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June 16, 2006

Office of General Counsel
Federal Election Commission
999 E. St., NW
Washington, DC 20463

Re: MUR 5732 (Massachusetts Democratic State Committee-Federal and Mary Jane Powell, Treasurer)

Dear Madam or Sir:

On behalf of the Massachusetts Democratic State Committee-Federal and Mary Jane Powell, Treasurer,[1] I respectfully submit the following response to the complaint in the above-captioned matter. The complaint was filed with the Federal Election Commission (hereinafter "FEC" or "Commission") on or about April 17th, 2006, by the Republican state parties of Hawaii and Rhode Island.[2] The assertions in the complaint stem from several newspaper stories regarding contributions made by certain Democratic state parties to the U.S. Senate campaign of Rhode Island Secretary of State Matt Brown.

Introduction

The Commission should be very hesitant to accept any factual or legal assertions appearing in newspaper accounts or sketchy allegations presented by competitor political parties. As will be demonstrated hereafter, the persons actually involved in the relevant transactions of the Massachusetts Democratic Party (MDP) or Massachusetts Democratic State Committee-Federal (MDSCF or "the Committee") present a different picture. Further, through the MDP

[1] According to the Commission's Treasurer Policy issued January 3, 2005, 70 Fed. Reg. 3, Ms. Powell has been named in her official capacity only. This, apparently, is standard procedure in all complaint matters where a political committee is named. It provides the Commission with an individual to serve with notice in the proceeding and does not suggest any personal liability on the part of Ms. Powell. *Id.* at 4.

[2] The Commission granted Respondents an extension until June 20, 2006, to file a response.

Executive Director, they are presenting a declaration under penalty of perjury regarding what happened, and what did not happen.

Also, the Commission should take into account the fact that the candidate who was the primary target of the insinuations in this matter decided to withdraw from the race and refund any contributions that had been questioned in any way. There is no justification for using significant government resources to further examine a matter that will have no impact on the political process. The declared facts demonstrate that no violation occurred, and fairness warrants a prompt dismissal of the complaint.

There was no violation of any laws

The heart of the complaint is a suggestion that certain donors to MDSCF made "earmarked" contributions that should be treated as if they were for the Matt Brown senatorial campaign. Although the complaint is not specific, MDSCF would be implicated for not reporting the receipt and disbursement of such funds as earmarked contributions. If the earmarking theory fails, the complaint suggests that the donors had "knowledge" that their funds would be contributed to the Matt Brown campaign and that such donors maintained "control" over their contributions to MDSCF. Presumably, there is no potential liability for MDSCF if only this second theory is at issue. Nonetheless, in order to help protect the interests of MDP donors, the second theory also will be addressed.[3]

A. The current state of the law.

As the Commission is well aware, there is a big difference between what donors may think is a possibility, and what they in fact do or know. The law recognizes this basic distinction so that donors and recipients are not caught up in campaign finance allegations where there is no "earmarking," or "knowledge" and "control." Even though a donor to a committee may think there is a possibility some of the funds donated will facilitate the ability of the recipient to support a particular candidate, such generalized thought does not trigger the relevant legal rules.

Further, the Commission is fully cognizant that it must not stray from existing legal bounds into areas that properly are not regulated. It would be a great sea change in national politics if persons supporting a candidate suddenly were not free to ask a party committee for support and offer at the same time to help raise funds for that party committee.

Under the law a donor may only contribute $2,100 per election to a federal candidate.

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[3] All contributions to and by MDP or MDSCF were within applicable limits. Further, all contributions to and by MDP or MDSCF were reported exactly as they happened—with full disclosure of the dates, amounts, and identification of donors. The names of donors were not hidden in any fashion, and the public record reflects precisely the information MDP and MDSCF had available.

2 U.S.C. 441a(a)(1)(A).[4] A contribution of $10,000 per year may be contributed to a party committee federal account. 2 U.S.C. 441a(a)(1)(D). Contributions that are "earmarked or otherwise directed through an intermediary" are considered contributions from the original donor to the candidate. 2 U.S.C. 441a(a)(8). FEC regulations clarify that "earmarked" means "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any party of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 CFR 110.6(b). On many occasions, though, the Commission has indicated that the evidence of earmarking must be clear.

