**IN THE SUPREME COURT OF IOWA**

NO. \*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

**JOHN DOE,**

*Petitioner-Appellant,*

v.

**JANE DOE,**

*Respondent-Appellee.*

On Appeal from the Iowa District Court for Polk County

The Honorable \*\*\*\*\*\*\*\* \*\*\*\*\*\*\*\*, Presiding Judge

**APPELLANT’S PROOF REPLY BRIEF**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES PRESENTED FOR REVIEW iii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

REPLY ARGUMENT 15

1. STANDARD OF REVIEW AND PRESERVATION OF ERROR
2. JANE FAILED TO ADDRESS NUMEROUS FACTS AND ARGUMENTS PRESENTED BY JOHN AND MISREPRESENTED OTHERS IN SUPPORT OF HER POSITION THAT THE COURT WAS CORRECT IN GRANTING HER PRIMARY CARE OF J.J.D.
3. Jane Failed to Present any Legitimate Argument and/or Supporting Facts to Demonstrate how J.J.D.’s Long Term Best Interests are served by placing him in Jane’s Physical Care.
4. Jane Failed to Meaningfully Address the Significant Concerns Regarding Her Character
5. Jane Failed to Explain Why She Had Divorce Papers Drafted on December 01, 2016, and waited until January 01, 2017 to Have John Served
6. THE TRIAL COURT’S DIVISION OF PROPERTY WAS FAIR AND EQUITABLE UNDER THE CIRCUMSTANCES

CONCLUSION 15

CERTIFICATE OF FILING 18

CERTIFICATE OF SERVICE 18

ATTORNEY’S COST CERTIFICATE 17

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS 17

**TABLE OF AUTHORITIES**

Case Law

*In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996)

*In re Marriage of Dannen*, 509 N.W.2d 132, 133 (Iowa App. 1993)

*In re Marriage of Forbes*, 570 N.W.2d 757, 760 (Iowa 1997)

*In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983)

*In re Marriage of McNerney*, 417 N.W.2d 205, 207 (Iowa 1987)

*In re Plasencia*, 541 N.W.2d 923 (Iowa Ct. App. 1995)

*In re Marriage of Reis and Stowers*, 2012 WL 30267491 (Iowa Ct. App. 2012)

*In re Marriage of Schriner*, 695 N.W.2d 493, 498 (Iowa 2005)

*In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988)

*In re Winter’s Marriage*, 223 N.W.2d 165, 167 (Iowa 1974)

Rules and Statutes

Iowa Code §598.21(1)(2015)

Iowa Code §598(21)(5)(2015)

Iowa R. App. P. 6.1101 (2015).

Iowa R. App. P. 6.1101 (3)(a) (2015)

Iowa R. App. P. 6.1101(2)(c)(2015)

**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. **STANDARD OF REVIEW AND PRESERVATION OF ERROR**
2. **JANE FAILED TO ADDRESS NUMEROUS FACTS AND ARGUMENTS PRESENTED BY JOHN AND MISREPRESENTED OTHERS IN SUPPORT OF HER POSITION THAT THE COURT WAS CORRECT IN GRANTING HER PRIMARY CARE OF J.J.D.**
3. **Jane Failed to Present any Legitimate Argument and/or Supporting Facts to Demonstrate how J.J.D.’s Long Term Best Interests are served by placing him in Jane’s Physical Care.**

*In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996)

1. **Jane Failed to Meaningfully Address the Significant Concerns Regarding Her Character**

*In re Marriage of Forbes*, 570 N.W.2d 757, 760 (Iowa 1997)

1. **Jane Failed to Explain Why She Had Divorce Papers Drafted on December 01, 2016, and waited until January 01, 2017 to Have John Served**

*In re Winter’s Marriage*, 223 N.W.2d 165, 167 (Iowa 1974)

1. **THE TRIAL COURT’S DIVISION OF PROPERTY WAS FAIR AND EQUITABLE UNDER THE CIRCUMSTANCES**

*In re Marriage of Dannen*, 509 N.W.2d 132, 133 (Iowa App. 1993)

*In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983)

*In re Marriage of McNerney*, 417 N.W.2d 205, 207 (Iowa 1987)

*In re Plasencia*, 541 N.W.2d 923 (Iowa Ct. App. 1995)

*In re Marriage of Reis and Stowers*, 2012 WL 30267491 (Iowa Ct. App. 2012)

*In re Marriage of Schriner*, 695 N.W.2d 493, 498 (Iowa 2005)

*In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988)

