 2022); *Mayo v. City of Huntington*, 2022 WL 1298742, at *2 (S.D.W. Va. April 29, 2022); *Meredith v. Int’l Marine Underwriters*, 2011 WL 1466436, at 4 (D. Md. Apr. 18, 2011).

IV. ARGUMENT

Under the plain language of Fed. R. Civ. P. 26(a)(2)(B), Defendants had an obligation to serve an expert report on behalf of Dr. Tama Celi. Defendants failed to do so. Defendants instead served an expert disclosure under Rule 26(a)(2)(C), with a bare-bones summary of Dr. Celi’s opinions. Given Defendants’ failure to follow the discovery rules and the prejudice such failure has caused and will cause Plaintiffs, the Court should exclude Dr. Celi’s expert testimony. *See Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 278 (4th Cir. 2005) (“Rule 26 disclosures are often the centerpiece of discovery in litigation that uses expert witnesses. A party that fails to provide these disclosures unfairly inhibits its opponent’s ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court’s management of the case.”).

A. The Court should strike Defendants’ Disclosures for Defendants’ failure to comply with Fed. R. Civ. P. 26(a)(2).

1. Rule 26(a)(2)(B) requires an expert report from a witness who is “retained or specially employed to provide expert testimony”—even if that witness is a party’s employee.

Whether Dr. Celi is required to serve an expert report hinges on the interpretation of Fed. R. Civ. P. 26(a)(2)(B). The rule creates two separate categories of expert witnesses who must serve full expert reports, stating that an expert disclosure “must be accompanied by a written report—prepared and signed by the witness—if the witness is [1] one retained or specially employed to provide expert testimony in the case *or* [2] one whose duties as the party’s employee regularly involve giving expert testimony.” Fed. R. Civ. P. 26(a)(2)(B) (emphasis added). This means that an expert witness who falls into *either* of these categories must serve an expert report. *See* Disjunctive Canon, Black’s Law Dictionary (11th ed. 2019) (the “disjunctive canon” is a legal “doctrine that in a legal instrument . . . *or* joins a disjunctive list to create alternatives”); *see also* Antonin Scalia et al., *Reading Law: The Interpretation of Legal Texts*, 116–21 (2012) (same). Therefore, under the plain language of the rule, an employee whose duties do not regularly involve giving expert testimony but who has nonetheless been “retained or specially employed to provide expert testimony” must serve an expert report. *See* Fed. R. Civ. P. 26(a)(2)(B).

Courts from around the country agree. For instance, in *National Railroad Passenger Corp. v. Railway Express, LLC*, 268 F.R.D. 211, 214 (D. Md. 2010), Amtrak sought to introduce testimony from several employees regarding topics “beyond common knowledge,” which qualified as expert testimony. In reviewing the admissibility of such testimony, the court grappled with the issue of whether, under Rule 26(a)(2)(B), those employees were required to serve an expert report. *Id.* The court explained that “the majority of courts” that have confronted

the question have concluded “that whenever an employee of a party gives expert testimony, even if outside the normal scope of his or her employment, the producing party must provide an expert report.” *Id.* at 215. The court held that, to be faithful to the rule, “where employees have no connection to the specific events underlying the case, or have reviewed information solely in preparation for litigation, they must produce expert reports.”¹ *Id.* at 217. Numerous other courts concur. *See, e.g., Albritton v. Acclarent, Inc.*, 2020 WL 11627275, at *8 (N.D. Tex. Feb. 28, 2020) (“[A] party’s employee may serve as a retained expert for the employer.”); *Bierman Family Farm, LLC v. United Farm Family Ins. Co.*, 2018 WL 1352966, at *1 (D. Md. Jan. 17, 2018) (An employee is a retained expert “[t]o the extent that employees provide expert testimony beyond the scope of knowledge they gained from their normal course of duty”); *Valvoline Instant Oil Change Franchising v. RFG Oil, Inc.*, 2015 WL 13935285, at *9 (S.D. Cal. Jan. 16, 2015) (holding that an employee’s testimony “‘cross[ed] over the boundary to become the sort of expert’ who must provide a report under Rule 26(a)(2)(B)” (alteration original)); *Vigilant Ins. Co. of N.Y. v. McKenney’s, Inc.*, 2011 WL 2415005, at *4 (D.S.C. June 10, 2011) (similar).

