S172684

IN THE

SUPREME COURT OF CALIFORNIA

DANA BRUNS,

Plaintiff and Appellant,

vs.

E-COMMERCE EXCHANGE, INC., ET AL.,

Defendants and Respondents

After A Decision By The Court Of Appeal, Second Appellate District, Division Five
Case No. B201952

ANSWER TO PETITION FOR REVIEW

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Service on the California Attorney General and the Orange County District Attorney required by Bus. & Prof. Code §17209.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Rules of Court

Other Authority

S172684

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INTRODUCTION

This is a putative class action which seeks relief from businesses which engage in the unlawful pattern and practice of sending unsolicited advertisements to telephone facsimile machines. This pattern and practice violates the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. §227(b)(1)(C). Plaintiff-Appellant, Dana Bruns, is the recipient of unsolicited advertisements which were faxed to her by Defendants-Respondents.

On May 14, 2007, the trial court granted motions which were brought by Defendants-Respondents under *Code of Civil Procedure* §§583.310, 583.340 and 583.360 to dismiss this lawsuit. (Appellant's Appendix page 936) On June 26, 2007, the final

judgment on Plaintiff-Appellant's claims was entered. (AA 969)

The petition for review in this unremarkable appeal challenges the reversal of the trial court's dismissal order/judgment of dismissal.

Seven stays of prosecution were imposed in this lawsuit. Three were complete stays of prosecution; the remainder were partial stays of prosecution. In calculating the 5-year dismissal period, the trial court excluded the time periods during which there were complete stays of prosecution, but included the periods during which prosecution of the action was partially stayed.[1] On appeal, Plaintiff-Appellant argued that the trial court abused its discretion in dismissing her action by failing to exclude from its 5-year dismissal computation, various time periods during which prosecution of this lawsuit was stayed, and by failing to omit various periods of time during it was impossible, impracticable or futile to bring the action to trial. The Court of Appeal agreed with Plaintiff-Appellant and held that the trial court abused its discretion by failing to exclude from its 5-year dismissal computation, certain time periods during which prosecution of the action was partially stayed. The Court of Appeal further held that the trial court abused its discretion by failing to exclude various time periods during which it was impossible, impracticable or futile for Plaintiff-Appellant to bring her action to trial.

The petition for review seeks review of two issues: (1) whether periods of partial

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[1] There were also multiple periods of time during which it was impossible, impracticable or futile to bring this lawsuit to trial. The trial court did not exclude any periods of impossibility, impracticability and futility from its 5-year dismissal time computation.

stays of prosecution – such as stays of discovery, motion and/or pleading practice – were required to be excluded from the 5-year dismissal computation in this action under *Code of Civil Procedure* §583.340(b); and, (2) whether the Court of Appeal erred in holding that the trial court abused its discretion by failing to exclude from its 5-year dismissal computation, certain time periods when it was impossible, impracticable or futile for Plaintiff-Appellant to bring her action to trial.

The petition for review is meritless for two reasons: (1) it does not present an occasion to secure uniformity of decision nor does it present important questions of law; and (2) it is unsupported by the facts and applicable law.

LEGAL DISCUSSION

I. THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW.

Review should be denied for the reason that this action presents neither an opportunity to secure uniformity of decision nor an important question of law. (See, Cal. Rules of Court, Rule 8.500(b)(1).)