For example, in MUR 4831/5274 involving allegations that several contributions to the Missouri Democratic State Committee were actually earmarked for the U.S. Senate campaign of Jeremiah "Jay" Nixon, the FEC only pursued transactions where there was clear documented evidence of acts by donors that resulted in their funds being used by the recipient committee for expenditures on behalf of the Nixon campaign. The documented evidence consisted of, for example, contributor checks with memo lines indicating, "Nixon," "Nixon-Win," "J. Nixon Fund," "Jay Nixon Campaign Contribution," and "Nixon, not for Skelton or Danner." The Commission rejected applying earmarking rules to donations to the party committee that merely stemmed from a party solicitation suggesting support for Nixon, that merely contained notations by party workers, or that merely coincided roughly with support provided to the Nixon campaign. *See*, e.g., MUR 4831/5274 Statement of Reasons of Vice Chairman Bradley A. Smith and Commissioner Michael E. Toner dated December 1, 2003.

Similarly, in MUR 5520 the FEC rejected allegations of earmarking by the committee of Rep. Tauzin through the Republican Party of Louisiana for the benefit of the Congressman's son who was campaigning for his father's seat. Though a newspaper article referred to "winking and nodding," the evidence provided by persons involved in the relevant transactions indicated that the news story reference was taken out of context and that there was no designation or instruction by the donor. Moreover, any alleged correlation between the timing of the supposedly earmarked funds and the party support provided to the candidate was not deemed strong enough to warrant Commission intrusion. *See* First General Counsel's Report in MUR 5520 dated May 31, 2005, pp. 6-9.

The FEC has rejected allegations of earmarking based only on circumstantial suggestion in several other cases as well. *See* dispositions in MUR 5445 (allegation of earmarking through several PACs for benefit of Geoffrey Davis for Congress dismissed); MUR 4538 (allegation of earmarking of contributions raised by Rep. Archer for the Alabama State Republican Party ostensibly for benefit of his son-in-law running for Congress dismissed); MUR 5125 (allegation of earmarking through the Indiana Democratic Party for the benefit of House candidate Dr. Paul Perry dismissed). *See also* dispositions in cases involving the analogous theory of routing non-federal campaign committee funds through intermediaries for the ultimate benefit of a federal campaign committee: MUR 5406 (allegation of routing funds through local Democratic party committees for benefit of Hynes for Senate campaign dismissed); MUR 5304 (allegation of

[4] Due to indexing for inflation, the limits currently do not track with the statutory language. *See* http://www.fec.gov/ans/answers_general.shtml#How_much_can_I_contribute.

routing funds through various non-federal candidate committees for benefit of Cardoza for Congress dismissed); MUR 4974 (allegation of routing funds through various candidate committees for benefit of Tiberi for Congress dismissed); MUR 5114 (allegation of routing funds through Democratic party-related groups for benefit of Friends of Jim Maloney dismissed). The common factor in most of these cases is a complaint based only on suggestion that is countered by clear, fact-based explanations by those involved in the activity at issue.[5]

As for the complainants' other theory, the regulation at issue, 11 CFR 110.1(h), provides:

[5] As noted, in MUR 4831/5274 (Nixon), the FEC did treat a limited number of transactions as "earmarked." In other cases where the FEC has done this, the evidence also was relatively clear that the donors had themselves provided to the recipient committee designations or instructions that the contributions in question were to be used to support a particular candidate, and there was some indication the recipient had followed through with such support. In MUR 2632 (Idaho State Democratic Party et al.), the FEC treated two contribution situations as earmarking. The cover letter in one instance contained a notation by the donor: "We are pleased to enclose a check for $2,500 to help in the election of John Evans to the United States Senate." The check in the other instance read: "Gov. John Evans – Senate Campaign." General Counsel's Report dated July 10, 1990, pp. 4, 8. As will be shown, *infra*, the facts clearly are different in the case at hand. There simply is no evidence of such donor designations or instructions.

