IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CENTRAL LABORERS PENSION FUND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 6287-VCN
	)	
NEWS CORPORATION,	)	
	)	
Defendant.	)	

DEFENDANT NEWS CORPORATION'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES & RULES

INTRODUCTION

Plaintiff's Answering Brief rests entirely on the false premise that its Demand Letter complied with Delaware law.[1] In fact, the Demand Letter did not comply with 8 *Del. C.* § 220, and thus dismissal is the proper remedy. Plaintiff tacitly admits that this is true by trying to cure the defective Demand Letter with an attachment to its Answering Brief (and by citing no case excusing Plaintiff from providing separate documentary evidence of beneficial ownership with its demand).[2] Once the Demand Letter's invalidity is taken into account, Plaintiff's various arguments—including its attempts to portray News Corp.'s motion to dismiss as a delay tactic—are revealed to be meritless.

Plaintiff's attempt to defend its purpose is equally unpersuasive. Plaintiff has no proper purpose for its demand, particularly given that the Derivative Action has been ongoing for more than 90 days. The overbroad, discovery-like scope of Plaintiff's requests in the Demand Letter also demonstrates that Plaintiff's purpose is improper (since discovery should be stayed in the Derivative Action pending the defendants' motions to dismiss). Unlike the defect in the Demand Letter, the defects in Plaintiff's purpose are not curable.

Plaintiff spends much of its Answering Brief mischaracterizing the facts surrounding the Transaction, apparently hoping to get a pass on its failure to comply with Section 220. *See, e.g.*,

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[1] Brief of Plaintiff Central Laborers Pension Fund in Opposition to Defendant News Corporation's Motion to Dismiss (Trans. ID 37688900) ("Answering Brief" or "PAB at __"). Capitalized terms not defined herein shall have the meaning given to them in Defendant News Corporation's Brief in Support of Its Motion to Dismiss (Trans. ID 36965053) ("Opening Brief" or "DOB at __").

[2] Section 220 sets forth a two-part requirement: both an affidavit and separate documentary evidence must be provided. *Smith v. Horizon Lines, Inc.*, 2009 WL 2913887, at *2 (Del. Ch. Aug. 31, 2009) ("The stockholder's sworn statement is an independent requirement under § 220 and does not substitute for the requirement of 'documentary evidence of beneficial ownership.'").

PAB at 1-7. Its efforts should fail—the Transaction itself is not at issue here,[3] and Plaintiff's Complaint in this action should be dismissed with prejudice.

COUNTERSTATEMENT OF FACTS

Regardless of the standard of review, this Court need not credit false assertions in Plaintiff's Complaint. The Transaction was not approved by the entire News Corp. Board, as Plaintiff suggests. *See, e.g.*, PAB at 1-2. Instead, as Exhibit A to the Answering Brief makes clear,[4] the "transaction was approved by the Audit Committee of the News Corporation Board of Directors. The Audit Committee . . . is composed entirely of independent directors . . . ."

ARGUMENT

Plaintiff's first misguided attack is on the Rule 12(b)(6) process itself. Plaintiff omits, however, that "pre-trial motion practice may be entertained in a books and records action where the underlying facts are largely undisputed." *Graulich v. Dell Inc.*, 2011 WL 1843813, at *4 (Del. Ch. May 16, 2011). That is the case here.

Plaintiff plays the victim, laying blame for any delay on News Corp. and suggesting that News Corp. is depriving it of an "expeditious resolution of the proceeding" by filing a motion to dismiss. PAB at 7; *see also* PAB at 2 (similar). But Plaintiff ignores what has happened thus far in this case: Plaintiff filed suit on March 16, 2011, and never sought a scheduling conference to move the case forward. Service was eventually made on March 25. Trans. ID 36740598. Twenty days later—with Plaintiff never having requested a shorter period—News Corp. filed its motion to dismiss and (helping the case proceed swiftly) its opening brief. Trans. ID 36965053.

[3] Indeed, a "Section 220 action is not the proper forum for litigating a breach of fiduciary duty case." *Khanna v. Covad Commc'ns Grp., Inc.*, 2004 WL 187274, at *6 (Del. Ch. Jan. 23, 2004).

