

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:) Chapter 11
)
TWG CAPITAL, INC.,) Case No. 12-11019-BHL-11
)
Debtor.)

FIRST DAY MOTION OF DEBTOR FOR ENTRY OF AN ORDER (A) AUTHORIZING, BUT NOT REQUIRING, PAYMENT OF CERTAIN PRE-PETITION (i) WAGES, SALARIES, AND OTHER COMPENSATION, (ii) EMPLOYEE MEDICAL AND SIMILAR BENEFITS, (iii) REIMBURSABLE EMPLOYEE EXPENSES, AND (B) AUTHORIZING AND DIRECTING APPLICABLE BANKS AND OTHER FINANCIAL INSTITUTIONS TO RECEIVE, PROCESS, AND HONOR AND PAY ALL CHECKS PRESENTED FOR PAYMENT AND TO HONOR ALL ELECTRONIC PAYMENT REQUESTS MADE BY THE DEBTOR RELATED TO THE FOREGOING

TWG Capital, Inc. (the "Debtor"), the debtor and debtor in possession in the above-captioned Chapter 11 case (the "Chapter 11 Case"), files this motion (the "Employee Obligations Motion") for entry of a final order (a) authorizing but not directing the Debtor to honor obligations to current employees and pay (i) wages, salaries, and other compensation in an amount not to exceed the priority claim cap established in 11 U.S.C. § 507(a)(4), (ii) employee medical and similar benefits in an amount not to exceed the priority claim cap established in 11 U.S.C. § 507(a)(5), (iii) reimbursable employee expenses, within the directive of 11 U.S.C. § 1129(a)(9)(B); and (b) authorizing and directing applicable banks and other financial institutions to receive, process, honor and pay all checks presented for payment and to honor all electronic payment requests made by the Debtor relating to the foregoing. The proposed form of the order granting the Employee Obligations Motion is attached as Exhibit A.

In support of the Employee Obligations Motion, the Debtor relies on the Declaration of Mark P. Nondorf In Support Of Chapter 11 Petitions and First Day Motions [Doc.

No. 4] (the "Nondorf Declaration"), and may present additional evidence at the hearing on the Employee Obligations Motion.

JURISDICTION

1. On September 14, 2012 (the "Petition Date"), the Debtor filed with the United States Bankruptcy Court for the Southern District of Indiana, Indianapolis Division (the "Court"), its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. as amended (the "Bankruptcy Code") commencing the Debtor's Chapter 11 Case.

2. The Debtor continues to operate its business and manage its properties as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

3. No trustee or examiner has been appointed in the Chapter 11 Case.

4. This Court has jurisdiction to consider the Employee Obligations Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.

5. The statutory bases for the relief sought herein are Sections 105(a), 363(b)(1), 507(a)(4) and 507(a)(5) of the Bankruptcy Code.

6. The Employee Obligations Motion is a "First Day Motion" as defined and provided for under Rule B-9013-3 of the Local Rules of the United States Bankruptcy Court for the Southern District of Indiana ("S.D. Ind. B-9013-3").

7. Pursuant to S.D. Ind. B-9013-3, the Court shall schedule and conduct a hearing on a First Day Motion within two business days (if possible) of the filing of a First Day Motion.

BACKGROUND AND EVENTS LEADING TO FILING

8. As more fully set forth in the Nondorf Declaration, the Debtor is a specialty finance company that services the insurance industry. Insurance agents and agencies own predictable renewal commission rights on certain types of insurance policies ("Insurance Commission Receivables," commonly referred to in the industry as "ICRs") that generate significant cash flows over extended periods of time. The Debtor provides a range of products and services based on the value of the ICRs.

9. The Debtor's business consists of three primary segments. The Debtor's most significant line of business is providing liquidity to insurance agents and agencies by serving as an originator to special purpose vehicles ("SPVs") for the purchase of ICRs at a rate less than the expected value of their future cash flows. The Debtor earns origination fees for this service. Second, the Debtor services on behalf of SPVs and other parties ICR asset portfolios, using proprietary technology. The Debtor earns a servicing fee for this service. Finally, the Debtor's wholly owned subsidiary, IR Finance 1, LLC ("IR Finance") makes loans to insurance agencies and collateralizes the loans with future insurance commissions. The Debtor services the loan assets and insurance commission collateral on behalf of IR Finance.