*Schantz v. Schantz*, 163, N.W.2d 398, 405 (Iowa 1968)

**ROUTING STATEMENT**

This case should be transferred to the Court of Appeals because no basis exists for the Supreme Court to retain it for review. Iowa R. App. P. 6.1101 (2015). Transferring this case to the Court of Appeals is warranted because it involves questions that can be resolved by applying existing legal principles. Iowa R. App. P. 6.1101 (3)(a) (2015). Further, it is not an issue of first impression for the Court. Iowa R. App. P. 6.1101(2)(c)(2015). Contrary to Appellee’s contention, the issue of distribution of settlement proceeds has been addressed by this Court and the court of appeals on numerous occasions. *See In re Marriage of McNerney*, 417 N.W.2d 205, 206 (Iowa 1987)(adopting the “mechanistic approach” when dealing with settlement proceeds); see also *In re Marriage of Stowers*, 2012 WL 3026791 (Iowa Ct. App. 2012)(addressing the division of funds received by a party from a sexual harassment claim in a divorce proceeding). As such, the case should be transferred to the court of appeals.

**STATEMENT OF THE CASE**

Appellant John Doe’s (hereinafter “John”) main brief accurately describes the nature of the case, the relevant events of the prior proceedings and the disposition of the case at the district court level. Since the filing of his proof brief, the parties have made no additional filings with the district court relevant to the issues of this appeal.

**STATEMENT OF THE FACTS**

John’s main brief accurately states the facts relevant to this appeal. John does, however, take issue with many of Jane’s factual assertions.

First, as the court will note upon reviewing Jane’s brief, many of the citations provided by Jane do not support the factual assertions contained within her brief. Moreover, many of the facts listed by Jane are simply inaccurate. While the legal impact of these failures will be addressed in John’s argument, below is a list of facts that Jane has either: 1) failed to provide any cite to the record in support of; (b) provided cites in the record which in no way support the factual assertion at issue; or (c) has simply completely misstated. Due to the large number of factual assertions made by Jane that have no cite to the record/appendix or which are simply inaccurate, the list found below is not comprehensive, but is meant to provide the court with a general understanding of this failure:

* Jane claims that she didn’t attend law school because “John was afraid of the couple taking on too much student debt.” (Appellee’s Brief , p. 4) This is just another unsuccessful attempt by Jane to blame John for her failures. In reality, Jane never applied to law school, was never accepted to a law school, and was told by the University of Arkansas to not apply there because her LSAT scores were too low. (Transcript, p. 31, Lines 8-15)
* Jane asserts that there is no indication in the record of any statement made by her that she and J.J.D. would move to New Jersey. (Appellee’s Brief, p. 8) Again her actions and the testimony of John don’t match this claim. John testified in detail about how Jane and him searched for housing in New Jersey with their realtor, \*\*\*\*\*\*\*\* \*\*\*\*\*\*\*\*. (Transcript p. 336, Lines 2-25) John laid out in detail how they looked for a residence in New Jersey which was located in a good school district for J.J.D. (Transcript, p. 336, Lines 2-25). While Jane was telling her boyfriend and friends a different story behind closed doors, she was certainly leading John to believe that she was relocating.
* Jane alleges that at the date of trial J.J.D. spent the last two years under her care. (Appellee’s Brief, p. 10) This is just another embellishment of the factual record. John went to work in New Jersey in August of 2014. (Transcript, p. 51-52) Trial in this matter commenced in April of 2016. (Transcript, p. 1) In that year and a half period, John regularly returned to Iowa three times a month to care for J.J.D. (Transcript, p. 310) Further, it needs to be remembered that Jane plotted to have J.J.D. in her care during that period. (Transcript, p. 111, Lines 3-19)
* She further states, “she has fostered J.J.D.’s relationship with John while he has been away, going so far as to allow him to stay in the home when he visits J.J.D. (Appellee’s Brief, p. 10) Should she receive credit or praise for allowing John to stay in his own house? John co-owned the house with Jane. (Transcript, p. 33) Jane’s statement erroneously asserts that she owned or was granted exclusive possession of the house.

**REPLY ARGUMENT**

1. **STANDARD OF REVIEW AND PRESERVATION OF ERROR**

John concedes that Jane has properly preserved error on the issues raised in her cross-appeal. He further agrees with his stated standard of review for those issues.