Dr. Celi cannot therefore escape the requirements of Rule 26(a)(2)(B) simply because she is a VDOC employee who does not regularly provide expert testimony. Defendants must also demonstrate that VDOC did not retain or specially employ Dr. Celi to provide expert testimony in this litigation. *Holmes*, 2022 WL 686791, at *6 (“The party seeking to avoid producing a written report bears the burden.”).

¹ Defendants have argued that *National Railroad* is no longer good law because Rule 26(a)(2)(C) was amended later the same year that the opinion issued. Ex. 3 at 4–5. However, *National Railroad* interpreted the language of Rule 26(a)(2)(B)—not Rule 26(a)(2)(C)—so the court’s analysis remains unchanged and persuasive, as evidenced by the numerous courts that have endorsed *National Railroad*’s reasoning since the 2010 amendments to Fed. R. Civ. P. 26. *See, e.g., Bierman Family Farm*, 2018 WL 1352966, at *1; *Valvoline*, 2015 WL 13935285, at *9.

2. An expert is retained or specially employed to provide expert testimony unless the expert has ground-level involvement in the events giving rise to the litigation.

Case law clarifies the circumstances under which an expert has been “retained or specially employed to provide expert testimony,” Fed. R. Civ. P. 26(a)(2)(B), and thus required to serve an expert report. The Fourth Circuit and other courts interpret the phrase “retained or specially employed to provide expert testimony” to reference any testifying expert who does not possess pre-suit knowledge of the facts of the case or whose expert testimony strays from the confines of that expert’s pre-suit knowledge or involvement. *See, e.g., Timpson v. Anderson Cnty. Disabilities and Special Needs Bd.*, 31 F.4th 238, 253 (4th Cir. 2022); *Downey v. Bob’s Discount Furniture Holdings, Inc.*, 633 F.3d 1, 6 (1st Cir. 2011). This contrasts with a Rule 26(a)(2)(C) expert—often characterized as a “hybrid witness”—who is an expert *and* “a direct participant in the events at issue,” whose testimony is “based on personal knowledge acquired before any litigation had begun.” *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 113 (1st Cir. 2003); *Morris v. Bland*, 666 Fed. App’x 233, *239 (4th Cir. 2016).

The First Circuit unpacked this distinction in *Downey*. There the court explained that “[i]n order to give the phrase ‘retained or specially employed’ any real meaning, a court must acknowledge the difference between a percipient witness who happens to be an expert and an expert who without prior knowledge of the facts giving rise to litigation is recruited to provide expert opinion testimony.” 633 F.3d at 6. Only the former—“a percipient witness who happens to be an expert”—falls outside the scope of Rule 26(a)(2)(B). *Id.* Treating physicians are the most common type of hybrid witness, and the application of Rule 26(a)(2) to their testimony is instructive. Treating physicians are experts in their field but also function (at least in part) as fact witnesses in that they are testifying about the medical treatment of a party to the case and about opinions formed before the litigation began. The treating physician is therefore “an actor with

regard to the occurrences from which the tapestry of the lawsuit was woven.” *Id.* For this reason, and because Rule 26(a)(2)(C) does not require that such witnesses serve a report, courts have held that “a physician is exempt from this written report requirement *only* as to opinions formed during the course of treatment.” *Morris*, 666 Fed. App’x at *239 (emphasis added).