10. On or around July 12, 2007, the Debtor entered into an origination and servicing contract with its wholly owned subsidiary, Insurance Receivables 7, LLC ("IR7"), whereby the Debtor would receive (i) an origination fee for purchases placed in IR7's debt facility and (ii) a servicing fee for monitoring and processing commission payments that were received under the purchases (the "IR7 Servicing Agreement"). On or around May 13, 2008, the Debtor, Inservico, Inc. ("Inservico") and other parties, including lenders to IR7 (the "IR7 Lenders") entered into that certain Back-Up Servicing Agreement (the "Back-Up Servicing Agreement"). On August 13, 2010, the

Debtor was terminated as the IR7 servicer and pursuant to the Back-Up Servicing Agreement, the IR7 Lenders purportedly appointed Inservico as successor to the Debtor as the servicer with respect to the IR7 Servicing Agreement. Inservico disputes any allegation that it has any obligations under the Back-Up Servicing Agreement or the IR7 Servicing Agreement. With reservation of Inservico's position, by that certain Subservicing Agreement between Inservico and the Debtor dated effective as of September 13, 2012, Inservico has subcontracted the servicing of IR7 to the Debtor. The origination and servicing fees from IR7 are currently the Debtor's primary source of revenue. Inservico is a 62.47% owner of the Debtor.

11. The prolonged impact of the financial crisis that hit in 2008 has impaired the performance of the Debtor's purchased asset portfolio, and the Debtor has sustained significant losses as a result. The financial crisis has also impacted the insurance industry as a whole, which caused the Debtor to experience lower than projected cash flows. The Debtor has also been required to sustain unexpected costs of litigation, including arbitration resulting from the Debtor's discovery of misrepresentations by the seller in the purchase of Medicare Supplemental policies (the "AIMC Arbitration"). During the AIMC Arbitration, the senior lenders on the IR7 debt facility declared an event of default that resulted in the immediate termination of new originations within the IR7 debt facility, thereby further impairing the Debtor's cash flow.

12. The Debtor has taken many measures to prevent the filing of the Chapter 11 Case. The Debtor has worked with investment bankers for over three years to develop and execute recapitalization strategies. However, traditional financing sources have been constrained, and the Debtor has been unable to raise sufficient capital to implement its business plan.

13. A more in depth discussion of the Debtor's business and the circumstances precipitating the filing of the Chapter 11 Case is set forth in the Nondorf Declaration, which is incorporated by reference herein.

RELIEF REQUESTED

14. By the Employee Obligations Motion, the Debtor requests that this Court enter an order authorizing, but not directing, the Debtor to pay or otherwise honor (i) prepetition wages, salaries, and commissions in an amount not to exceed the priority claim cap established in Section 507(a)(4) of the Bankruptcy Code, (ii) prepetition obligations arising under various employee benefit programs in an amount not to exceed the priority claim cap established in Section 507(a)(5) of the Bankruptcy Code, and (iii) reimbursable employee expenses (collectively, the "Employee Obligations"), owing to the Debtor's current employees (collectively, the "Employees") and to certain temporary personnel, as set forth in detail herein. The Debtor further seeks authority to continue various employee benefit programs (the "Employee Benefit Programs") in the ordinary course of business.

15. As part of the foregoing relief, the Debtor also seeks authorization to pay payroll-related taxes relating to prepetition periods including, but not limited to, all federal, state and local withholding taxes, social security taxes, unemployment taxes, and Medicare taxes, as well as other withholdings, such as 401(K) contributions and garnishments.

16. Finally, the Debtor requests the entry of an order (a) directing all banks to honor the Debtor's prepetition checks for payment of the Employee Obligations and (b) prohibiting banks from placing any holds on, or attempting to reverse, any automatic transfers to Employees' accounts for Employee Obligations.

A. TWG Capital, Inc.

17. As of the Petition Date, the Debtor employs six active Employees that provide a myriad of services. All of the Employees are full-time.¹ In the ordinary course of its business, the Debtor issues payroll checks to its Employees on a semi-monthly basis. The aggregate average gross semi-monthly payroll for the Debtor's employees is approximately \$28,000.