In MUR 3620, the FEC made preliminary findings and then entered a conciliation agreement with the Democratic Senatorial Campaign Committee on the theory that some unknown percentage of donations received pursuant to "tally program" solicitations involved earmarking. The solicitations indeed contained strong suggestions that donated funds would help specific Senate campaigns. Examples include phrases like, "For those of you who have already maxed out to my campaign, the DSCC tally is an avenue through which you can offer more support;" "You can tally your [DSCC] membership to ['s] campaign. This means that those dollars will go to ['s] effort;" and "I must raise an additional $4 million over the next few weeks. . . . If you and [ ] have any room to make additional federal contributions, I would be grateful if you could tally money to the DSCC for this effort to defeat [my opponent]." Conciliation Agreement dated August 21, 1995, pp. 4-6. Because this case was resolved with an accommodation that "some percentage of contributors who responded to these 'tally' solicitations earmarked their contributions to the DSCC on behalf of a particular candidate," *id.*at p. 6, it is not clear what actually was done by donors that constituted earmarking. What is most significant is that the overall tally program was found appropriate. Thus, as long as it was made clear in subsequent solicitations for the DSCC that earmarked contributions would be returned and that any DSCC decisions about which candidates to support would be made based on many factors, there would be no earmarking problem. Candidates could even urge that donors "tally" their contributions for their own potential benefit, and donors could even follow through with such "tally" suggestions. This again reflects the FEC's decision to allow generalized thoughts on the part of donors, recipients, and candidates about how contributions *may* be used to remain free from regulation. As will be demonstrated, there was nothing as far reaching as the tally system involved in the facts at hand.

A person may contribute to a candidate or his or her authorized committee with respect to a particular election and also contribute to a political committee which has supported, or anticipates supporting, the same candidate in the same election, as long as—
(1) The political committee is not the candidate's principal campaign committee or other authorized political committee or a single candidate committee;
(2) The contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election; and
(3) The contributor does not retain control over the funds.

The purpose of this regulation is to assure aggregation of contributions made to non-authorized committees with contributions made to a candidate under certain conditions. 52 Fed. Reg. 765 (Jan. 9, 1987). The use of the conjunctive term "and" means that all three elements must be satisfied.

This regulation raises vagueness concerns if used as a proscription, since it grants permission to make a contribution under certain conditions, but technically does not prohibit any type of contribution. It indicates what a person "may" do, but doesn't contain language saying what may not be done. Moreover, the regulation should not be read as a prohibition because it might thereby proscribe what is plainly legal. Specifically, a person could not be prohibited from contributing $1,000 to a candidate and then contributing another $1,000 to a controlled PAC with an assurance from PAC officials that the funds would be expended on behalf of the same candidate.

Vagueness and drafting concerns aside, the Commission over the years has interpreted this provision in a common sense way to prevent over-regulating normal, everyday contribution activity. First, the Commission has only applied the regulation where a potential excessive contribution situation exists. Second, it has required clear evidence that a donor gave funds to a non-authorized committee with actual knowledge that a substantial portion of the donor's own funds will in fact be used to support a particular candidate; a generalized sense that the funds may somehow help the recipient who may somehow help a candidate is not sufficient to trigger the regulation. Third, the Commission has required that the donor have sufficient influence over the non-authorized committee so that the element of control over the funds clearly can be substantiated.

In MUR 5445 involving assertions that an individual had contributed to several PACs in order to generate more campaign support for the House campaign of Geoffrey Davis, the FEC declined to apply 11 CFR 110.1(h). Even though the individual "acknowledged that it was not unforeseen that the respondent PACs would contribute to the 2004 Davis Committee," the Commission found the evidence of "knowledge" lacking. MUR 5445 First General Counsel's Report dated Feb. 2, 2005, p. 12. Moreover, the Commission noted that the individual in question specifically denied having control over the funds provided to the PACs and explained that the PACs had complete control. *Id.*

The Commission similarly rejected allegations in MUR 5305 that an individual made an excessive contribution to Herrera for Congress by virtue of a contribution to the Free Cuba PAC. The FEC accepted at face value the flat denials by the individual and the PAC of any

conversations, orchestration, or instructions regarding the use of the funds contributed to the PAC. In addition, the FEC observed the individual's assertion in response that he had no control over the PAC or how it used its funds. The "inferences" in the complaint were found insufficient to warrant FEC intervention based on 11 CFR 110.1(h). MUR 5305 First General Counsel's Report dated Jan. 16, 2004, p. 9.

