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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 PAUL MING YU CHAU,  
12 Plaintiff,  
13 v.  
14 THE BANK OF NEW YORK MELLON  
15 TRUST COMPANY, N.A., in its  
16 individual capacity and as trustee for the  
17 RFMSI 2003S19, et al.,  
18 Defendant.

Case No.: 18-CV-1536-CAB-WVG

**ORDER GRANTING IN PART  
MOTION TO DISMISS AND  
DECLINING SUPPLEMENTAL  
JURISDICTION OVER STATE LAW  
CLAIMS**

[Doc. Nos. 12, 13]

19 This matter is before the Court on the motion to dismiss filed by Defendant  
20 Wilmington Savings Fund Society, FSB (“Wilmington”). The motion has been fully  
21 briefed, and the Court deems it suitable for submission without oral argument. For the  
22 following reasons, the Court finds that Plaintiff lacks standing to pursue his claims  
23 individually, which is how he has pled them. Further, even if Plaintiff has standing, the  
24 Court lacks subject matter jurisdiction based on diversity, Wilmington’s motion is granted  
25 with respect to the sole federal claim, and the Court declines supplemental jurisdiction over  
26 the remaining state law claims.  
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1           **I.     Background**

2           This lawsuit is Plaintiff’s latest effort to stave off foreclosure of a property owned  
3 by Plaintiff in San Diego, California (the “Property”). Plaintiff acquired the Property in  
4 2000 and refinanced the loan on the Property in 2003 with Homecomings Financial  
5 Network, Inc., which the complaint also refers to as GMAC Homecomings Financial  
6 Network, Inc., and is not a party to this case. [Doc. No. 1 at ¶¶ 14-15; Doc. No. 1-2 at 3.]  
7 The Deed of Trust on the loan was assigned to Defendant The Bank of New York Mellon  
8 Trust Company, National Association (“BONY”) in 2011. [Doc. No. 1 at ¶ 18; Doc. No.  
9 1-2 at 29.] A corrective assignment was executed on February 1, 2017, and recorded on  
10 February 27, 2017, to correct the assignee verbiage in the 2011 assignment document.  
11 [Doc. No. 1-2 at 42-43.] On June 14, 2016, BONY assigned the Deed of Trust for the  
12 Property to Defendant U.S. Bank, N.A. (“USB”). [Doc. No. 1-2 at 39-40.] On February  
13 3, 2017, USB assigned the Deed of Trust to Wilmington. [Doc. No. 1-2 at 45-46.]

14           The complaint alleges and attaches three notices of default (“NODs”) that were  
15 recorded on the Property between April 23, 2010 and September 21, 2017. [Doc. No. 1 at  
16 ¶¶ 17, 19, 25; Doc. No. 1-2 at 26-27, 31-33, 50-52.] The first two NODs have since been  
17 rescinded. [Doc. No. 1 at ¶¶ 20, 24; Doc. No. 1-2 at 37-38, 48.] On February 20, 2018,  
18 Defendant Clear Recon Corporation (“Clear Recon”) caused to be recorded a Notice of  
19 Trustee’s Sale of the Property setting a sale date of March 26, 2018. [Doc. No. 1 at ¶ 26;  
20 Doc. No. 1-2 at 57-58.] On March 26, 2018, Plaintiff initiated a bankruptcy case under  
21 Chapter 13 of the United States Bankruptcy Code. [Doc. No. 1 at ¶ 44; Doc. No. 1-2 at  
22 82.] As a result of Plaintiff’s bankruptcy filing, the foreclosure sale date was postponed to  
23 July 9, 2018. [Doc. No. 1 at ¶ 64.] Plaintiff’s bankruptcy petition was dismissed on June  
24 26, 2018, and he filed a new Chapter 13 bankruptcy petition on July 9, 2018. [Doc. No.  
25 12-3 at 171-72, 177.]<sup>1</sup> In this still pending bankruptcy proceeding, the trustee has objected  
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28 <sup>1</sup> With its motion, Wilmington requested judicial notice of certain documents in the record for Plaintiff’s  
bankruptcy filings. Plaintiff did not oppose this request, and the Court finds it appropriate to take judicial

1 to confirmation of the Chapter 13 plan and moved to dismiss the petition on the grounds  
2 that the proposed plan is not made in good faith. The trustee’s motion is currently set for  
3 hearing on October 23, 2018. [Doc. Nos. 42, 43 in Bankr. S.D. Cal. Case No. 18-4085-  
4 MM13.]