**II. JANE FAILED TO ADDRESS NUMEROUS FACTS AND ARGUMENTS PRESENTED BY JOHN AND MISREPRESENTED OTHERS IN SUPPORT OF HIS POSITION THAT THE COURT WAS CORRECT IN GRANTING HER PRIMARY CARE OF J.J.D.**

While John’s main brief effectively addresses the arguments presented by Jane, there are several important facts/arguments presented in John’s main brief that Jane simply fails to address. These facts/arguments, together with additional facts the court should be aware of are presented below.

1. **Jane Failed to Present any Legitimate Argument and/or Supporting Facts to Demonstrate how J.J.D.’s Long Term Best Interests are Served by Placing Him in Jane’s Physical Care.**

Jane’s entire argument and factual basis for how she can serve J.J.D.’s Long Term Best Interests was confined to the following five lines:

“Not only does Jane provide a stable home, but she is active in her son’s life, serving as a coach in soccer and a volunteer in the classroom. She has done everything that is needed to help J.J.D. succeed, and it shows in the facts that J.J.D. is a healthy, well-adjusted, flourishing boy.” (Appellee’s Brief, p. 25)

While Jane should pat herself on the back for becoming active in in her child’s life upon deciding to file for divorce, it hardly demonstrates that she is the parent who “is most likely to bring the child to healthy physical, mental, and social maturity.” *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996). Further, contrary to her assertion, she has not “done everything that is needed to help J.J.D. succeed.” (Appellee’s Brief, p. 25) As her own witness testified, until she had divorce papers drafted in December of 2016 Jane was “not too active” in J.J.D.’s life. (Transcript 478, Line 18) As the famous basketball coach John Wooden once said, “the true test of a man’s character is what he does when no one is watching.” When the bright lights were off in this case in 2013 Jane simply wasn’t there for J.J.D. .   
 Conversely, when no one was watching, John laid the bedrock to the strong foundation upon which J.J.D. developed. John didn’t spend the first four years of J.J.D.’s life focusing on himself. Rather, he did the heavy lifting that resulted in J.J.D. being the well-adjusted, flourishing boy he is today.

1. **Jane Failed to Meaningfully Address the Significant Concerns Regarding Her Character**

Jane claims that the District Court correctly granted her primary physical care of J.J.D., and that such an order was in J.J.D.’s best interests. (Appellee’s Brief, p. 22) In support of her argument, Jane attempts to create a distorted view of her role in bringing about stability to J.J.D.’s life. Further, she completely discounts every single negative character flaw that she possesses. She fails to acknowledge a single deficiency in her parenting or herself. Most remarkable about this denial is that John’s references to these deficiencies are entirely supported by the record created at trial by the exhibits, by Jane’s testimony, and the testimony of the witnesses.

Domestic Violence

Jane for the first time seems to rebut John’s allegations of domestic violence in her Reply Brief. (Reply Brief p. 23) It’s important to note though, that there still is not an outright denial that domestic violence occurred. Rather, Jane simply asserts that, “there is no documented history of domestic violence, and the district court found no compelling evidence of a pattern of domestic violence.” (Reply Brief p. 23) Jane’s failure to outright deny the allegation shouldn’t come as a surprise though, as Jane himself admitted under oath to the physical nature of the parties’ conflicts. In her affidavit on temporary matters she indicated, “[t]here was a time when John and I would regrettably enter into arguments that could become mutually physical… .” (Exhibit U, p. 31) Despite this, Jane would still like us to believe that there was no history of domestic violence.

Jane relies on *In re Marriage of Forbes*, in support of her argument that the district court analyzed the domestic abuse issue properly. (Appellee’s Brief, p. 15-16). The *Forbes* court reasoned that, “[n]or does more than one minor incident automatically establish a “history of domestic abuse”.” *In re Marriage of Forbes*, 570 N.W.2d 757, 760 (Iowa 1997). Unlike the *Forbes* case, John’s allegations can hardly be characterized as minor incidents. Again, the unrebutted evidence demonstrated that in 2013, while John was holding the parties’ minor child, Jane hit him with enough force to make him fall to the ground. (Tr. p. 203) She then continued to punch him while he cradled the parties’ minor child. (Tr. p. 203) Jane’s oldest daughter then took the minor child and locked herself in the bathroom with the child. (Tr. p. 203) Jane then took John’s keys, so he could not leave. (Tr. p. 203) In addition, John credibly testified that Jane would routinely hit him in his torso during arguments, as this resulted in no visible bruising. (Tr. p. 203) On other occasions she has pinned his head to the ground or slammed his head into the wall. (Tr. p. 203) John then testified that the assaults went unreported, as Jane would have lost her national security clearance upon an arrest for domestic violence. (Tr. p. 294) Jane’s explosive temper was confirmed by her own eighteen year-old daughter, Abigail, who testified that she didn’t want her little brother to have to go through what she did as a child with Jane. (Tr. p. 411) Jane then failed to provide any rebuttal evidence to John’s or Abigail’s testimony.