With regard to the first proposed issue for review – whether the periods of partial stays of prosecution in this action were required to be excluded from 5-year dismissal computations under *Code of Civil Procedure* §583.340(b) – the Court of Appeal's affirmative conclusion expressly considered, and is consonant with, settled case law, including decisions of this Court. For example, the Court of Appeal stated the following in its decision:

> "The parties disagree on whether discovery stays constitute stays of the 'prosecution ... of the action' under section 583.340, subdivision (b). We have found no case that defines the term 'prosecution' as it is used in subdivision (b) of section 583.340. In Melancon v. Superior Court (1954) 42 Cal.2d 698, 268 P.2d 1050, however, our Supreme Court stated that the taking of depositions constitutes 'a step in the 'prosecution' of an action. (Id. at p. 707, 268 P.2d 1050.) The Supreme Court based this statement on its earlier holding in Ray Wong v. Earle C. Anthony, Inc. (1926) 199 Cal. 15, 18, 247 P. 894, in which it stated, 'The term 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination.' (Melancon v. Superior Court, supra, 42 Cal.2d at pp. 707-708, 268 P.2d 1050.) We construe Melancon v. Superior Court and Ray Wong v. Earle C. Anthony, Inc. as standing for the proposition that the 'prosecution' of an action is a broad concept encompassing all of the various steps in an action, including, but not limited to, pleading, discovery, and law and motion. Each of the various steps in an action constitutes 'prosecution' of that action.
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> * * *
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> In Holland v. Dave Altman's R.V. Center (1990) 222 Cal.App.3d 477, 482, 271 Cal.Rptr. 706, the Court of Appeal addressed the meaning of the term 'stay' in subdivision (b) of section 583.340 and stated, 'The parties cite no reported decisions construing the term 'stay' as used in section 583.340, and we have found none. The term, however, appears to have a commonly understood meaning as an indefinite postponement of an act or the operation of some consequence, pending the occurrence of a designated event. Thus, in People v. Santana (1986) 182 Cal.App.3d 185, 190 [227 Cal.Rptr. 51], a case involving the stay of a sentence, the court concluded that '[a] stay is a temporary suspension of a procedure in a case until the happening of a defined contingency.' Black's Law Dictionary (5th ed.1979) page 1267 defines the term as 'a suspension of the case or some designated proceedings within it.'' We agree with the view expressed in Holland v. Dave Altman's R.V. Center that a 'stay' within the meaning of subdivision (b) of section 583.340 includes 'a temporary suspension of a procedure in a case' or a suspension of designated proceedings within a case."
> (172 Cal.App.4th 488, 498-499.)

The petition for review presents no occasion for this Court to reconcile disparate decisions or to secure uniformity of decision. Indeed, there is no contrary case law or case

law which is inconsistent with the Court of Appeal's analysis or decision. Moreover, the facts and circumstances of this action which frame the issues on appeal are highly unusual and unlikely to recur.

In that regard, during the period May 24, 2000 to June 26, 2007, four different trial judges imposed seven stays of prosecution in this action which collectively lasted a period of 1,544 days.[2] The trial court also impaired prosecution of Appellant's action by

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[2]Stay 1: During the period May 24, 2000 to July 12, 2000, Judge William McDonald imposed a partial stay of prosecution under which all discovery, discovery issues and motions in this lawsuit were stayed. (AA p. 593, ln. 13)

Stay 2: During the period June 13, 2002 to October 21, 2003, Judge C. Robert Jameson imposed a complete stay of the action pending resolution of *Kaufman v. ACS Systems, Inc.*, which was then on appeal before the Second District Court of Appeal. (AA p. 823:17-20; p. 868; 823:20-22; and, p. 871)

Stay 3: During the period December 3, 2003 to January 15, 2004, Judge Jameson imposed a partial stay of prosecution under which all discovery was stayed. (AA p. 824:4-7; p. 873; 824:12-14; and, p. 878)

Stays 4: On December 3, 2003, Defendant-Respondent Fax.com, Inc. ("FCI") filed a Notice of Submission of Petition for Coordination. (AA p. 335) On January 30, 2004, Judge Jameson ordered that, "All hearings, orders, motions, discovery or other proceedings are hereby stayed in all cases subject of the petition for coordination until determination whether coordination is appropriate." (AA p. 359) This stay was imposed at FCI's request under Rule 3.515 of the California Rules of Court. (AA p. 335:27-p. 336:4)