5 On July 6, 2018, Plaintiff initiated the instant lawsuit with a verified complaint and  
6 motion for temporary restraining order (“TRO”). [Doc. Nos. 1, 3.] The complaint asserts  
7 eight claims under California state law, and one claim (the Ninth Cause of Action) with the  
8 heading “Violation of Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691f) California  
9 Code of Civil Procedure § 1060.” [Doc. No. 1 at p. 28.] It names five defendants: (1)  
10 BONY, in its individual capacity and as trustee for the RFMSI 2003S19 and as trustee for  
11 Residential Funding Mortgage Securities I, Inc., Mortgage Pass Through Certificates  
12 Series 2003-S19; (2) USB, as trustee for NRZ Pass-Through Trust V; (3) Wilmington d/b/a  
13 Christiana Trust, as trustee for Pretium Mortgage Acquisition Trust; (4) Western  
14 Progressive, LLC; and (5) Clear Recon.

15 In his motion for a temporary restraining order, Plaintiff sought to enjoin foreclosure  
16 on the Property, including the trustee sale scheduled for July 9, 2018. [Doc. No. 3.] On  
17 July 11, 2018, Plaintiff filed a notice that the foreclosure sale was rescheduled to July 23,  
18 2018. [Doc. No. 4.] The Court then entered an order stating that the Court would not take  
19 action on the motion until Plaintiff served the complaint and TRO motion on Defendants.  
20 [Doc. No. 5.] On August 15, 2018, Plaintiff filed proofs of service and a declaration from  
21 his counsel that all Defendants had been served. [Doc. Nos. 6-11.] The declaration also  
22 stated that the trustee’s sale date had been postponed to August 27, 2018. [Doc. No. 11.]  
23 On August 24, 2018, the Court held a hearing during which it denied Plaintiff’s motion for  
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27 notice of such documents. Accordingly, Wilmington’s request is granted. *See generally Cobb v. Aurora*  
28 *Loan Servs., LLC*, 408 B.R. 351, 353-54 (E.D. Cal. 2009) (considering plaintiff’s bankruptcy petition in  
deciding motion to dismiss).

1 a TRO. [Doc. No. 21.] The record is silent as to whether the trustee’s sale went forward  
2 on August 27, 2018.

3 While the motion for a TRO was pending, Wilmington filed the instant motion to  
4 dismiss as well as a motion to strike Plaintiff’s request for punitive damages.

## 5 **II. Standing**

6 At the TRO hearing, the Court raised the question of whether Plaintiff has standing  
7 to pursue his claims in light of his prior and pending bankruptcy petitions. In his opposition  
8 brief, Plaintiff relies on *Linares v. CitiMortgage, Inc.*, No. C-14-3435 EMC, 2015 WL  
9 2088705 (N.D. Cal. May 5, 2015), a case where the plaintiffs argued that the statute of  
10 limitations for their claims was tolled during their Chapter 13 bankruptcy proceedings  
11 because they could not file suit while the bankruptcy was pending. The district court  
12 disagreed, holding that there is no statutory prohibition to filing a lawsuit based on Chapter  
13 13 bankruptcy that tolls the statute of limitations period. *Id.* at \*6. The district court  
14 reasoned:

15 Title 11 U.S.C. § 1306(b) provides: “Except as provided in a confirmed plan  
16 or order confirming a plan, the debtor shall remain in possession of all  
17 property of the estate.” 11 U.S.C. § 1306(b). In *In re DiSalvo*, 219 F.3d 1035  
18 (9th Cir. 2000), the Ninth Circuit affirmed the continuing role of a debtor in  
Chapter 13 proceedings:

19 In Chapter 7 liquidation proceedings, only the trustee has standing to  
20 prosecute or defend a claim belonging to the estate. The same cannot be  
21 said for trustees under the reorganization chapters. In those regimes, the  
22 debtor has express authority to sue and be sued. Bankruptcy Rule 6009,  
23 which applies to Chapters 7, 11, and 13, directs that “with or without court  
24 approval, the trustee or debtor in possession may prosecute or may enter  
25 an appearance and defend any pending action or proceeding by or against  
26 the debtor, or commence and prosecute any action or proceeding in behalf  
27 of the estate before any tribunal.” Fed. R. Bankr.P. 6009 (emphasis added).  
28 The Chapter 13 debtor has been considered analogous to Chapter 11,  
which grants the debtor full authority as representative of the estate typical  
of a trustee. See 11 U.S.C. § 1107.

1 *Id.* at \*5-6 (quoting *In Re DeSalvo*, 219 F.3d at 1039) (internal quotation marks and  
2 brackets omitted). The above language from *Linares* and *DeSalvo*, however, only stands  
3 for the proposition that a debtor in possession may prosecute any action *on behalf of the*  
4 *bankruptcy estate*. Plaintiff, however, pursues his claims in this case individually, and not  
5 on behalf of his bankruptcy estate. Although the complaint references the first of his two  
6 recent Chapter 13 bankruptcy filings, it does not allege or argue that Plaintiff is prosecuting  
7 this action on behalf of his bankruptcy estate. Further, there does not appear to be any  
8 explicit disclosure of the existence of this lawsuit or of the claims asserted herein in either  
9 of the recent Chapter 13 proceedings. This lawsuit is not referenced the schedules  
10 submitted in the currently pending proceedings, and Plaintiff’s Chapter 13 Plan only states:  
11 “As to those creditors having claims on my home located on Treyburn Way, I am going to  
12 litigate that issue as an adversary proceeding as they have no standing and do not own any  
13 secured or unsecured lien on my home.” [Doc. No. 28 at 12 in Bankr. S.D. Cal. Case No.  
14 18-4085-MM13.] This representation, stated in the future tense, implies that this lawsuit  
15 is not already pending. In sum, Plaintiff cannot claim to be bringing his claims for the  
16 benefit of his bankruptcy estate when he has not even disclosed this lawsuit in his  
17 bankruptcy proceedings. *See King v. Indiana Harbor Belt R.R. Co.*, No. 2:15-CV-245 JD,  
18 2018 WL 1566821, at \*3 (N.D. Ind. Mar. 30, 2018) (“A Chapter 13 debtor . . . has standing  
19 to bring a claim in his own name for the benefit of the bankruptcy estate, but not for his  
20 own personal benefit. Where, as here, a Chapter 13 debtor has not disclosed legal claims  
21 in his bankruptcy proceeding, he cannot claim to be bringing them for the benefit of his  
22 estate.”) (internal citation omitted); *see also Cable v. Ivy Tech State Coll.*, 200 F.3d 467,  
23 472-73 (7th Cir. 1999) (“Under the reorganization chapters, the debtor-in-possession steps  
24 into the role of trustee and exercises concurrent authority to sue and be sued on behalf of  
25 the estate.”).

26 Because Plaintiff brings his claims individually and not on behalf of his Chapter 13  
27 bankruptcy estate, he lacks standing. Nevertheless, because Plaintiff may be able to  
28 remedy this defect through amendment in this case and disclosure of his claims in his

1 bankruptcy action, the Court addresses other jurisdictional defects and the merits of  
2 Wilmington’s motion to dismiss below.