In MUR 5019 involving a claim that several individuals contributed to Keystone PAC to generate contributions in turn to two federal campaigns, the Commission also rejected application of 11 CFR 110.1(h). Of most significance was the Commission's statement that "although the contributors were likely aware that the Keystone Federal PAC would contemporaneously contribute to the Porter and Ensign Committees, it does not appear that the contributors knew that a portion of *their own contributions* would be given to a specified candidate [italics in original]." MUR 5019 First General Counsel's Report dated Feb. 5, 2001, pp. 27, 28.

To summarize, then, both the earmarking theory and the 11 CFR 110.1(h) theory have been interpreted by the Commission as requiring more than newspaper-based assertions or circumstantial inferences where the parties involved provide clear denials of the elements of a violation. Moreover, the earmarking test requires clear evidence of some sort of direction being conveyed by the donor to the recipient committee, and 11 CFR 110.1(h) requires clear evidence that a donor had both "knowledge" and "control." In neither case is the law triggered by some generalized perception that funds donated *might* in some way facilitate support of a candidate.

B. The facts do not support application of earmarking or 110.1(h) rules.

Contrary to the implications in the complaint, MDP and MDSCF received no designation or instruction from any donor that funds were to be routed to any particular candidate, provided no basis for any donor to "know" that the donor's funds would be contributed to a particular candidate, and ceded no "control" to a donor regarding any decision to use funds to support a particular candidate. The MDP and MDSCF properly reported these receipts based on the information they had.

The complaint and related news stories contain suggestions that Mr. John M. Connors, Mr. Richard Bready, Mr. David Messer, and Ms. Barbara Duberstein may have contributed to MDP or MDSCF in a way that would trigger application of the earmarking rule or 11 CFR 110.1(h). As the attached declaration demonstrates, this did not occur. None of the conditions carefully crafted by the Commission are satisfied in this case.

First, as to earmarking, the MDP Executive Director, Susan Thomson, avers that nothing was conveyed by the donors at issue to MDP or MDSCF that would constitute a designation or instruction resulting in a contribution being made to the Matt Brown Senate campaign. Second, as to 11 CFR 110.1(h), she avers that there was no representation by MDP or MDSCF that would provide "knowledge" to any donor that his or her funds would be used to support the Matt

Brown campaign, and no donor had "control" over MDP or MDSCF to assure that any funds would be so used.[6]

Ms. Thomson, explains that there was no communication whatsoever with any of the donors in this matter. Ms. Thomson has conducted a thorough search for any indication of earmarking by any of the donors reportedly involved, and has found no such evidence. Indeed, as to one individual mentioned in the complaint, Mr. Connors, the donation to MDSCF appears to have no potential connection whatsoever with the Matt Brown Senate campaign. This demonstrates the imprudence of relying on the complaint's allegations.

Because (1) there was absolutely no communication with the donors, (2) there is no evidence of designation or instruction by the donors or anyone acting on their behalf, (3) there is no evidence of anyone providing any donors or anyone acting on their behalf with any representation that would result in "knowledge" about how their funds would be used, and (4) there is no evidence that any donors had "control" over the funds given to MDP or MDSCF, there can be no finding of any "earmarking" that caused the MDSCF contribution to the Brown campaign, and there can be no finding of "knowledge" or "control" on the part of the donors that would trigger 11 CFR 110.1(h).

The MDP is a very active state party committee that receives many contributions and makes many contributions over the course of any election cycle.[7] Yet, because the use of contribution dollars to support particular candidates generates a great deal of scrutiny, the Party is very careful not to accept or make any commitments or representations that would lead to an earmarking or 11 CFR 110.1(h) determination.

It is not unusual or unexpected that persons seeking support of a particular candidate might urge a state party to provide a contribution and also seek to encourage donors to give to that party. This is part of the everyday role of candidate supporters and party committees. Stripped of any evidence of earmarking or 11 CFR 110.1(h) activity, this is all that the press reports in the complaint suggest happened.

