

Terms of Use and Terms and Conditions

Faculty of Science Shared Research Equipment (ShaRE) has Terms of Use which applies to any Internal User within the University of Auckland that wishes to obtain services from ShaRE. For External Users, the Terms and Conditions apply.

An 'Internal User' is a person who is a member of a department or division of the University and excludes any person who is member of a department or division that is part of a legal entity separate from The University (including a wholly owned subsidiary of the University e.g. Auckland UniServices Limited).

For clarification, the Terms of Use apply only if you are an Internal user. If you are an internal user procuring the services for an external user, the Terms and Conditions apply. If you are an internal user that is otherwise receiving external funding to obtain the Services from ShaRE, the Terms and Conditions apply.

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Terms of use

1. APPLICABILITY OF TERMS

1.1 The Internal User will immediately disclose to ShaRE if any such circumstances arise (for example the Project subsequently receives funding from or is otherwise for an external party).

1.2 If ShaRE becomes aware that such circumstances have arisen (by disclosure by the Internal User or otherwise) ShaRE may terminate these Terms and require that the external party enter into a replacement Services Agreement.

2. PROJECT AND SERVICES

2.1 ShaRE will undertake the Project and perform the Services for the Internal User in accordance with these Terms.

2.2 ShaRE will use reasonable endeavours to undertake the Project and perform the Services within the targeted timeframes specified in the Schedule, or as otherwise specified by the ShaRE Centre Manager, using reasonable skill and care in undertaking the Project and performing the Services.

2.3 To enable ShaRE to undertake the Project and perform the Services, the Internal User will provide to ShaRE the materials and assistance described in the Schedule, and if nothing is set out in the Schedule, then as specified on the iLabs booking site, and otherwise as agreed by the ShaRE Centre Manager.

2.4 Except as otherwise agreed in writing, all materials supplied by the Internal User may be disposed of by ShaRE at the conclusion of delivery of the Services without reference back to the Internal User. The cost of disposal of the Internal User's samples may be charged to the Internal User.

2.5 ShaRE may at its discretion appoint sub-contractors to perform some or all of the Services.

2.6 Except as otherwise agreed in writing, all analytical data relating to the Project Results will be retained by ShaRE for a period of three months only and may then be deleted or otherwise destroyed by ShaRE at ShaRE's sole discretion.

2.7 The Internal User may, on application to the ShaRE Centre Manager, use ShaRE facilities provided that ShaRE is satisfied that the relevant person has received appropriate training and is sufficiently qualified. The Internal User will treat the ShaRE facilities with care and respect in a manner as if the facilities were their own and leave the facilities in a state that they were found. ShaRE reserves the right to charge the Internal User for any cleaning of the ShaRE equipment or facilities after the Internal User's use and for any wilful damage.

3. PAYMENT OF PROJECT COSTS

3.1 If the Project Costs are to be met through the internal re-allocation or transfer of departmental budget funding or grant funding from the Internal User to ShaRE, then "payment" of an amount shall be deemed to be made upon the completion of the transfer of that amount into ShaRE's departments' budget, as processed and recorded in the Peoplesoft management software system (or equivalent system, if applicable).

3.2 If the Project Costs are to be settled in cash using NZ\$, "payment" of an amount will be deemed to be made by the Internal User depositing that amount into a bank account nominated by ShaRE.

3.3 Unless otherwise set out in the Schedule, payment of the Project Costs (by the applicable method) shall be made no later than the 20th of the month following the date of the invoice.

4. INTELLECTUAL PROPERTY RIGHTS

4.1 Until full payment of the Project Costs has been made in accordance with clause 3, the Internal User may not use, copy, distribute or otherwise exploit the Project Results (including the Final Report or its contents) without first obtaining written consent from ShaRE.

4.2 The Internal User will have no right to use the Other Results or any Intellectual Property Rights in them.

4.3 ShaRE may use any know-how, method, process or technique known to ShaRE or its employees, students, agents and contractors at the Targeted Start Date ("Tools of Trade"). Any modification or improvement of such Tools of Trade developed during the course of the Project by ShaRE will form part of the Other Results.

4.4. The Internal User grants to ShaRE an irrevocable royalty-free, non-exclusive, transferable, sub licensable, worldwide license to use the Internal Users' Existing Material provided to ShaRE, for the purpose of undertaking the Project and performing the Services.