### 3 **III. Subject Matter Jurisdiction**

4 The complaint alleges that this Court has subject matter jurisdiction under 28 U.S.C.  
5 § 1332 (diversity jurisdiction). “For a federal court to exercise diversity jurisdiction under  
6 § 1332(a), the amount in controversy must exceed \$75,000, and the parties must be citizens  
7 of different states.” *Rainero v. Archon Corp.*, 844 F.3d 832, 839 (9th Cir. 2016). The  
8 complaint, however, alleges that Plaintiff resides in San Diego [Doc. No. 1 at ¶ 1], and that  
9 Defendant Clear Recon has its headquarters in San Diego. [*Id.* at ¶ 8.] Thus, both Plaintiff<sup>2</sup>  
10 and at least one defendant<sup>3</sup> are citizens of California. This lack of diversity between  
11 Plaintiff and Clear Recon means that this Court does not have subject matter jurisdiction  
12 under 28 U.S.C. § 1332. *See Lopez v. Nationstar Mortg. LLC*, No. CV-15-03288-MWF  
13 (AJWx), 2015 WL 6478263 (C.D. Cal. Oct. 26, 2015) (holding that presence of Clear  
14 Recon as defendant defeated diversity jurisdiction when Plaintiff alleged that his primary  
15 residence was in California).

16 Notwithstanding the foregoing, the presence of Plaintiff’s putative claim for  
17 violation of the Equal Credit Opportunity Act (“ECOA”) makes it possible that Plaintiff  
18 could amend the complaint to allege federal question subject matter jurisdiction over that  
19 claim under 28 U.S.C. § 1331, and supplemental subject matter jurisdiction over the state  
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22 <sup>2</sup> Although residence alone does not necessarily establish citizenship for the purposes of diversity  
23 jurisdiction, in light of Plaintiff’s multiple bankruptcy filings in this district and the absence of evidence  
24 that Plaintiff is a citizen of another state, the Court assumes that Plaintiff is a citizen of California.

25 <sup>3</sup> The complaint also does not allege the citizenship of Defendant Western Progressive, LLC (“Western”).  
26 For the purposes of diversity jurisdiction, limited liability companies are “a citizen of every state of which  
27 [their] owners/members are citizens.” *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899  
28 (9th Cir. 2006). The complaint does not allege the citizenship of Western’s owners or members.  
Accordingly, Plaintiff has not satisfied his burden to demonstrate diversity jurisdiction for this reason as  
well. *See Linthicum v. Ocwen Loan Servicing, LLC*, No. 1:15-CV-01120-AWI, 2015 WL 4477963, at \*2  
(E.D. Cal. July 21, 2015) (remanding complaint because removing defendant had not established the  
citizenship of Western); *Smith v. Ocwen Loan Servicing, LLC*, No. ED CV 14-2208 PA KXX, 2014 WL  
8480452, at \*3 (C.D. Cal. Oct. 29, 2014) (same).

1 law claims under 28 U.S.C. § 1367. Accordingly, the Court will consider the pending  
2 motion to dismiss with the understanding that subject matter jurisdiction exists on the basis  
3 of the existence of a federal question, and not on the basis of diversity as alleged in the  
4 complaint.

#### 5 **IV. Claim for Violation of Equal Credit Opportunity Act**

##### 6 **A. Legal Standards on Motions to Dismiss**

7 Wilmington moves for dismissal of the complaint for failure to state a claim under  
8 Federal Rule of Civil Procedure 12(b)(6). To survive such a motion, “a complaint must  
9 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible  
10 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v.*  
11 *Twombly*, 550 U.S. 544, 570 (2007)). Thus, the Court “accept[s] factual allegations in the  
12 complaint as true and construe[s] the pleadings in the light most favorable to the  
13 nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031  
14 (9th Cir. 2008). On the other hand, the Court is “not bound to accept as true a legal  
15 conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550  
16 U.S. at 555). “In sum, for a complaint to survive a motion to dismiss, the non-conclusory  
17 factual content, and reasonable inferences from that content, must be plausibly suggestive  
18 of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th  
19 Cir. 2009) (quotation marks omitted).