18. The Debtor also occasionally employs temporary personnel who provide necessary administrative services to the Debtor ("Temporary Personnel"). The aggregate average gross semi-monthly payroll for Temporary Personnel is approximately \$400. The services performed by the Temporary Personnel are vital to the efficient operation of the Debtor's business, and the Debtor's ability to pay any unpaid wages due to Temporary Personnel will help ensure that necessary assistance remains available to the Debtor.

1. Wages, Salaries and Commissions

19. As of the Petition Date, certain prepetition wages, salaries, commissions, overtime, holiday, other paid leave and/or other compensation (excluding vacation and severance pay) may have accrued during the most recent payment period, but were not paid (collectively, "Unpaid Compensation"). As of the Petition Date, there is approximately \$27,000 in Unpaid Compensation. Items of Unpaid Compensation were due and owing on the Petition Date because, among other things:

- (a) the Chapter 11 Case was filed during the Debtor's regular and customary salary and hourly wage payroll periods; and

¹ Full-time employees are defined as those Employees who are normally scheduled to work at least 40 hours per week.

- (b) Employees and Temporary Personnel may not have been paid all their salaries and wages for services previously performed on behalf of the Debtor.

20. Pursuant to the Employee Obligations Motion, the Debtor seeks to pay in the ordinary course of business, the outstanding amounts owed as of the Petition Date for Unpaid Compensation up to the priority claim cap established in Section 507(a)(4) of the Bankruptcy Code, including amounts that the Debtor is required by law to withhold from payroll checks in respect of federal, state and local income taxes, garnishments, social security and Medicare taxes.

2. Other Compensation, Withholdings and Reimbursable Employee Expenses

21. The Debtor provides its Employees other forms of usual and customary compensation, including vacation pay and paid holidays, as well as reimbursing certain necessary business expenses. These payments are usual, customary and necessary if the Debtor is to retain qualified Employees to operate its business.

22. Vacation and Paid Holidays. The Debtor offers paid vacation benefits and certain paid holidays to all Employees who have met their eligibility period ("Eligible Employees"). Under the Debtor's vacation policy, Eligible Employees are eligible for one to four weeks of paid vacation ("Vacation Time"). Vacation Time accrues on January 1 and July 1 of each calendar year. Vacation Time must be taken in the calendar year in which it is accrued. Employees who are terminated or who voluntarily separate may be entitled to a payout for accrued, unused Vacation Time.

23. The Debtor also provides its Eligible Employees with approximately nine paid holidays each year, including three floating holidays.

24. By the Employee Obligations Motion, the Debtor seeks authority but not direction to honor in the ordinary course of its business operations, the liabilities to its

Employees that arose under its vacation policies or practices prior to the Petition Date. The Debtor anticipates that its Employees will utilize any accrued Vacation Time in the ordinary course without resulting in any material cash flow requirements beyond the Debtor's normal payroll obligations.

25. Prepetition Reductions and Payments Withheld From Employee

Paychecks. The Debtor deducts from its Employees' paychecks (a) payroll taxes and the Employees' portion of FICA and unemployment taxes; (b) Employee contributions for medical, dental, and life insurance; (c) Employee contributions to the Debtor's 401(K) plan; (d) Employee contributions to the Debtor's medical flexible spending account, (e) legally ordered deductions such as wage garnishments, child support and tax levies; and (f) voluntary savings through savings bonds, credit unions or other financial institutions (collectively, the "Employee Deductions"). The Debtor forwards amounts equal to the Employee Deductions from its general operating account to appropriate third-party recipients. Due to the commencement of the Chapter 11 Case, these funds may have been deducted from Employee paychecks but may not have been forwarded to appropriate third-party recipients.

26. As of the Petition Date, the Debtor estimates that the unremitted Employee Deductions total approximately \$2,000.00. By the Employee Obligations Motion, the Debtor seeks authority to forward the Employee Deductions to the appropriate parties.