4.5 The Internal User will ensure that ShaRE receives acknowledgment in any publications which arise from or make reference to the Services or the Project IP.

5. SHARE WARRANTIES

5.1 ShaRE warrants and undertakes that it will use reasonable endeavours to ensure the accuracy of the Project Results, but makes no warranty, express or implied, as to accuracy and will not be held responsible for any consequence arising out of any inaccuracies or omissions.

5.2 Except as expressly provided in these Terms, ShaRE gives no warranties or representations in relation to the Services, Project or Results.

5.3 The Internal User acknowledges and agrees that the Project may produce unpredictable, inaccurate or uncertain Project Results, or Project Results that do not satisfy the Internal User's commercial objectives.

6. INTERNAL USER WARRANTIES

6.1 The Internal User warrants that:

- a) any material provided to ShaRE by the Internal User or by the Internal User's employees, agents or contractors for the Project has been prepared in accordance with all applicable laws, regulations, and government guidelines;
- b) it has obtained all necessary regulatory and ethical approvals, releases, waivers and consents required to enable ShaRE to lawfully and ethically complete the Project; and
- c) it has complied with all necessary sample transfer/shipping regulations and provided all necessary transfer/shipping paperwork in particular but not limited to, regulatory requirements such as transfer approvals.

6.2 ShaRE reserves the right to decline any sample(s) if there is any concern regarding the transfer approval.

7. LIABILITY

7.1 In no event will ShaRE be liable to the Internal User for any loss, damage, cost or expense of any kind suffered or incurred by the Internal User (whether directly or indirectly, or consequential or of a special nature) arising from or in connection with these Terms, the Services or the Project (other than a refund of some or all of the Project Costs if the Project does not commence).

8. CONFIDENTIALITY, PUBLICATION AND PUBLICITY

8.1 Neither party may use or disclose the Confidential Information of the other party except as expressly permitted under the Terms, or to the extent necessary to undertake the Project, perform the Services or exercise its rights under these Terms.

8.2 Each party will use all reasonable endeavours to ensure that it does not disclose the Confidential Information of the other party other than to employees, students, agents, contractors or subcontractors who need to know the information for the purposes of the Project and who are under obligations of confidentiality no less restrictive than the provisions of clause 8.1 and this 8.2.

8.3 Except as specified in clause 4.1, nothing in this clause 8 will prevent the Internal User from disclosing the Project Results or the Final Report to any other person. In addition, nothing in these Terms will prevent or limit ShaRE from using or disclosing the Other Results.

8.4 ShaRE will have the right to present at seminars, symposia, national or regional professional meetings, and to publish in journals, theses or dissertations, or otherwise of their own choosing, the Project Results, subject to written approval sought from the Internal User prior to any such disclosure. If the Internal User does not object to such disclosure within 15 working days of receipt of a request from ShaRE detailing the planned disclosure and requesting approval, ShaRE shall be free to disclose and will have no liability to the Internal User in respect of such disclosure.

8.5 Unless otherwise agreed by parties in writing, the Internal User grants ShaRE permission to use the Internal User's name in any publicity and promotional activities and materials relating to the Services.

9. TERM AND TERMINATION

9.1 These Terms will commence on the date that these Terms are signed and, unless earlier terminated pursuant to clauses 9.2 or 1.2, will terminate when both parties have fulfilled their respective obligations under these Terms.

9.2 Either party may terminate these Terms in writing at any time by giving the other party at least 5 business days' notice.

9.3 Upon termination of these Terms for any reason:

- a) ShaRE will immediately cease all work in relation to the Project;
- b) ShaRE will deliver up to the Internal User the Project Results, or any part of the Project Results that have been completed and paid for in full; and
- c) the Internal User will pay to ShaRE all Project Costs payable but unpaid as at the date of termination.

10. DEFINITIONS

10.1 In these Terms capitalised terms have the meanings assigned to them in the attached Schedule, and otherwise;

"Confidential Information" means all information, whether scientific, technological, or related to the trade or business operations of a party that is identified by the disclosing party as confidential, and any Project Results and Project IP in which that party owns the Intellectual Property Rights.