[4] Plaintiff concedes, in referring to its Exhibit A, that "[i]n considering this Motion, the Court may take judicial notice of News Corp's subsequent public filings." PAB at 4 n.2.

Nearly two weeks later, Plaintiff requested additional time to respond and stipulated to a briefing schedule giving it more than a month to respond and giving News Corp. nearly another month to reply. Trans. ID 37337290. Thus, while Plaintiff suggests that this case should have gone to trial in two months (PAB at 7), it has not moved the case forward expeditiously, and instead requested a briefing schedule allowing it to file its Answering Brief two months after this action was filed.[5]

Further, Plaintiff should have known—under Section 220's express terms and established case law—that its Demand Letter was fundamentally defective, and it certainly knew so by April 14, when it received News Corp.'s Opening Brief. But Plaintiff never bothered to correct the statutory flaws in its Demand Letter. *Cf. Graulich*, 2011 WL 1843813, at *3 (describing a plaintiff who did correct a similarly flawed demand: "Because the demand letter did not include an 'Exhibit A' referenced in the document that purportedly evidenced Graulich's beneficial ownership of Dell stock, . . . plaintiff submitted a new demand letter on August 24, 2010 . . . ."). Certainly, if Plaintiff were concerned about moving this case expeditiously to resolution, it should have acted promptly to address the statutory defects in its Demand Letter.

I. THIS ACTION SHOULD BE DISMISSED BECAUSE PLAINTIFF'S DEMAND LETTER VIOLATES THE STATUTORY REQUIREMENTS OF SECTION 220.

As stated in the Opening Brief, this Court has noted that "[c]ompliance with [Section 220] is not difficult, and it is not too much to ask of a stockholder or his lawyers to read the statute and comply with its plain provisions when making a demand." *Seinfeld v. Verizon Commc'ns Inc.*, 873 A.2d 316, 317 (Del. Ch. 2005). Plaintiff apparently disagrees.

[5] To be clear, Plaintiff requested 35 days to prepare and file its Answering Brief (more than 2 days per page). Plaintiff filed its Answering Brief two months and three days after filing this action. To the extent there has been any delay in this case, Plaintiff has no one but itself to blame.

Section 220(b) requires beneficial stockholders making a demand to (1) provide "documentary evidence of beneficial ownership of the stock" and (2) "state that such documentary evidence is a true and correct copy of what it purports to be." 8 *Del. C.* § 220(b); *see also Smith*, 2009 WL 2913887, at *2 (same). Again, Plaintiff disagrees.

Plaintiff makes three arguments, none of which holds up under Delaware law.

First, Plaintiff argues that the Koeppel Affidavit constitutes both the required "documentary evidence of beneficial ownership" and the required "state[ment] that such documentary evidence is a true and correct copy." *See* PAB at 7-8. That is absurd. Plaintiff does not even believe its own argument—the Koeppel Affidavit itself refers to an "annexed document which is a true and correct copy of the original record." Compl., Ex. A. Plaintiff apparently intended to provide documentary evidence of its beneficial ownership, but no "annexed document" accompanied the Demand Letter.

Put simply, Section 220 requires two separate documents. *See Smith*, 2009 WL 2913887, at *2 ("The stockholder's sworn statement is an independent requirement under § 220 and *does not substitute for the requirement of 'documentary evidence of beneficial ownership.'*" (emphasis added)); *Seinfeld*, 873 A.2d 316 (dismissing a Section 220 complaint for failure to comply with the attestation requirement, even though documentary evidence was provided). While the Koeppel Affidavit may "identif[y] all of the same information" (PAB at 8) that the "documentary evidence" required by Section 220 would contain, Plaintiff cannot avoid the two-part requirement of the statute.[6] Two items are required; Plaintiff cannot simply omit one.

[6] Plaintiff does not even have the courage of its own convictions on this point. It submitted along with its Answering Brief what appears to be the "documentary evidence" missing from its Demand Letter.