27. Expense Reimbursement. Before the Petition Date and in the ordinary course of its business, the Debtor reimbursed employees and directors for certain expenses incurred in the scope of their employment. As of the Petition Date, the Debtor estimates, based upon average monthly expenditures, that it owes approximately \$1,500.00 to Employees and/or directors consisting of prepetition expenses relating to, among other things, business-related

travel expenses, business meals, relocation allowances, phone costs, tuition reimbursement, membership in professional associations, seminars and other job-related training expenses, relocation/moving expenses, car expenses, mileage reimbursement, and miscellaneous business expenses (collectively, the "Reimbursable Employee Expenses").

28. All of the Reimbursable Employee Expenses were incurred on the Debtor's behalf, by Employees of the Debtor, and with the understanding on the part of the Employees that such expenses would be reimbursed. Accordingly, to avoid harm to the Employees, the Debtor seeks authority to pay the Reimbursable Employee Expenses to the Employees in the ordinary course of business, consistent with past practice.

3. Employee Benefits

29. Prior to the Petition Date and in the ordinary course of its business, the Debtor established various plans and policies to provide its Employees with certain employee benefits. Eligible Employees (and their spouses and eligible children) are eligible to participate in the Debtor's benefit plans. The benefit plans allow Eligible Employees the opportunity to make selections from options in the following benefit areas: medical, prescription drug, dental, life insurance, and other similar benefits (collectively, the "Employee Benefits"). The Employee Benefits are described below.

30. Health Benefits. An important element of the Employee Benefits is the availability of medical benefits. As with the Unpaid Compensation, the Employees and their families and dependents rely on the Debtor to provide continuing health care. Any failure to pay these amounts would be injurious to Employee welfare, morale and expectations.

31. Medical Insurance. Eligible Employees may choose a health plan for themselves and their families from the offerings of the Debtor's insurance carrier. The Debtor

and the Employees share in the premium payment with the Employees' share being deducted from their paychecks on a semi-monthly basis. The Debtor and the Employees' shares of the premium payments are remitted monthly to the insurance carrier.

32. Dental Insurance. Eligible Employees may choose a dental insurance plan for themselves and their families from the plans offered by the Debtor's insurance carrier. The premium payments are deducted from the Employees' paychecks on a semi-monthly basis and remitted monthly to the insurance carrier.

33. Life Insurance and Disability Benefits. The Debtor automatically provides basic life insurance and long-term disability benefits to Eligible Employees. The Debtor pays monthly premiums in the approximate amount of \$450. The aggregate amount payable by the Debtor for the premiums as of the Petition Date is approximately \$450. The Debtor requests authority to continue to pay these amounts in the ordinary course of business.

34. By the Employee Obligations Motion, the Debtor seeks authority to pay all amounts related to the Employee Benefits in the ordinary course of business in an amount not to exceed the priority claim cap established in Section 507(a)(5) of the Bankruptcy Code.

B. Workers' Compensation

35. All of the Debtor's workers' compensation benefits are covered under the Debtor's worker's compensation insurance program, which is insured by Zurich Insurance Group.

36. There are currently no known workers' compensation claims against the Debtor. To the extent that the Debtor learns of any workers' compensation claims that arose prior to the Petition Date, the Debtor seeks authority to pay and/or contest in good faith, as appropriate in the Debtor's business judgment, all amounts related to workers' compensation claims that

arose prior to the Petition Date, including without limitation, any payments to insurers required as a result of such claims.

C. Direction To Banks

37. Finally, the Debtor requests that all applicable banks and other financial institutions be authorized and directed to receive, process, honor and pay all checks presented for payment and to honor all funds transfer requests made by the Debtor related to Employee Obligations, whether such checks were presented or funds transfer requests were submitted prior to or after the Petition Date. Accordingly, checks other than those for Employee Obligations will not be honored inadvertently. Moreover, the Debtor represents that it has sufficient cash reserves, together with anticipated access to sufficient cash, to pay promptly all Employee Obligations, to the extent described herein, on an ongoing basis and in the ordinary course of its business. Nothing contained in the Employee Obligations Motion shall constitute a request for authority to assume any agreements, policies or procedures relating to Employee Obligations.