"Existing Material" means documentation, software, processes, inventions, methods and other materials that are provided by one party for use in the Project that are:

- a) owned by, or licensed by third parties to, either party before the Start Date; or
- b) developed independently from the Terms by either party or its third party licensors or suppliers;

"Intellectual Property Rights" means all industrial and intellectual property rights whether conferred by statute, at common law or in equity, including, but not limited to, all copyright and similar rights that may subsist in works or other subject matter, rights in relation to inventions (including all patents and patent applications), trade secrets and

know-how, rights in relation to designs (whether registerable), rights in relation to registered and unregistered trademarks, business names; and rights in relation to domain names;

"Other Results" means all Results that are not Project Results;

"Project IP" means the Intellectual Property Rights in the Project Results;

"Project Results" means the Results of the Project as set out in the Final Report;

"Results" means all results, outcomes, conclusions, products, discoveries, inventions, reports records, data, materials, research processes, research protocols, lab books, associated documents and research notes, memoranda and other writings and drawings, created, discovered, invented, reduced to practice or developed during or as a result of undertaking the Project or performing the Services.

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Terms and conditions

1. DEFINITIONS

In these Terms and Conditions: -

"Agreement" means the Schedule together with these Terms and Conditions;

"ShaRE" means Faculty of Science Shared Research Equipment, a centre of expertise within The University of Auckland;

"Client Party" means the Client named in the Schedule;

"Collaborator" means the ShaRE affiliated collaborator providing the Services named in the Schedule;

"End Date" means the end date specified in the Schedule;

"Existing Material" means documentation, software, processes, inventions, methods and other materials that are provided by one party for use in the Project that are:

- owned by, or licensed by third parties to, either party before the Start Date; or
- developed independently from the Agreement by either party or its third-party licensors or suppliers

"Final Report" means the final report described in the Schedule;

"Intellectual Property Rights" means all industrial and intellectual property rights whether conferred by statute, at common law or in equity, including, but not limited to, all copyright and similar rights that may subsist in works or other subject matter, rights in relation to inventions (including all patents and patent applications), trade secrets and know-how, rights in relation to designs (whether registerable), rights in relation to registered and unregistered trademarks, business names; and rights in relation to domain names;

"Other Results" means all results that are not Project Results;

"Project" means the project described in the Schedule;

"Project Costs" means the project costs specified in the Schedule;

"Project IP" means the Intellectual Property Rights in the Project Results;

"Project Results" means the Results that were specifically anticipated in terms of the Project, as more particularly described in the Schedule;

"Results" means all results, outcomes, conclusions, products, discoveries, inventions, reports records, data, materials, research processes, research protocols, lab books, associated documents and research notes, memoranda and other writings and drawings, created, discovered, invented, reduced to practice or developed during or as a result of undertaking the Project or performing the Services;

"Sample Value" means the value of each sample to be provided by the Client Party to ShaRE for the purposes of the Project, as specified in the Schedule;

"Schedule" means the schedule to which these Terms and Conditions are attached;

"Services" means the services described in the Schedule; and

"Start Date" means the start date specified in the Schedule.

2. PROJECT AND SERVICES

2.1 ShaRE agrees to undertake the Project and perform the Services for the Client Party in accordance with the Agreement.

2.2 ShaRE will use reasonable endeavours to undertake the Project and perform the Services within the timeframes specified in the Schedule, and in accordance with the appropriate standards applicable to work of the kind comprising the Project.

2.3 To enable ShaRE to undertake the Project and perform the Services, the Client Party will provide to ShaRE the materials and assistance described in the Schedule. The Parties agree that ShaRE can only undertake the Project subject to samples or libraries provided by the Client Party first passing ShaRE internal quality control tests. ShaRE will not be liable to the Client Party for any delay or failure in meeting any obligations under the Agreement to the extent such delay or failure is attributable to delay or failure by the Client Party in complying with its obligations under this Agreement.

2.4 Except as otherwise agreed in writing, all materials supplied by the Client Party may be disposed of by ShaRE at the conclusion of delivery of the Services without reference back to the Client Party. The cost of disposal of the Client Party's samples may be charged to the Client Party.

2.5 ShaRE may at its discretion appoint sub-contractors to perform some or all of the Services and except where the context otherwise requires, references in this agreement to ShaRE are deemed to include its duly appointed subcontractors.