Second, Plaintiff contends that any defect in its Demand Letter has been cured by its submission to this Court of a revised Koeppel affidavit as the missing "documentary evidence." Plaintiff is wrong. Once again, resort to the plain language of the statute is instructive: "the *demand* under oath shall . . . be accompanied by documentary evidence of beneficial ownership of the stock." 8 *Del. C.* § 220(b) (emphasis added); *Seinfeld*, 873 A.2d at 317 ("This is also not a formalistic or unimportant provision of the statute."). The statute says nothing about parties' *briefs* being accompanied by documentary evidence. Until Plaintiff delivers to News Corp., pursuant to Section 220, a demand letter accompanied by both the requisite documentary evidence and a document attesting that the documentary evidence is a true and correct copy of the original, News Corp. has no obligations under Section 220 to provide books and records. *See* 8 *Del. C.* § 220(b) ("The demand under oath shall be directed to the corporation at its registered office in this State or at its principal place of business."); *Smith*, 2009 WL 2913887, at *3 (requiring plaintiff to file a "new demand letter that attaches unambiguous documentary evidence showing his beneficial ownership of Horizon stock"); *Graulich*, 2011 WL 1843813, at *3 (describing a plaintiff, who had originally omitted his documentary evidence, sending an amended demand containing such evidence). Instead of spending more than a month drafting its 16-page answering brief, Plaintiff would have been far better served by sending News Corp. a complying demand.

Third, Plaintiff disagrees that the proper remedy here is dismissal. PAB at 8. Plaintiff ignores, of course, that this Court in *Seinfeld* similarly dismissed a complaint for failure to comply with Section 220(b). *See Seinfeld*, 873 A.2d at 318. Plaintiff also ignores that Chancery Court Rule 15(aaa) governs this proceeding. Under the stipulated scheduling order, Plaintiff had 35 days to prepare and send a new demand accompanied by documentary evidence and then

amend its Complaint accordingly. Plaintiff refused to do so. Thus, Plaintiff's existing Complaint must stand or fall on its own merits. And under the facts here and well-established case law, the Complaint falls.[7]

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF CANNOT STATE A PROPER PURPOSE.

Plaintiff's purported chief purpose for its demand was to investigate facts to support both a derivative action and a claim of demand futility in that action. *See* PAB at 9. It has already filed the Derivative Action and made a claim of demand futility in that action; its only purpose now could be to avoid the stay of discovery that should properly accompany any motion to dismiss a derivative action. That purpose is improper, and Plaintiff's Complaint should be dismissed.

A. Because It Filed The Derivative Action Before Bringing This Action, Plaintiff Cannot Show A Proper Purpose.

As demonstrated in News Corp.'s opening brief, Plaintiff admitted that it lacks a proper purpose for the requested inspection by filing the Derivative Action nearly simultaneously with this action.[8] Op. Br. at 8-13. In its Answering Brief, Plaintiff makes two main arguments; neither is availing.

[7] Plaintiff also fails to defend the flaws in its power of attorney. *See* DOB at 7 n.3.

[8] News Corp. does not dispute that, in theory, a stockholder desiring to investigate possible mismanagement could establish a proper purpose. But simply saying the magic words does not entitle a stockholder to books and records. *See, e.g.*, *Graulich*, 2011 WL 1843813, at *8 (dismissing a Section 220 action under Rule 12(c) for lack of a proper purpose, even though the stockholder claimed that he needed to investigate possible mismanagement). Plaintiff's actions are inconsistent with its stated purpose and fly in the face of established Delaware practice. Saying that it wants to investigate possible mismanagement is not enough, where Plaintiff's actions reveal that purpose to be mere pretext.

First, Plaintiff suggests that its case is different from the cases discussed in *VeriFone*[9] because this action was not filed "long after" the Derivative Action. PAB at 10 (emphasis omitted). That is not the issue—the issue is that Plaintiff has already filed a verified derivative complaint in this Court, thus certifying that Plaintiff had sufficient information to meet its pleading obligations under Rule 11.[10] And Plaintiff *simultaneously* asserts in this action that it needs books and records to be able to file the complaint it already filed (and has now already amended). In effect, Plaintiff seeks documents so that it can do in the future what it has already done in the past. Without bending the laws of physics, Plaintiff's stated purpose cannot support a Section 220 demand.