APPLICABLE AUTHORITY

38. Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code require that certain claims for prepetition wages, salaries, commissions, vacation, severance, sick leave, and employee benefit contributions be accorded priority in payment in an amount not to exceed \$11,725 for each employee. Because there are multiple payroll cycles, and because some amounts due Employees are unknown pending submission of claims, it would be administratively burdensome and highly impractical to pinpoint the exact prepetition amount owing to each individual Employee while still making timely payroll payments on the existing payroll schedule. The Debtor seeks authority to pay the Unpaid Compensation and the Employee Benefits in amounts not to exceed the \$11,725 priority cap set forth in Sections 507(a)(4) and

507(a)(5) of the Bankruptcy Code. As such, payment of the Unpaid Compensation and the Employee Benefits in the ordinary course of business should neither prejudice general unsecured creditors nor materially affect the Debtor's estate because Section 507(a)(4) and Section 507(a)(5) priority claims are already entitled to payment in full under a reorganization plan. See 11 U.S.C. § 1129(a)(9)(B).

39. Accordingly, granting the relief sought herein would only affect the timing, and not the amount, of payment of the Employee Obligations. Many Employees live from paycheck to paycheck and rely exclusively on receiving their full compensation or reimbursement of their expenses in order to continue to pay their daily living expenses. These Employees will be exposed to significant financial and health-related problems if the Debtor is not permitted to pay certain of the Employee Obligations. Moreover, the Debtor believes that if it does not honor its Employee Obligations, employee morale and loyalty will be jeopardized at a critical time. If the Debtor is not authorized to pay for Health Benefits, then many of the Debtor's Employees may not be reimbursed or otherwise have their Health Benefits claims paid. In addition, certain Employees may become primarily obligated for the payment of these claims in cases where health care providers have not been reimbursed and may face having health services terminated. The Debtor believes such uncertainty will cause significant anxiety at precisely the time the Debtor needs its Employees to perform their jobs at peak efficiency.

40. This Court and other courts have approved the payment of prepetition claims of employees for wages, salaries, expenses and benefits on the grounds that the payment of such claims were necessary to effectuate a successful reorganization. See, e.g., In re Willemsen Dairy LLC, Case No. 10-13036 (JKC) (Bankr. S.D. Ind. Sept. 2, 2010); In re Union Go-Dairy, LLC, Case No. 10-01175 (JKC) (Bankr. S.D. Ind. Feb. 10, 2010); In re: ATA Airlines,

Inc., 08-03675 (BHL) (Bankr. S.D. Ind. Apr. 4, 2008); In re: ATA Holdings Corp., 04-19866 (BHL) (Bankr. S.D. Ind. Oct. 26, 2004); In re American Commercial Lines, et al., 03-90305 (BHL) (Bankr. S.D. Ind. Feb. 6, 2003); In re Homelife Corp., Case No. 01-02412 (EIK) (Bankr. D. Del. July 18, 2001); In re HomePlace Stores, Inc., Case No. 98-00008 (PJW) (Bankr. D. Del. Jan. 17, 2001); In re AmeriServe Food Distribution, Inc., Case No. 00-00358 (PJW) (Bankr. D. Del. Feb. 2, 2000).

41. The Seventh Circuit Court of Appeals was the first federal appellate court to articulate the circumstances under which business debtors may be authorized to pay the prepetition claims of certain creditors. See In re Kmart Corp., 359 F.3d 866 (7th Cir. 2004). In the Kmart decision, the Seventh Circuit acknowledged the practical business utility of allowing corporate debtors limited authority to make such payments if the circumstances warrant.

42. The Court identified Section 363(b)(1) of the Code as the source of authority for such payments. Id. at 872–73. Section 363(b)(1) of the Code authorizes a bankruptcy court, after notice and a hearing, to authorize a debtor to "use, sell, or lease, other than in the ordinary course of business, property of the estate" The Court reasoned that "satisfaction of a pre-petition debt in order to keep 'critical' supplies [customers] flowing is a use of property other than in the ordinary course of administering an estate in bankruptcy," and thus is within the literal ambit of the statute's language. Id. at 872. The Court cautioned, however, that "it is prudent to read, and use, § 363(b)(1) to do the least damage possible to priorities established by contract and by other parts of the Bankruptcy Code." Id.