2.6 Except as otherwise agreed in writing, all analytical data relating to the Project Results will be retained by ShaRE for a period of three months only and may then be deleted or otherwise destroyed by ShaRE at ShaRE's sole discretion.

3. PROJECT COSTS

3.1 The Client Party will pay to ShaRE the Project Costs. ShaRE will issue to the Client Party invoices for the Project Costs on the dates or on achievement of the milestones and amounts, specified or calculated in accordance with the Schedule. Invoices for the Project Costs will be delivered to the address for invoices specified in the Schedule.

3.2 The Client Party will pay ShaRE as per the Schedule. All invoices are to be paid by the Client Party by the 20th of the month following the date of the invoice.

3.3 All sums due to ShaRE under this Agreement:

are exclusive of any GST which, where applicable, will be payable by the Client Party to ShaRE in addition

will be paid in New Zealand dollars to the credit of a bank account to be designated in writing by ShaRE

will be paid in full without deduction or set-off of any kind, and

will be paid by the due date, failing which ShaRE may charge interest on any outstanding amount on a daily basis at an annual rate equivalent to the standard commercial overdraft interest rate charged by The University of Auckland's bankers plus 3%, calculated from the due date to the date of actual payment.

4. INTELLECTUAL PROPERTY RIGHTS

4.1 Despite any other provision of this clause 4 to the contrary, each party or its third-party licensors, suppliers or subcontractor(s) retains ownership of all Intellectual Property Rights in Existing Material.

4.2 Legal and beneficial ownership of the Project Results and Project IP (including copyright in the Final Report) will vest in the Client Party upon the Client Party paying the Project Costs in full. Until full payment has been made, the Client Party may not use, copy, distribute or otherwise exploit the Project Results (including the Final Report or its contents) without first obtaining written consent from ShaRE.

4.3 Following payment in full by the Client Party of the Project Costs in accordance with clause 4.2, ShaRE will assign to the Client Party absolutely all of ShaRE's rights, title and interest in or to the Project IP. The form of the assignment document will be prepared by the Client Party but must be in a form reasonably acceptable to ShaRE.

4.4 Legal and beneficial ownership of the Other Results will vest exclusively in ShaRE or in its subcontractor(s). The Client Party will have no claim over, and no right to use, the Other Results or any Intellectual Property Rights in them.

4.5 Nothing in this Agreement will prevent ShaRE or its employees, students, agents, contractors and subcontractors from using any know-how, method, process or technique known to ShaRE or its employees, students, agents and contractors at the Start Date ("**Tools of Trade**"). Any modification or improvement of such Tools of Trade developed during the course of the Project by ShaRE or its employees, students, agents, contractors or subcontractors will form part of the Other Results, unless such modification or improvement is expressly stated in the Schedule to form a part of the Project Results.

4.6. The Client Party grants to ShaRE an irrevocable royalty--free, non-- exclusive, transferable, sub licensable, worldwide license to use the Client Parties' Existing Material provided to ShaRE, for the purpose of undertaking the Project and performing the Services.

4.7 The Client Party will ensure that ShaRE (and where noted on the Schedule, ShaRE's subcontractor,) receives acknowledgment in any publications which arise from or make reference to the Services or the Project IP. In addition, where a subcontractor's personnel have made sufficient contribution to the Project Results, ShaRE may request that the subcontractor's personnel be acknowledged or named as authors according to

the usual standards of the research field, and such request will not be unreasonably refused by the Client Party.

5. SHARE WARRANTIES

5.1 ShaRE warrants and undertakes that:

- it will use reasonable skill and care in undertaking the Project and performing the Services; and
- the use and copying by the Client Party of the Final Report will not infringe the copyright of any third party.

5.2 No warranty or undertaking is given by ShaRE for any failure, defect or infringement arising from:

- any content or material supplied by the Client Party
- use, copying or distribution of the Project Results or Final Report in a manner not contemplated by ShaRE;
- any breach of the Agreement by the Client party; or
- any other act or omission of the Client Party not reasonably contemplated by ShaRE.

5.3 The Client Party acknowledges and agrees that the Project may produce unpredictable, or inaccurate or uncertain Project Results, or Project Results that do not satisfy the Client Party's commercial objectives.