Stays 5: On April 7, 2004, Judge Jameson issued an Order Granting Petition For Coordination. (AA p. 579:2-4, and pp. 634-638) By operation of CRC Rule 3.529(b), the action was automatically stayed. On May 6, 2004, Judge Charles McCoy was appointed as the coordination trial judge. (AA p. 579:9-12, and pp. 641-646)

Stay 6: On August 2, 2004, Judge McCoy stayed all discovery, motion and pleading activity in the coordinated TCPA cases, including this lawsuit. (AA p. 922:13-14) The discovery stay remained in effect until July 11, 2006, when it was lifted in this action by Judge Carolyn Kuhl. (AA 670:10-11) The stay on motion and pleading activity was never lifted and remained in effect until this action was dismissed. (AA p. 580:20-p. 581:2)

Stay 7: On January 25, 2007, Judge Kuhl imposed another complete stay in the

nullifying appellant's discovery (AA p. 593, ln. 13; p. 821:18-p. 822:7; p. 822:4-7, and p. 844; p. 822:8-11, and p. 837:15-18) and later, by holding Appellant's action in abeyance for a period of 88 days pending receipt of Appellant's file from Orange County Superior Court in the Coordinated TCPA Cases. (AA p. 826:13 - p. 827:9; RT Q-12:6 - Q-13:1)

The unique facts/circumstances of this action render it and its appellate issues an anomaly. Rather than a being a matter of importance to the courts and legal community, this appeal and its issues are a curiosity. As such, the petition for review does not present important legal questions warranting review by this Court.

With regard to the second proposed issue for review – whether the Court of Appeal erred in holding that the trial court abused its discretion by failing to exclude from its 5-year dismissal computation, certain time periods when it was impossible, impracticable or futile for Plaintiff-Appellant to bring her action to trial – there is no conflict or disparity of law among the courts of appeal regarding the standard of appellate review. Thus, the proposed second issue presents no opportunity to secure uniformity of decision. Likewise, the second proposed issue does not present an important question of law. Rather, review would necessitate consideration of the unique facts and circumstances of delay/trial disability which characterize of this action. Although the second issue is of interest to the litigants in this action, it is of no importance or significance to the courts and legal community.

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proceedings. (RT Q-39:24 - Q-40:10) The stay remained in effect until June 26, 2007, when the final judgment on Plaintiff-Appellant's claims was entered.

II. THE PETITION IS UNSUPPORTED BY THE FACTS AND APPLICABLE LAW.

The arguments advanced by Respondents in its support the petition for review are without merit.

A. Active Case Management.

The petition for review attempts to transform this unremarkable appeal into a matter of importance by divining a false public policy concern regarding partial stays of prosecution. In particular, Respondents argue that partial stays of prosecution cannot be permitted to toll the 5-year dismissal statute since trial courts would be impaired in their ability to actively manage complex and coordinated lawsuits. (See, Petition for Review (PFR) pp. 16-21.) This is a false argument.

Courts seek to achieve three things through active management of complex or coordinated lawsuits: (1) expedite the case, (2) keep costs reasonable, and (3) promote effective decision making. The need for active case management to achieve these three goals yields the definition of whether an action is "complex" under CRC Rule 3.400(a), which states:

> "A 'complex case' is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel."

The petition for review singularly focuses on the first judicial goal, to expedite lawsuits. (See, PFR pp. 16-19.) Limiting their focus on the goal of "'expediting' case

resolution," Respondents assert in their petition that, "[t]he five-year statute and the Rules of Court requiring active management are intended to work in tandem to reach a common policy goal." (PFR p.18.)

Unquestionably, many case management orders have as their objective, the goal of expediting case resolution. Orders which quicken the pace of litigation are consonant with the purpose of the dismissal statutes - expediting case resolution. No one disputes this. The petition for review ignores the fact that not all case management orders have as their objective the goal of expediting case resolution. Courts also issue case management orders which are directed to the goals of economy (*i.e.*, cost containment and burden avoidance) and efficient/effective decision making. Such orders may have the effect of hindering case development and slowing the pace of litigation, while advancing other important case management goals such as economy/burden avoidance.