43. To that end, the Court articulated a dual-pronged requirement that business debtors must satisfy as a condition to honoring prepetition obligations. First, debtors must provide evidence that creditors whose claims are to be paid will cease dealing with the debtor if

not immediately paid for prepetition goods and services. Second, debtors must provide evidence that "the business will gain enough from continued transactions with the favored [creditors] to provide some residual benefit to the remaining . . . creditors, or at least leave them no worse off." Id. at 868.

44. The Debtor's request to honor the Employee Obligations satisfies these standards. First, as noted above, the Debtor seeks authority to pay the Unpaid Compensation and the Employee Benefits in an amount not to exceed the priority claim cap established in Sections 507(a)(4) and (a)(5) of the Bankruptcy Code.

45. Second, as established by the Nondorf Declaration, the Debtor believes that there is a significant risk that Employees whose Employee Obligations are not honored in the ordinary course of business may terminate their employment relationships with the Debtor. The continued service and dedication of the Employees is critical to the Debtor. In order to retain its Employees and maintain morale under difficult working conditions, and in order, therefore, to avoid jeopardizing the basic operation of its business, the Debtor needs the authority to pay or otherwise satisfy the Employee Obligations summarized above.

46. Third, as established by the Nondorf Declaration, the Debtor's creditors and the estate as a whole will be better off—will certainly be no worse off—if the Debtor is permitted to honor the Employee Obligations in the ordinary course of business. As the testimony in the Nondorf Declaration demonstrates, the Debtor's business and the Chapter 11 Case will be seriously undermined if Employees are not paid and if they, as a consequence, leave the Debtor's employment at this critical juncture. The Debtor has already released all nonessential Employees, and the Debtor simply cannot operate its business without the remaining

Employees. The continued support of the Debtor's Employees is essential to the successful reorganization during the Chapter 11 Case.

47. The Debtor also requests authority to pay the Employee Deductions to the appropriate parties. Employee Deductions principally represent employee earnings which Employees or in the case of garnishments, judicial authorities, have designated for deduction from Employee paychecks to be paid accordingly. The failure to pay these benefits could result in hardship to certain employees. The Debtor expects inquiries from garnishors regarding the Debtor's failure to submit, among other things, child support and alimony payments which are not the Debtor's property, but rather have been withheld from Employee paychecks. Moreover, if the Debtor cannot remit these amounts, the Debtor's Employees may face legal action due to the Debtor's failure to submit these payments. The Debtor's Employees are essential assets and critical to any successful reorganization. Deterioration in employee morale and welfare at this critical time undoubtedly would adversely impact the Debtor, the value of its estate, and ultimately, the Debtor's ability to reorganize.

48. The "fundamental purpose of reorganization is to prevent the debtor from going into liquidation, with an attendant loss of jobs." In re Northwest Airlines Corp., 349 B.R. 338, 356 (Bankr. S.D.N.Y. 2006) (quoting NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984)). Payment of the amounts requested in the Employee Obligations Motion is in the interest of all parties because such payment will facilitate the continued operation of the Debtor's business. See In re Lehigh and New England Ry. Co., 657 F.2d 570, 581 (3d. Cir. 1981); In re Just For Feet, Inc., 242 B.R. 821, 824–25 (Bankr. D. Del. 1999). Accordingly, the relief sought by the Employee Obligations Motion will allow the Debtor to continue to operate with minimal disruption and enable the Debtor to stabilize its business.

NOTICE

49. The Debtor has provided or will provide notice of the Employee Obligations Motion and the hearing thereon by telephone, telecopy, electronic mail, overnight delivery service, hand delivery, or regular mail, to (i) the office of the United States Trustee for the Southern District of Indiana; (ii) the Internal Revenue Service; (iii) the Debtor's twenty (20) largest general unsecured creditors; (iv) all secured Creditors; and (v) any party who has filed an appearance and served same on the Debtor prior to service.

NO PRIOR REQUEST

50. No previous request for the relief requested herein has been made to the Court in the Chapter 11 Case.

WHEREFORE, the Debtor respectfully requests that the Court immediately enter the order attached as Exhibit A granting the relief requested in the Employee Obligations Motion, and granting the Debtor all other proper relief.

Respectfully submitted,

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