The credible history of domestic violence in this case, is very distinct from the situation addressed in *Forbes*. Jane’s actions should not be minimized or marginalized.

Moral Fabric

Jane again minimizes and marginalizes her negative character traits when it comes to her moral fabric. (Appellee’s Brief, p. 23) John alleges that she had eight affairs on him. Jane will only admit to the two that she was physically caught having. (Transcript, p. 116, Lines 12-14)

John alleges that she has an issue with consuming alcohol, which is evidenced by her driving her car into the ditch, drinking every night in the barn, and meeting a boyfriend at a bar in 2013 when she was caring for J.J.D. (Transcript , p. 162-163) Jane simply claims she has never had an issue. (Appellee’s Brief p. 23)(stating, “this case does not involve a history of domestic abuse and alcohol abuse”)

John claims that it was inappropriate for Jane to have J.J.D. sleep in bed with her boyfriend before John was even aware that Jane had a boyfriend. (Transcript, p. 108, Lines 19-23) Jane doesn’t think it was a big deal. (Transcript, p. 108, Lines 19-23)

Jane admits that their arguments regrettably would get physical, but in the same breath she was never physically violent. (Exhibit U, p. 31)

Jane denied accessing John’s e-mails impermissibly. Upon being told that a forensic scan would be conducted on her computer she not only admitted to accessing the e-mails, but admitted to opening confidential attorney-client communications. (Transcript p. 103-104)

Jane tells the truth when she is cornered. She has a long history of dishonesty, deceit, and manipulation. While she was an acceptable short term care option for J.J.D., she certainly is not the best long term care option.

**C. Jane Failed to Explain Why She Had Divorce Papers Drafted on December 01, 2016, and waited until January 01, 2017 to Have John Served.**

The timing of Jane’s actions in this case raise real concerns about her ability to foster a positive relationship between John and J.J.D. Having divorce papers drafted on December 01, 20146 and then waiting until January 01, 2017, to have John served, are indicators that Jane is more interested in coming out on top of what she views as a competition rather than providing a stable environment for J.J.D. in the long run. (Appellant’s Brief, p. 11) This argument is further strengthened by the fact that Jane was largely an absent parent for the first four years of J.J.D.’s life. (Tr. p. 98, 188, 297, 300; Exhibit K; February 3, 2016, Temporary Order p. 2) Despite her declarations that she provides more stability to J.J.D., Jane failed to provide a single explanation for the timing of her filing or for why she was not too active J.J.D.’s life for the first four years. Common sense dictates that she held off on filing the case for a year, so she could establish a pattern of caring for J.J.D. It further lends credence to John’s argument that Jane continually promised to move to New Jersey and set him up. (Tr. p. 170-172)

The question then becomes, “should a party benefit for obtaining temporary care of their child during the pendency of a divorce through means of fraud or deception?” The simple answer is no.

Jane’s deception and her other poor character traits demonstrate that she is the most detrimental option out of the two parents when it comes to safeguarding J.J.D.’s growth and development. *See In re Winter’s Marriage*, 223 N.W.2d 165, 167 (Iowa 1974)(noting that “[d]etermining what custodial arrangement will best serve the long-range interest of a child frequently becomes a matter of choosing the least detrimental available alternative for safeguarding the child’s growth and development.”) Accordingly, J.J.D.’s long term best interests are served by placing him in the physical care of John. The trial court’s ruling should be overturned.

**III. THE TRIAL COURT’S DIVISION OF PROPERTY WAS FAIR AND EQUITABLE UNDER THE CIRCUMSTANCES**

A division of property pursuant to a dissolution of marriage is governed by Iowa Code §598.21(1)(2015) and the criteria set forth in *Schantz v. Schantz*, 163, N.W.2d 398, 405 (Iowa 1968). The ultimate test that should be applied by the trial court is whether the division of property is fair and just given all of the circumstances. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983). The trial court is not required to make an equal percentage division, but rather that which is just and equitable under the circumstances. *In re Marriage of Dannen*, 509 N.W.2d 132, 133 (Iowa App. 1993); *In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988). Iowa Code §598.21(1)(2015) directs a dissolution court to equitably divide between the parties all property except inherited property or gifts received by one party. Inherited property and gifts are set aside to the receiving party is divided*. In re Marriage of McNerney*, 417 N.W.2d 205, 207 (Iowa 1987).