If in the course of actively managing a complex or coordinated action a stay of prosecution, partial or complete, is imposed, the mandatory, unconditional provisions of C.C.P. §583.340(b) require exclusion of the time period during which the stay was in effect. Likewise, if judicial action in actively managing a case makes it impossible, impracticable or futile to bring the action to trial, the time period of the impediment is required to be excluded from the 5-year dismissal computation under C.C.P. §583.340(c). As the Court of Appeal observed in this action, nothing in the Code, the California Rules of Court, or case law excepts from the tolling provisions of §583.340, case management

orders or orders issued under active case management. (172 Cal.App.4th 488, 503)

Respondents' attempted policy argument also ignores the fact that the tolling provisions of C.C.P. §583.340 are unconditional. As stated in *Ocean Services Corp. v. Ventura Port District* (1993) 15 Cal.App.4th 1762, 1774:

> "Code of Civil Procedure section 583.340, subdivision (b), provides that the five-year period 'shall be' tolled if '[p]rosecution or trial of the action was stayed or enjoined.' The statute is unconditional and is intended to have uniform application. 'This is consistent with the treatment given other statutory excuses; it increases certainty and minimizes the need for a judicial hearing to ascertain whether or not the statutory period has run.' (17 Cal. Law Revision Com. Rep. (Jan. 1984) p. 919.) It also is consistent with the general policy favoring trial over dismissal. (§ 583.130.)" [Citation omitted.]" [3] (Emphasis added.)

The importance of active case management in complex and coordinated lawsuits is beyond serious dispute. So too, is the recognition that effective and proper case management demands consideration and balancing of its three chief goals - expediting case resolution, economy, and promotion of effective decision making.

The trial courts are aware that their orders yield real consequences when selecting and employing their case management 'tools.' And, they are well aware that the actions they take in management of litigation can advance or retard case resolution. This

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[3] Respondents seek to strip the statute of certainty and uniform application by inviting the courts to assess and weigh the relative impact of partial stays of prosecution. (See, PFR pp. 24-27.) Under Respondents' construct, the 5-year dismissal statute would be tolled during some partial stays of prosecution, but not as to others. Respondents state, "Whether 'prosecution...of an action was stayed,' should therefore at least be a fact-intensive inquiry dependent upon the totality of the circumstances of the case..." (PFR p.24.) Respondents' suggestion would obliterate the very policy considerations articulated in *Ocean Services Corp.*, which are underscored, above.

recognition factors heavily in their determination of the timing, nature, and duration of their case management restrictions/activities. The policy dilemma urged by Respondents is fictitious; trial court case management decisions/orders have long been made with judicial contemplation of their consequences. Preservation of the integrity of the tolling provisions of C.C.P. §583.340 will in no manner chill trial court efforts to manage complex or coordinated lawsuits.

B. All Stays of Prosecution Are Excluded From The Five-Year Dismissal Computation.

The petition for review asserts that only a complete stay is a stay of prosecution within the meaning of C.C.P. §583.340(b). (PFR pp. 21-23.) Respondents attempt to support this claim by citing the Law Revision Commission's Comment to C.C.P. §583.340(b), which states:

> "Subdivision (b) codifies existing case law. See, e.g., Marcus v. Superior Court, 75 Cal.App.3d 204, 141 Cal.Rptr.890 (1977)"

Respondents assert in their petition for review that *Marcus* was "the existing law being codified." (PFR p. 22.) This assertion is frivolous.