5.4 ShaRE will use reasonable endeavours to ensure the accuracy of the Project Results, but makes no warranty, express or implied, as to accuracy and will not be held responsible for any consequence arising out of any inaccuracies or omissions unless such inaccuracies or omissions are the result of a wilful default on the part of ShaRE or its employees, students, agents, contractors or subcontractor(s).

5.5 The Client party acknowledges that, except as expressly provided in the Agreement, ShaRE gives no warranties or representations in relation to the Services, Project or Results, either express or implied, including but not limited to any implied warranties relating to quality, fitness for any particular purpose or ability to achieve a particular result.

6. CLIENT PARTY WARRANTIES

6.1 The Client Party warrants that:

- any material provided to ShaRE by the Client Party or by the Client Party's employees, agents or contractors for the Project has been prepared in accordance with all applicable laws, regulations, and government guidelines;

- it has obtained all necessary regulatory and ethical approvals, releases, waivers and consents required to enable ShaRE to lawfully and ethically complete the Project;
- it has complied with all necessary sample transfer/shipping regulations and provided all necessary transfer/shipping paperwork in particular but not limited to, regulatory requirements such as transfer approvals; and
- all personal information provided by it to ShaRE has been obtained and disclosed in accordance with the Privacy Act 1993, and that the use by ShaRE of such personal information for the Project will not breach the Privacy Act.

6.2 ShaRE reserves the right to decline any sample(s) if there is any concern regarding the transfer approval.

7. LIABILITY

7.1 In no event will ShaRE be liable (whether in contract, tort including negligence, or otherwise) to the Client Party for:

- any loss of revenue or profit, loss of anticipated savings, loss of goodwill or opportunity, loss of production, loss or corruption of data or wasted management or staff time; or
- any loss, damage, cost or expense of any kind whatsoever that is indirect, consequential, or of a special nature, arising directly or indirectly out of the Agreement, Project, Services, or Results.

7.2 Without limiting the effect of clause 7.1:

- the maximum liability of ShaRE to the Client Party arising directly or indirectly in respect of the Services being performed by ShaRE in relation to any sample provided by the Client Party will be strictly limited to the relevant Sample Value; and
- in no event will the total aggregate liability of ShaRE to the Client Party, arising directly or indirectly out of the Agreement, Project, Services, or Results exceed the Project Costs.

8. CONFIDENTIALITY, PUBLICATION AND PUBLICITY

8.1 Subject to the proviso below, each party's "Confidential

Information" shall comprise:

- all information, whether scientific, technological, or related to the trade or business operations of a party that is identified by the disclosing party as confidential; and
- any Project Results and Project IP in which that party owns the Intellectual Property Rights.

Confidential Information does not include information that:

- was, before the recipient party's receipt from the other party, in the recipient party's possession;
- is independently acquired or developed by the recipient party;
- is subsequently disclosed to the recipient party by a third party who has not derived it from the other party;
- is or becomes generally available to other public through no act or default of the recipient party; or
- is required to be disclosed by law.

8.2 Neither party may use or disclose the Confidential Information of the other party except as expressly permitted under the Agreement, or to the extent necessary to undertake the Project, perform the Services or exercise its rights under this Agreement. Each party's Confidential Information will include all information about the operations, business affairs, technologies and data of the party.

8.3 Each party will use all reasonable endeavours to ensure that it does not disclose the Confidential Information of the other party other than to employees, students, agents, contractors or subcontractors who need to know the information for the purposes of the Project and who are under obligations of confidentiality no less restrictive than the provisions of clause 8.2 and this 8.3.

8.4 Except as specified in clause 4.2 above, nothing in this clause 8 will prevent the Client Party from disclosing the Project Results or the Final Report to any other person. In addition, nothing in this Agreement will prevent or limit ShaRE from using or disclosing the Other Results.

8.5 ShaRE will have the right to present at seminars, symposia, national or regional professional meetings, and to publish in journals, theses or dissertations, or otherwise of their own choosing, the Project Results, subject to written approval sought from the Client Party prior to any such disclosure. If the Client Party does not object to such disclosure within 15 working days of receipt of a request from ShaRE detailing the planned disclosure and requesting approval, ShaRE shall be free to disclose and will have no liability to the Client Party in respect of such disclosure.