##### 20 **B. Discussion**

21 Because the ECOA claim is the linchpin to subject matter jurisdiction, the Court  
22 addresses this claim first. The ECOA “makes it illegal ‘for any creditor to discriminate  
23 against any applicant, with respect to any aspect of a credit transaction ... on the basis of  
24 race, color, religion, national origin, sex or marital status, or age.’” *Schlegel v. Wells Fargo*  
25 *Bank, NA*, 720 F.3d 1204, 1210 (9th Cir. 2013) (quoting 15 U.S.C. § 1691(a)(1)). To state  
26 a claim for discrimination under ECOA, “a plaintiff must allege that: (1) she is a member  
27 of a protected class; (2) she applied for credit with defendants; (3) she qualified for credit;  
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1 and (4) she was denied credit despite being qualified.” *Harvey v. Bank of Am., N.A.*, 906  
2 F. Supp. 2d 982, 990-91 (N.D. Cal. 2012) (citations and internal quotation marks omitted).

3 In addition, “[w]hen a creditor takes an adverse action against an applicant without  
4 giving the required notice, the applicant may sue for a violation of ECOA.” *Schlegel*, 720  
5 F.3d at 1210 (citing 15 U.S.C. § 1691e). As “adverse action” under the ECOA is a:

6 denial or revocation of credit, a change in the terms of an existing credit  
7 arrangement, or a refusal to grant credit in substantially the amount or on  
8 substantially the terms requested. Such term does not include a refusal to  
9 extend additional credit under an existing credit arrangement where the  
10 applicant is delinquent or otherwise in default, or where such additional credit  
11 would exceed a previously established credit limit.

12 *Id.* (quoting 15 U.S.C. § 1691(d)(6)). Individual claims under the ECOA are subject to a  
13 five year statute of limitations. 15 U.S.C. § 1691e(f).

14 The complaint contains the conclusory allegation that “Defendants have exhibited  
15 and practiced pervasive discrimination against Hispanic and African-American [sic] as  
16 evidenced by” a 2009 letter from the Federal Trade Commission (“FTC”) regarding an  
17 investigation of Homecomings Financial. [Doc. No. 1 at ¶ 131; Doc. No. 1-2 at 23-24.]  
18 This FTC letter, however, makes no mention of Wilmington or any other Defendant.  
19 Moreover, the complaint does not make any allegations that Plaintiff is a member of a  
20 protective class who was denied credit despite being qualified. To the contrary, based on  
21 the allegations in the complaint, Plaintiff has been in default of his obligations under the  
22 Deed of Trust since at least 2010, indicating that Plaintiff was decidedly not qualified to  
23 receive any additional credit secured by the Property from Defendants. Further,  
24 considering that the FTC letter regarding Homecomings Financial was sent more than nine  
25 years before Plaintiff filed the complaint and that the default and foreclosure proceedings  
26 concerning the Property have been ongoing for almost as long, any claim Plaintiff could  
27 possibly assert under the ECOA is almost certainly time-barred. Finally, in addition to  
28 (and possibly because of) all the foregoing reasons, Plaintiff makes no argument in support  
of this claim in his opposition to the motion to dismiss, thereby waiving any argument as



1 to the adequacy of this claim. Accordingly, the claim for violation of the ECOA is  
2 dismissed.

### 3 **V. Supplemental Jurisdiction**

4 Having dismissed Plaintiff's federal claim, the Court's "decision of whether to  
5 exercise supplemental jurisdiction over the remaining state law claims 'is purely  
6 discretionary.'" *Couture v. Wells Fargo Bank, N.A.*, No. 11-CV-1096-IEG (CAB), 2011  
7 WL 3489955, at \*2 (S.D. Cal. Aug. 9, 2011) (quoting *Carlsbad Tech., Inc. v. HIF Bio, Inc.*,  
8 556 U.S. 635, 639 (2009)); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357  
9 (1988) ("We conclude that a district court has discretion to remand to state court a removed  
10 case involving pendent claims upon a proper determination that retaining jurisdiction over  
11 the case would be inappropriate."); *Holt v. First Franklin Fin. Corp.*, No. C 10-5929 SBA,  
12 2011 WL 4595195, \*4 (N.D. Cal. Sept. 30, 2011) ("When the federal claims that served as  
13 the basis for jurisdiction are eliminated, either through dismissal by the court or by a  
14 plaintiff amending his or her complaint, federal courts may decline to assert supplemental  
15 jurisdiction over the remaining state law causes of action.") (citing 28 U.S.C. § 1367(c)(3)).