The *Marcus* decision was cited as an example of case law, hence the "see, e.g." Respondents' spin on the comment requires deletion of the words, "see, e.g." The Law Revision Commission did not state that subdivision (b) of §583.340 was a codification of the *Marcus* decision. This is significant because *Marcus* involved a very specific and

narrow set of circumstances: a stay pending the outcome of arbitration proceedings[4]. If §583.340(b) was a codification of the *Marcus* decision, then the only stays which would be excluded from the 5-year dismissal computation would be those imposed during the pendency of an arbitration. Not even Respondents have the temerity to declare that C.C.P. §583.340(b) is limited to arbitration-based stays.

At page 22 of the petition for review, Respondents assert,

> "Every California case that has found that there was a stay of 'prosecution' has done so only in cases involving complete stays of trial court activity."

Respondents cite the decision in *Bank of America v. Superior Court* (*Urich*) (1988) 200 Cal.App.3d 1000 in "support" of this proposition.

In *Bank of America*, the trial court in a related lawsuit - the El Dorado action - stayed depositions until a specified date, "unless [a] petition for coordination has been earlier filed and ruled on." *Id.* at 1013. On appeal, the stay of depositions in El Dorado was deemed to be "a stay of proceedings in the El Dorado action until the coordination petition was decided." *Id.*

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[4] The issue in *Marcus* was whether all parties to judicial proceeding were entitled to a stay under C.C.P. §1281.4, irrespective of whether they were a party to the arbitration agreement or not. The court held in the affirmative. After concluding that the provisions of C.C.P. §1281.4 are mandatory, it gave short shrift to a concern voiced by the plaintiff that the issuance of a stay pending arbitration would subject him to risk that the 5-year period under C.C.P. §583(b) would expire. In dicta, the court stated that the 5-year period could not run when a stay order was in effect because it was impossible or impracticable to proceed to trial. *Marcus*, 75 Cal.App.3d 204 at 212-213.

Under *Bank of America*, a stay of discovery (depositions) was regarded as a stay of proceedings. This directly conflicts with Respondents' assertion.

Respondents' argument that only "complete stays" are stays of prosecution under section 583.340(b), necessitates an unduly narrow and restrictive construction the term, "prosecution." Under Respondents' construction, "prosecution" is regarded in a comprehensive sense - referring to the litigation process as a whole; Respondents do not regard the steps and phases of litigation as "prosecution." Thus, Respondents deny that a "mere discovery stay or other partial stay" is a stay of prosecution within the meaning of section 583.340(b). (See, PFR p.23.)

Respondents err in their narrow, restrictive view of "prosecution." That term refers both to the totality of the action as well the steps and activities by which an action advances from its commencement to conclusion. "Prosecution" of an action refers, *en masse*, to the totality of actions/activities undertaken to move the case from commencement to conclusion; "prosecution" also means and refers to the performance of each litigation step/activity taken during the course of a lawsuit. Thus, for example, a lawsuit is being "prosecuted" when discovery is propounded. It is also being prosecuted when law and motion practice is being engaged, when pleading activity is undertaken, and when other litigation activities are performed. This view of "prosecution" was adopted in *Melancon* where this Court, quoting *Ray Wong v. Earle C. Anthony* (1926) 199 Cal. 15, 18, stated,

> "The term, 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination." (*Melancon*, 42 Cal.2d 698, 707-708.)

The taking of depositions in *Melancon* was regarded by this Court as a litigation step in "prosecution" of the action. (42 Cal.2d 698 at 707.)[5]

The duality of the term, "prosecution" - one which refers to the individual steps taken in an action as well as the totality of those steps - is further confirmed by the decision in *Ray Wong v. Earle C. Anthony* (1926) 199 Cal. 15 - the very decision quoted by this Court in *Melancon*. *Wong* involved an action for malicious prosecution which stemmed from the malicious filing of a criminal complaint against Mr. Wong, the ensuing issuance of an arrest warrant, and the arrest and criminal trial of Mr. Wong. The question before the Court was whether the malicious prosecution action was properly venued in San Joaquin County - the county selected by plaintiff. In addressing this question, the Court noted that the underlying malicious criminal complaint was filed, and the arrest warrant was issued, in Sacramento; plaintiff was arrested in Stockton and incarcerated in San Joaquin County, and; plaintiff was then transferred back to Sacramento County where he was incarcerated, tried and acquitted. (199 Cal. 15, 16-17.) In reaching its decision, this Court instructed that, "[t]he term, 'prosecution' is sufficiently comprehensive to