The same logic applies beyond cases involving a treating physician. *Downey*, 633 F.3d at 6. An expert falls within Rule 26(a)(2)(C)’s narrow exception only if his or her opinions were formed during the time and in connection with the events giving rise to the litigation. For instance, in *Timpson*, the Fourth Circuit explained that experts must serve a full report unless their “opinion testimony arises not from [their] enlistment as an expert but, rather, from [their] ground-level involvement in the events giving rise to the litigation.” *Timpson*, 31 F.4th at 253 (“Most witnesses do not qualify as hybrid witnesses”). In *Timpson*, the court held that “the district court properly excluded [certain expert] witnesses from offering their expert opinions during trial” because the proffering party had failed to serve reports and the alleged hybrid witnesses’ “only involvement in the case occurred in the context of having been hired to provide their opinions.” *Id.* at 254. Thus, the Fourth Circuit confirmed in *Timpson* that a proper hybrid witness must have some personal involvement in the underlying facts giving rise to the litigation. *Id.*; see also *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011) (holding “that a treating physician is only exempt from Rule 26(a)(2)(B)’s written report requirement to the extent that his opinions were formed *during the course of treatment.*”) (emphasis added); *Caruso v. Bon Secours Charity Health Sys., Inc.*, 703 Fed. App’x 31, 33 (2d Cir. 2017) (“[T]he more relevant distinction is between an expert who happened to have personal involvement with the events giving rise to litigation and an expert whose only involvement consists of aiding the already-initiated litigation.”); *Bierman Family Farm*, 2018 WL 1352966, at

*1 (“To the extent that employees provide expert testimony beyond the scope of knowledge they gained from their normal course of duty, however, expert reports are required for those opinions.”); *Valvoline*, 2015 WL 13935285, at *9 (an employee “‘cross[ed] over the boundary to become the sort of expert’ who must provide a report under Rule 26(a)(2)(B)” when he went beyond merely “testify[ing] as a percipient expert witness based on his perceptions and memories of relevant events” (first alteration original)).

3. Dr. Celi was retained or specially employed to provide expert testimony in this matter.

Dr. Celi’s disclosed testimony in this case does not fall within Rule 26(a)(2)(C)’s narrow exception because Dr. Celi has no personal or “ground-level involvement in the events giving rise to the litigation.” *Timpson*, 31 F.4th at 253. Instead, she has all the characteristics of a typical retained expert who has no familiarity with the underlying facts of this litigation whom VDOC assigned to provide rebuttal testimony to Mr. Molter’s report. This is made clear by Defendants’ and Dr. Celi’s own statements. For instance, Defendants have admitted that “Dr. Celi has little relevance to the litigation other than with respect to [the Inmate Data Spreadsheet].” Ex. 5 at 1, which Dr. Celi testified was “created solely for the purposes of *this litigation*.” Ex. 6 at 24:17–19 (emphasis added). Further, during her expert deposition, Dr. Celi acknowledged, “I can’t speak to the litigation because I don’t really know the case,” Ex. 4 at 72:11–12, and “I really don’t know what’s going on with the case other than the bits I’ve been shown.” *Id* at 72:17–18.

That Dr. Celi has been retained or specifically employed to provide expert opinions is further underscored by the fact that Dr. Celi’s opinions relate to and rely solely on the Inmate Data Spreadsheet, which she does not use in her day-to-day job. Again, Dr. Celi acknowledged during her Rule 30(b)(6) deposition that the spreadsheet was “created solely for the purposes of this litigation.” Ex. 6 at 24:17–19. When Dr. Celi’s department creates its own reports, she uses

other tools, namely CORIS data, *id.* at 92:7–9, which “does not exist in an Excel spreadsheet,” *id.* at 25:7–16. Indeed, Dr. Celi noted that she consulted the data provided in the Inmate Data Spreadsheet solely for the purposes of this litigation and solely to rebut Mr. Molter’s report: “[W]e were looking at [the spreadsheet] for the purposes of looking at Mr. Molter’s report.” Ex. 4 at 72:11–12. The record unequivocally shows, therefore, that the entirety of Dr. Celi’s work on the Inmate Data Spreadsheet has been during and directly in connection with this litigation—i.e., “occurred in the context of having been hired to provide [her] opinions.” *Timpson*, 31 F.4th at 254.