In any event, Plaintiff's (continuing) failure to deliver a demand compliant with Section 220 puts it in the very situation it claims not to be in. The Demand Letter did not comply with Section 220(b); the Answering Brief does not suffice as a valid demand under Section 220. Plaintiff therefore has not yet sent to News Corp. a valid Section 220 demand that requires a

[9] Plaintiff attempts to find support in *VeriFone* but fails. The Supreme Court recognized that it is a "proper purpose under Section 220 to inspect books and records that would aid the plaintiff in pleading demand futility in a to-be-amended complaint in a plenary derivative action, where the earlier-filed plenary complaint was dismissed on demand futility-related grounds without prejudice and with leave to amend." *King v. VeriFone Hldgs., Inc.*, 12 A.3d 1140, 1150 (Del. 2011). That is not Plaintiff's situation. Further, the Supreme Court noted that it did not endorse "proceeding in that way." *Id.* Indeed, the Court noted that one "remedy for a derivative complaint brought prematurely and without prior investigation of facts that would excuse a pre-suit demand, would be for the plenary court to dismiss the derivative complaint with prejudice and without leave to amend as to the named plaintiff." *Id.* at 1151.

[10] *Parfi Hldg., AB v. Mirror Image Internet, Inc.*, C.A. No. 18457, at 6 (Del. Ch. Mar. 23, 2001) (TRANSCRIPT) ("By filing [a] plenary action, the plaintiff in the 220 case has already necessarily conceded that they had enough information to file allegations of mismanagement in a complaint with good faith and for its counsel to have satisfied the necessary pleading standards."). Indeed, in its Answering Brief, Plaintiff asserts that, "*after reasonable investigation and research*, Plaintiff, together with another major institutional investor, filed a derivative action against the Board alleging that it had breached its fiduciary duties owed to News Corp in agreeing to the Transaction, including by allowing Murdoch to place his daughter on the Board." PAB at 6 (emphasis added).

response. Whatever Plaintiff's reasons for not delivering a valid demand, the fact is that—if it ever does make a valid demand—it will have done so *months* after filing the Derivative Action. The Derivative Action was filed on March 16.[11] It is now June 17, and no valid demand has been made. Thus, by definition, there will be a "significant temporal gap between the filing first of a derivative action and the subsequent filing of [a valid] Section 220 action." PAB at 11.

Second, Plaintiff charges News Corp. with delay in not responding to the Demand Letter. But News Corp. had no obligation to respond to an invalid demand; Plaintiff still has not sent News Corp. a demand letter that complies with Section 220.

For that reason and others, this situation is nothing like *Khanna* or *Romero*. In *Romero*, the plaintiff sent a demand on May 26, 2004. *Romero v. Career Educ. Corp.*, 2005 WL 1798042, at *1 (Del. Ch. July 19, 2005). Romero received only some documents from the defendant and filed her Section 220 action on November 3, 2004. *Id.* She did not file her derivative action until June 3, 2005—more than one year after sending her demand letter. *Id.* at *2 n.8. No mention was made of any technical defects in Romero's demand letter. The *Romero* Court thus understandably held that the "filing of a derivative complaint will not make an otherwise proper purpose improper" when "*the overlap in suits results from a defendant's failure to comply with its § 220 obligations.*" *Romero v. Career Educ. Corp.*, 2005 WL 3112001, at *2 (Del. Ch. Nov. 4, 2005) (emphasis added). Here, News Corp. had no Section 220 obligations: the Demand Letter was defective and invalid. The overlap in suits here is attributable solely to Plaintiff's haste.

[11] Plaintiff states that "it cannot be gainsaid that . . . Plaintiff filed the derivative action in some sort of 'race to the courthouse' to secure a lead plaintiff position." PAB at 11 n.3. Plaintiff protests a bit too much: it filed the Derivative Action weeks before the Transaction was even approved; its counsel filed a copy-cat action on the same facts nine days later; and it filed a stipulated consolidation order (in which all plaintiffs had the same counsel) appointing itself one of the lead plaintiffs very soon thereafter.