16 Here, because the Court is dismissing the sole federal claim at the outset of the  
17 litigation, it is more appropriate to decline supplemental jurisdiction over the state law  
18 claims. *See Carnegie-Mellon*, 484 U.S. at 350 (holding that "when the federal-law claims  
19 have dropped out of the lawsuit in its early stages and only state-law claims remain, the  
20 federal court should decline the exercise of jurisdiction by dismissing the case without  
21 prejudice"); *see also Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) ("A  
22 district court 'may decline to exercise supplemental jurisdiction' if it 'has dismissed all  
23 claims over which it has original jurisdiction.'") (quoting 28 U.S.C. § 1367(c)(3)).

### 24 **VI. Leave to Amend**

25 In his opposition, Plaintiff requests leave to amend to assert common law fraud and  
26 RICO claims. Although the fraud claim will not cause the Court to reconsider its decision  
27 to decline to exercise supplemental subject matter jurisdiction, a federal RICO claim could  
28 give the Court federal question subject matter jurisdiction and warrant exercise of

1 supplemental jurisdiction over the state law claims. Further, although the Court is skeptical  
2 that any ECOA claim could survive dismissal, it is not impossible that Plaintiff could  
3 actually allege enough to state such a claim. However, because Plaintiff seeks to add  
4 entirely new claims and because Plaintiff's opposition brief does not specify any additional  
5 facts that he could allege to state these claims or to remedy the other defects outlined herein,  
6 he must file a motion for leave to amend pursuant to Federal Rule of Civil Procedure 15  
7 before amending his complaint. In addition to remedying defects in subject matter  
8 jurisdiction, any proposed amended complaint (which must be submitted with the motion  
9 for leave to amend), must also remedy the defects discussed above with respect to  
10 Plaintiff's standing. Specifically, it must contain allegations sufficient to demonstrate that  
11 Plaintiff brings this lawsuit on behalf of his bankruptcy estate and not as an individual.

## 12 **VII. Disposition**

13 For the foregoing reasons, it is hereby **ORDERED** as follows:

- 14 1. Plaintiff lacks standing to prosecute the claims asserted in the complaint as an  
15 individual, which is how the complaint is pled;
- 16 2. The Court does not have subject matter jurisdiction based on diversity as alleged  
17 in the complaint;
- 18 3. Wilmington's motion to dismiss for failure to state a claim is **GRANTED** as to  
19 the ninth claim for violation of the Equal Credit Opportunity Act, which is the  
20 only federal claim asserted in the complaint;
- 21 4. Even assuming Plaintiff has standing, in light of the dismissal of the lone federal  
22 claim, the Court declines to exercise supplemental jurisdiction over his state law  
23 claims, so the motion to dismiss is **DENIED AS MOOT** with respect to the  
24 remaining claims;
- 25 5. Defendants' motion to strike is also **DENIED AS MOOT**; and,
- 26 6. The complaint is **DISMISSED** in its entirety without prejudice to refileing the  
27 state law claims in state court. If Plaintiff wants to file an amended complaint in  
28 this court that would remedy the jurisdictional defects discussed herein, he must

1 file a motion for leave to amend that attaches clean and redlined versions of the  
2 proposed amended complaint (*see* CivLR 15.1.b), on or before **October 11, 2018**.  
3 If Plaintiff does not file a motion for leave to amend by this deadline, the Clerk  
4 of Court shall **CLOSE THIS CASE** without further order from the Court.

5 It is **SO ORDERED**.

6 Dated: September 28, 2018



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7 Hon. Cathy Ann Bencivengo  
8 United States District Judge  
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