Whatever the Matt Brown campaign may have conveyed to any of the donors mentioned in the press stories, no "designation, instruction, or encumbrance" came from these donors to MDP or MDSCF. Nothing was conveyed to them or others by MDP or MDSCF that would give them "knowledge" their funds would be contributed to the Brown campaign. Certainly, no

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[6] It should be noted that the contributions or donations from individuals apparently solicited by representatives of the Brown campaign came in *after* the December 29, 2005 MDSCF contribution to the Brown Senate campaign. Since 11 CFR 110.1(h)(2) requires that a donor know that his or her own contribution "will be" contributed to or expended on behalf of a candidate, its application is untenable under the facts at hand.

[7] When the $10,000 Connors contribution came in on November 16, 2005, the Party was in the midst of a filing period that involved federal receipts of $213,940.17. *See* MDSCF 2005 Year End Report, available at www.fec.gov. Thus far in the year when the $5,000 January 5, 2006, Bready contribution came in, the Party has had federal receipts of $230,206.99. *See* MDSCF 2006 May Monthly Report, available at www.fec.gov.

"control" was ceded by MDP or MDSCF to these individuals regarding the use of their contributions. In accordance with Commission precedent outlined above, the declared facts completely rebut the suggestions contained in the news stories upon which the complaint is based.[8]

Conclusion

The foregoing demonstrates that the Commission should promptly dismiss this matter. As it has in other cases where a complaint's assertions have been met with clear, declared evidence by those involved that no earmarking or 11 CFR 110.1(h) rules have been implicated, the Commission should determine there is no reason to believe a violation of any kind has been committed by MDP or MDSCF and Treasurer Mary Jane Powell. In light of the fact that the candidate involved withdrew from the race and returned all contributions received from the various parties—and the fact that donors received refunds as well—this result is particularly justified.

6-16-06
Date

Robert Crowley LeBlanc
Counsel for Respondents

Attachment:
-- Declaration of Susan Thomson

[8] Even if a representative of the Matt Brown campaign gave an assurance of some sort about trying to raise funds for a party committee while soliciting a contribution, there is simply no legal consequence for such actions. The Commission has wisely narrowed the reach of the earmarking and 110.1(h) rules to allow such activity since it only reflects, at most, the normal role of campaigns, party committees, and donors.

The Commission also has shown restraint when dealing with other situations that might seem to implicate the contribution limits. For example, in MUR 4783, when presented with circumstances suggesting a candidate's operatives made arrangements with other political committees to have their donors make contributions to the candidate's campaign with an understanding that a prior donor to the candidate's campaign would in turn make contributions to those other political committees, the Commission indicated this arrangement would not pose any legal concerns. *See* MUR 4783 First General Counsel's Report dated June 16, 1999, pp. 29-32.

FEDERAL ELECTION COMMISSION
Office of General Counsel
999 E Street, NW
Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL
Please use one form for each Respondent/Witness
FAX (202) 219-3923

MUR: 5732

COUNSEL: Robert Crowley LeBlanc

FIRM: Law Firm of

ADDRESS: 2 Gaythorne Rd, Methuen, MA 01844

TELEPHONE - OFFICE: (978) 685-9742

FAX: 978) 327-5329

The above-named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

6.15.06
Date

Mary Jane Powell
Signature

Treasurer
Title

RESPONDENT/WITNESS NAME (PRINT): Massachusetts Democratic State Com - Fed.

MAILING ADDRESS: 50 Roland Street Suite 203
Boston, MA 02129

TELEPHONE – HOME: (___)

OFFICE: (617) 776-2676

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation

Rev. 2004

Before the Federal Election Commission

Matter Under Review 5732

Declaration Under Penalty of Perjury of Susan Thomson

1. My name is Susan Thomson. I serve as Executive Director of the Massachusetts Democratic Party (MDP).

2. I have reviewed the complaint in MUR 5732 and the related newspaper stories on which it is based. I have conducted a review of whatever MDP records I could find that might relate to this matter and have spoken with MDP officials and staff.