8.6 Unless otherwise agreed by parties in writing, the Client Party grants ShaRE permission to use the Client Party's name in any publicity and promotional activities and materials relating to the Services.

8.7 ShaRE agrees that the Client Party may use the publicity statement wording specific in the Schedule for label claims or product promotion.

8.8 Except as permitted in clauses 8.6 and 8.7, neither party may use the name of the other party, or of any member of the other party's staff, in any publicity, advertising, or news release in relation to the Project without the prior written approval of the other party.

9. TERM AND TERMINATION

9.1 This Agreement will commence on the Start Date and, unless earlier terminated pursuant to clause 9.2, 9.3 or 9.4, will terminate on the End Date.

9.2 Either party may immediately terminate this Agreement by giving written notice to the other party if the other party is in material breach of any provision of this Agreement and has failed to remedy the material breach within 30 days of receipt of written notice describing the material breach and calling for it to be remedied.

9.3 Either party may terminate this Agreement in writing at any time by giving the other party at least 15 business days' notice.

9.4 ShaRE may terminate this Agreement immediately by giving written notice to the Client Party if ShaRE is no longer able to complete the Project or perform the Services due to equipment failure or unavailability, or due to the appropriate staff or students no longer being available at ShaRE.

9.5 Upon termination of this Agreement for any reason:

- ShaRE and its Subcontractors will immediately cease all work in relation to the Project;
- ShaRE will deliver up to the Client Party the Project Results, or any part of the Project Results that have been completed and paid for in full;
- The Client Party will pay to ShaRE all Project Costs outstanding to ShaRE as at the date of termination;
- If the Project has not been completed, the Client Party will also pay to ShaRE a proportion of the Project Costs that would have been charged had the Project been completed, such proportion to fairly reflect the amount of the Project actually completed, as reasonably determined by ShaRE;
- The provision of clauses 3 to 8, 9.5 and 11 will remain in full force and effect; and
- Subject to this clause 9.5, and except for any accrued rights, neither party will be under any further obligation to the other party.

10. DISPUTE RESOLUTION

10.1 The parties will in good faith try to resolve any dispute arising from or otherwise in relation to this Agreement. If the dispute is not resolved within twenty days from the date the dispute was advised by one party to the other in writing, the parties agree to

refer the matter in dispute to a mutually acceptable independent adjudicator whose decision shall be final and binding on both parties. This clause 10.1 does not prevent a party from seeking an urgent interim remedy from the Courts of New Zealand.

11. GENERAL

11.1 ShaRE or its subcontractor(s) will not be liable to the Client Party for any breach or failure to perform any of its obligations under this Agreement where such breach or failure is caused by anything beyond ShaRE's reasonable control, including (without limitation) war, civil commotion, hostility, act of terrorism, strike, lockout, other industrial act, weather phenomenon or other act of God, governmental regulation or direction.

11.2 No amendment, variation or modification to this Agreement will be effective unless it is in writing and has been signed by duly authorized representatives of both parties.

11.3 Neither party may sell, assign, transfer, novate, charge, pledge or otherwise encumber this Agreement, or any of its rights or obligations under this Agreement, without first obtaining the written consent of the other party. The other party may not unreasonably or arbitrarily withhold or delay such consent.

11.4 ShaRE may at its discretion appoint subcontractors to perform some or all of the Services.

11.5 No failure or delay by either party to exercise any right or remedy under this Agreement will be treated as a waiver of such right or remedy. No single or partial exercise or any right or remedy will prevent the further exercise of such right or remedy.

11.6 This Agreement contains the whole of the contract and understanding between the parties relating to the matters covered by it. This Agreement supersedes all prior representations, agreements, statement and understanding between parties relating to those matters covered, whether verbal or in writing.

11.7 New Zealand law governs the formation, validity, construction and performance of this Agreement. Subject to clause 10.1, this Agreement is subject to the non-exclusive jurisdiction of the New Zealand courts, and the parties submit to that jurisdiction.

11.8 The parties may sign this Agreement in any number of counterparts (including facsimile copies). All counterparts, when taken together, will constitute one and the same agreement. A party may enter into this Agreement by signing any counterpart.

11.9 Each party agrees to execute, acknowledge and deliver all instruments, make all applications and do all things, as may be necessary or appropriate to carry out the purposes and intent of this Agreement.

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