Similarly, in *Khanna*, the plaintiff made his demand on June 10, 2003. 2004 WL 187274, at *1. The defendant largely denied Khanna's request on June 18 and did not raise any technical or statutory defects. *Id.* at *3; *see also id.* at *4 n.9 (assuming that Khanna "has otherwise submitted a proper demand under Section 220"). Khanna filed his Section 220 action on August 11 and—concerned about a potential time-bar—filed a class and derivative action on September 25, three and a half months after making the demand. *Id.* at *3. No time-bar issue faced Plaintiff here: Plaintiff filed the Derivative Action weeks before the Transaction was even approved. In *Khanna*, the "overlap of the Section 220 action and the Derivative Action [was] attributable to [*the defendant's*] failure to comply with its obligations under Section 220 when the Demand was made." *Id.* at *4. Here, by contrast, the overlap is a result of Plaintiff's choice, and News Corp. had no obligations under Section 220. *Cf. id.* at *5 (stating that the burden "only occurred because, assuming again that Khanna has a proper Section 220 demand, [defendant] chose not to meet its statutory obligations to one of its shareholders").

Moreover, Plaintiff here waited only one day before filing the Derivative Action.[12] That is far from the situation in *Khanna*. *See id.* at *5 n.13 (stating that Khanna's "demand was sufficiently far in advance [over three months] of the filing of the Derivative Action that it did not impose any undue burden on Covad and it does not relieve Covad of its statutory obligations"); *see also id.* at *5 (same). Indeed, the *Khanna* Court foresaw that a plaintiff might—as Plaintiff did here—try to file simultaneous derivative and Section 220 actions. This Court stated that it has "the power to take such steps as are necessary to protect a [corporation] from the abuse of the judicial process." *Id.* at *5 n.13. Those steps are necessary here.

[12] Plaintiff admits that the Demand Letter was delivered to News Corp. on March 8, 2011. PAB at 5. Five business days from March 8 is March 15. Plaintiff filed the Derivative Action on March 16. PAB at 6. Plaintiff's statement that it "should not have to wait *indefinitely*" (PAB at 12 (emphasis added)) is a bit exaggerated.

B. This Action Should Be Dismissed Because The Improper Scope Of The Document Requests Reveals Plaintiff's Improper Purpose.

Plaintiff suggests that the "scope" arguments should be saved for trial, but Plaintiff misses the point. Defendants in the Derivative Action have moved to dismiss the complaint in that action. *See* Trans. ID 38082821; Trans. ID 38092811; Trans. ID 38082109. Briefing on those motions will be completed on July 29, 2011. Stipulated Briefing Schedule and Order (Trans. ID 37463478). Under well-established Delaware law, discovery should be stayed pending the resolution of those motions. *See, e.g.*, *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000) (noting that "the Court will not permit discovery under Chancery Rules 26-37 to marshal the facts necessary to establish that pre-suit demand is excused"); DOB at 12-13.

The overbreadth of Plaintiff's document requests in the Demand Letter simply demonstrates that Plaintiff's actual purpose is to defeat a proper discovery stay in the Derivative Action and obtain News Corp. discovery out of turn. *See Khanna*, 2004 WL 187274, at *8 n.33 ("Indeed, if Section 220 afforded a shareholder the full panoply of discovery rights, the goal of avoiding the costs and burdens of unnecessary discovery reflected in the policy of staying discovery while derivative and class actions are tested by motions to dismiss would be frustrated."); *Parfi*, C.A. No. 18457, at 4 ("I think the real problem here is . . . that what this is about is gathering evidence to support the claims that [plaintiff] has made in the arbitration and in the litigation."). It is no accident that the requests in the Demand Letter are drafted as if they were Rule 34 document requests. *Cf. Khanna*, 2004 WL 187274, at *9 ("A Section 220 action is not a substitute for discovery under the rules of civil procedure."). But Plaintiff chose to file simultaneous actions; it must now live with the consequences of that choice. *See Parfi*, C.A. No. 18457, at 9 ("[Plaintiff's] having chosen to go forward with the plenary action at the same time, I just can't condone that . . . ."); *Taubenfeld JT v. Marriott*, C.A. No. 20122-NC, at 2-3 & n.5

(Del. Ch. July 29, 2003) ("It is inherent in a court of equity, however, that a litigant must live with its choices. . . . The benefit of exercising [plaintiff's Section 220] right may be moderated . . . by plaintiff's decision to file its [derivative] complaint before seeking the company's books and records . . . .").