The record also demonstrates that Dr. Celi’s opinions are not hybrid opinions of fact mixed with expert analysis. Instead, her opinions are pure expert testimony. Each opinion is in response to Mr. Molter’s expert report, not the facts of this case:

1. The use of measures of central tendency in statistics.
2. Whether the measure of central tendency included in Mr. Molter’s reports was appropriate.
3. Whether the exhibits provided by M. Molter [sic] have a data-analysis-associated reason.
4. Apparent inconsistencies between the steps that Mr. Molter asserts in his reports that he took to analyze the data and his results.

Ex. 1 at 1; Ex. 2 at 1.

As Dr. Celi’s proposed testimony demonstrates, Defendants are simply attempting to categorize one of their experts as a hybrid witness because she happens to be a VDOC employee in order to shield her opinions from examination before trial. The Court should reject such an effort.

B. At a minimum, Defendants should be required to produce source code.

If the Court determines that Dr. Celi's testimony falls within Rule 26(a)(2)(C)'s exception to serving a full expert report, this Court should nevertheless compel Defendants to provide Dr. Celi's source code. Dr. Celi ran and analyzed source code to calculate the median length of stays in the Step-Down Program, which is memorialized in the Supplemental Disclosure of Dr. Celi. Ex. 2 at 6–7; Ex. 4 at 58:15–18 (“Q And is there a code for [your] analysis that you ran similar to the way that there’s a code for the analyses that Mr. Molter ran? A Yeah. We call it syntax in SPSS.”). Defendants have refused to produce that source code. Ex. 4 at 58:7–9. Yet Defendants have articulated no rationale for withholding that source code except that “Dr. Celi is not an expert who is required to produce that information.” *Id.*

Fed. R. Civ. P. 26(b)(1) states that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” That standard is applicable here. *See L.A. Riverside Military Acad. Found., Inc.*, 2021 WL 8998914, *9 (N.D. Ga. Sept. 30, 2021) (finding that the physician was a hybrid witness and ordering that “[i]f Plaintiff wishes to present [the physician] as an expert witness, he must produce [his] records to Defendants”). While Rule 26(a)(2)(B) specifies the specific information that retained experts are required to disclose along with their reports, nothing in Rule 26(a)(2)(C) overrides a party’s right to request similar information under Rule 26(b)(1). *Id.*

To be clear, Dr. Celi's source code is relevant to the issues in the case. For instance, Defendants requested—and Plaintiffs produced—the source code underlying Mr. Molter's report and the updated code underlying his supplemental report. Dr. Celi also testified that she needed

Mr. Molter’s source code to analyze his conclusions and to be able to “replicate the analysis.”²

Ex. 4 at 56:7–57:12. Moreover, not only did Defendants request that Plaintiffs produce Mr. Molter’s source code, Defendants demanded that Plaintiffs produce the output files from that source code—despite Mr. Molter’s testimony that “you can basically click on the code and it recreates an output into a CSV file.” Ex. 7 at 73:13–74:2.

It is disingenuous of Defendants to request the source code and output files from Mr. Molter while simultaneously refusing to provide the source code that their own expert created—an expert whom Defendants retained to rebut Mr. Molter’s analysis and who is effectively performing the same exact function for Defendants as Mr. Molter is for Plaintiffs. Thus, if the Court concludes that Dr. Celi falls within the narrow exception to Fed. R. Civ. P. 26(a)(2)(C), the Court should compel Defendants to produce the source code that Dr. Celi used in preparing her analysis.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court GRANT their Motion to Strike Defendants’ Disclosure of Expert Testimony of Dr. Tama S. Celi and Defendants’ Supplemental Disclosure of Expert Testimony of Dr. Tama S. Celi.

² Dr. Celi testified in her expert deposition, and is expected to testify at trial, that she could not replicate some of Mr. Molter’s results. Ex. 4 at 52:7–53:9. Plaintiffs cannot, however, counter this assertion without being able to determine whether Dr. Celi’s data or source code contained errors.

Dated: September 8, 2023

Respectfully Submitted,

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Certificate of Service

I hereby certify that on the 8th day of September, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants.

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