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[5] This Court's recognition in *Melancon* that discovery (*e.g.*, the taking of depositions) is "prosecution" of an action defeats Respondents's argument that a stay of discovery is not a stay of prosecution. Stated differently, if the act of taking discovery constitutes "prosecution," then a stay of that activity is a "stay of prosecution."

include every step in an action from its commencement to its final determination." (199 Cal. 15, 18.) This Court then reasoned that venue was proper in both that Sacramento and San Joaquin counties because "prosecution" of the underlying criminal action had occurred in both counties. *Id.* at p. 19.

Wong makes clear that "prosecution" refers not only to the totality of a legal action, but to the individual steps taken during the pendency of a legal action. Thus a stay of discovery, a stay motions, and stays of pleading practice are each "stays of prosecution." As such, the settled law of this state firmly supports the Court of Appeals decision in this action.

C. The Correct Standard of Review Was Used And Applied by The Court of Appeal.

In an effort to obtain a third bite at the apple, Respondents claim that the Court of Appeal applied the wrong standard of review when considering whether the trial court erred in failing to exclude from its 5-year dismissal computation, certain time periods during which it was impossible, impracticable or futile for Plaintiff-Appellant to bring her action to trial. Respondents are mistaken. The Court of Appeal's opinion expressly states the standard of review it employed:

> "As set forth above, we review for an abuse of discretion a grant of dismissal for failure to prosecute an action. (Sagi Plumbing v. Chartered Construction Corp., supra, 123 Cal.App.4th at p. 447, 19 Cal.Rptr.3d 835.)" (172 Cal.App.4th 488, 505, FN 12)

The Court then reviewed the established facts and determined whether the trial court had

abused its discretion in failing to exclude three time periods under C.C.P. §583.340(c). (See, 172 Cal.App.4th 488, 505-509)

In *Department of Parks & Recreation v. State Personnel Board* (1991) 233 Cal.App.3d 813, 831, the court explained the abuse of discretion standard as follows:

> "The abuse of discretion standard...measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria. 'The scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action ....' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion.'[Footnote and citation omitted.]"

In this action, the Court of Appeal reviewed the legal principles governing the statute, *i.e.*, its statutory "confines" (See, 172 Cal.App.4th 488, 504) and determined whether, given the established evidence, the trial court erred (abused its discretion) in failing to exclude certain time periods from its five-year dismissal computation under C.C.P. §583.340(c).

The Court of Appeal did precisely what is was required to do. It used the proper standard of review and correctly applied the standard to the issues before it.

CONCLUSION

For the forgoing reasons, this Court should deny the petition for review.

Respectfully submitted.

DATED: May 21, 2009

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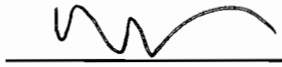

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Certification of Brief Length

In accordance with the requirements of Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 4,130 words, not including the Tables of Contents and Authorities, the caption page, proof of service or this certification page.

DATED: May 21, 2009 LAW OFFICES OF KEVIN M. TRIPI

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

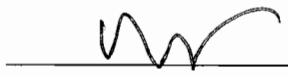
I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2030 Main Street, Suite 1040, Irvine, California 92614.

On May 21, 2009, I served the foregoing document described as ANSWER TO PETITION FOR REVIEW on the interested parties by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Irvine, California, addressed as follows:

SEE ATTACHED SERVICE LIST.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED: May 21, 2009



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