3. It is my understanding that the Federal Election Commission analysis will turn on whether there was any "earmarking" of contributions to MDP or whether MDP did anything to give any donor a basis for "knowing" that his or her funds would be used to support a particular candidate or in any way gave "control" to any donor over funds contributed to MDP.

4. With respect to any names mentioned in the complaint or related news stories, I have found no evidence whatsoever that any donors to MDP—either its federal account or nonfederal account—provided any designation, instruction, or encumbrance that resulted in any contribution being made to the Matt Brown Senate campaign.

5. The only indication of a named donor's particular wish I have found relates to a notation on the check received from Mr. David Messer. It merely indicates that the donation is for the nonfederal account of MDP. A copy is attached. This donation was deposited into the nonfederal account of MDP.

6. I have found no evidence whatsoever that anyone at MDP made any representation to anyone that would give any donor at issue a basis for knowing that any funds contributed would be contributed to or expended on behalf of a particular candidate.

7. I have found no evidence whatsoever that any donor retained any control over funds contributed.

8. I have found no evidence whatsoever that anyone at MDP had any contact at all with any of the donors mentioned in the complaint or related news stories.

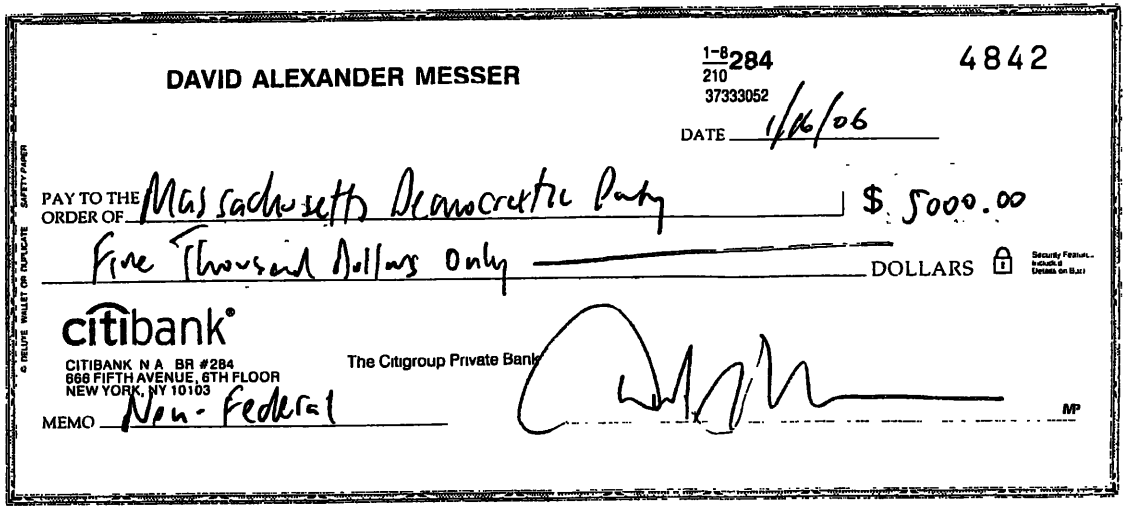
9. As the press inquiry developed, a decision was made to return any funds that may have been related in any way to reported solicitations by representatives of the Brown campaign. On March 3, 2006, MDP issued a $5,000 refund check to Mr. Richard Bready, issued a $5,000 refund check to Mr. David Messer, and returned a non-deposited check to Ms. Barbara Duberstein (it had the same address as that of Mr. Messer).

10. Because the complaint in this matter mentioned contributions to MDP from Mr. John Connors, I attempted to ascertain any relevant information. He is a regular contributor to MDP. My understanding is that he was solicited for his 2005 contribution to the Massachusetts Democratic Party Committee-Federal by someone with no relationship whatsoever to the Matt Brown Senate campaign.

This Declaration is submitted in accordance with 28 U.S.C. 1746. I declare under penalty of perjury that the foregoing is true and correct. Executed on June 16, 2006.

Susan Thomson

Susan Thomson, Executive Director
Massachusetts Democratic Party



DAVID ALEXANDER MESSER

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DATE 1/26/06

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