Plaintiff suggests that, under *Khanna*, it should be allowed to seek documents under Section 220 to bolster its briefing on the motions to dismiss in the Derivative Action. PAB at 13. It should not. First, as noted above, *Khanna* does not apply here: the Demand Letter was defective, and any overlap in suits is Plaintiff's fault. Second, motions to dismiss are to be decided on the complaint as pleaded—not on new allegations made in briefs. *See, e.g.*, *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005) ("On a motion to dismiss, a court's review is limited to the well-pleaded allegations in the complaint."); *Lonergan v. EPE Hldgs., LLC*, 5 A.3d 1008, 1023 (Del. Ch. 2010) (refusing to consider an argument made in briefing that did not appear in the complaint: "It is not currently pled, and there is no need for me to comment on an unpled claim."); *Morgan v. Cash*, 2010 WL 2803746, at *8 n.64 (Del. Ch. July 16, 2010) ("That allegation must be rejected because, by failing to raise this allegation in her complaint, Morgan has waived the claim—a plaintiff cannot use her briefing to rewrite her complaint."). This is precisely why the Delaware courts routinely stay discovery when a motion to dismiss is pending. So bolstering a brief is not a proper purpose for a Section 220 inspection.

In any event, this Court has made clear that document requests of the type in the Demand Letter are overly broad. *Compare* Compl., Ex. A. at 3 (requesting "[a]ll documents reflecting any communications between or among Elizabeth [sic] Murdoch, Rupert Murdoch, News Corp, any directors of officers of News Corp, or anyone acting on behalf of any of the foregoing, regarding the possibility or potential of Elizabeth [sic] Murdoch joining the Board, without

limitation by any time period"), *with Khanna*, 2004 WL 187274, at *9 ("[T]o require the production of all communications, including e-mails, among directors and officers of Covad, under these circumstances, would be excessive. The appropriate documents, *i.e.*, necessary for purposes reasonably related to [plaintiff's] status as stockholder, consist of those documents which are not the documents of individuals but, instead, are those which are held by the corporation.").[13]

Using Section 220 as a means to obtain discovery that should be obtained in the Derivative Action is not a proper purpose, so this action should be dismissed. The Court in *Parfi* made a similar observation. Noting that the Section 220 action was "really . . . about discovery in the underlying actions," the *Parfi* Court did not "think that is a proper primary purpose under Section 220, in a situation where the 220 plaintiff has already made a decision—an informed decision to initiate two pieces of litigation against the company." *Parfi*, C.A. No. 18457, at 6 ("What happens at that point is that there are other processes under law [*i.e.*, discovery] which are wholly sufficient to satisfy the plaintiff's purposes."). A similar analysis should apply here: Plaintiff filed the Derivative Action without the books and records it demands in this action. It obviously does not need them to decide whether to file a derivative action. If Plaintiff's claims

[13] In its Answering Brief, Plaintiff calls its document requests "narrowly tailored" no less than five times. *See* PAB at 1, 2, 5, 14. Even on a motion to dismiss, this Court is entitled to review the Demand Letter and make its own determination. *See, e.g.*, Ct. Ch. R. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). As just some examples, Plaintiff's characterization is inconsistent with requests 5, 8, and 11:

- "All documents relating to or reflecting negotiations of the terms of News Corp's proposed acquisition of Shine";
- "All documents concerning any due diligence performed in connection with News Corp's potential acquisition of Shine as disclosed in the February 21, 2011 Press Release"; and
- "All documents reflecting the reasons for News Corp's proposed acquisition of Shine."

Compl., Ex. A at 2.

in the Derivative Action can survive a motion to dismiss, it will get discovery in that action. There is no need for it to get any relief in this one.

CONCLUSION

For the foregoing reasons, News Corp. respectfully requests that the Court grant News Corp.'s motion and dismiss Plaintiff's Section 220 complaint with prejudice.

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Dated: June 17, 2011

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