John concedes that settlement or lawsuit proceeds received by one spouse during the course of an Iowa marriage are subject to the equitable distribution principles set out in Iowa Code §598(21)(5)(2015).  *In re McNerney*, 417 N.W.2d at 207; *see also* *In re Marriage of Schriner*, 695 N.W.2d 493, 498 (Iowa 2005)(holding that workers compensation benefits received and retained during the marriage constitute property of the marriage). Thus, the trial court did error in concluding that the settlement proceeds were not marital property.

Despite that error, the trial court’s assignment of the settlement monies to John was equitable. Contrary to Jane’s argument, the issue of equitably assigning settlement or lawsuit proceeds received by one party during the course of an Iowa marriage has been addressed by this court on multiple occasions. *McNerney*, 417 N.W.2d at 208; see also *In re Plasencia*, 541 N.W.2d 923 (Iowa Ct. App. 1995)(holding that it is equitable to award the injured party the settlement proceeds); see *also In re Marriage of Reis and Stowers*, 2012 WL 30267491 (Iowa Ct. App. 2012). These cases generally hold that it is equitable to assign settlement proceeds received and retained in a marriage to the injured party.

In applying the statutory factors, the *McNerney* court noted that the husband was injured in an automobile accident and received $45,000.00 as a settlement. *McNerney*, 417 N.W.2d at 206. The settlement did not designate what part of the proceeds were for lost wages, pain and suffering, medical expenses or loss of consortium. *Id.* However, the wife was a party to the civil cause of action. *Id.*  The court found under those facts, that it was equitable to award the husband approximately seventy-six of the settlement proceeds. *Id.* The court reasoned that the wife was entitled to some of the settlement proceeds, as some of the award was intended for loss of consortium and damage to the vehicle. *Id.*

The court of appeals had the opportunity to revisit *McNerney* in *In re Plasencia*, 541 N.W.2d 923 (Iowa Ct. App. 1995). In *Plasencia* the father had an outstanding personal injury claim at the time of the divorce trial. *Id.* at 926. The court heeded the advice of the *McNerney* court and found that settlement proceeds to not automatically belong to either party. *Id.* However, they found it equitable to assign all of the proceeds to the husband, as he was the one who suffered an injury. *Id.*

In *In re Marriage of Reis and Stowers*, the court of appeals was given the opportunity to analyze the division of settlement proceeds received by the wife for a sexual harassment claim. *Id.* at 1. At the time of the parties’ trial in *Reis*, they had $1,314,660.00 in a Vanguard account. *Id.* at 4. Approximately $918,513.00 of the account balance was attributable to the settlement. *Id.* The court of appeals then found it equitable to award the wife with $861,633.50 from the account, as she was the injured party. *Id.* at 5.

The lesson from *McNerney* and these court of appeals decisions is that despite the fact that settlement proceeds received and retained during the marriage are marital property, equity calls for the injured party to receive the lion’s share of the settlement monies that may exist on the date of trial. *Id.* What is received by the non-injured spouse is generally limited to the settlement proceeds earmarked for a loss of consortium or for property damage. *Id.*

In this case, John’s settlement from his previous employer was for specific incidents that occurred at his workplace. The settlement proceeds were not related to property damage or a loss of consortium claim. Further, Jane has not and cannot argue that the proceeds were related to her loss of consortium. The incidents leading to the settlement occurred while she was dating her present boyfriend. The only party damaged was John. Under these circumstances, the trial court’s assignment of the settlement proceeds to John was equitable and just.

**CONCLUSION**

As more fully set forth above and in John’s main brief, the evidence at trial establishes that J.J.D.’s long term best interests are served by being placed in the primary physical care of John. Jane’s entire argument in support of retaining physical care of J.J.D., is that she had J.J.D. in her care for the year and a half before trial. As stated, Jane accomplished this through deception. This is not an appropriate basis for placing J.J.D. in her care.

Jane’s argument that she is entitled to a portion of John’s settlement with his ex-employer is equally empty. When the actions leading to the settlement occurred Jane already had divorce papers drafted and a new boyfriend in tow. None of the monies received were earmarked to replace property of Jane’s. Further, none of the monies related to a loss of consortium claim.

As such, John respectfully requests that the court find the district court erred in placing J.J.D. in the physical care of Jane, and properly awarded John all of his settlement monies.

WHEREFORE, Appellant, prays that the District Court’s decision in his favor on the property settlement be affirmed and that the decision to grant Jane physical care of J.J.D. be overturned.

Respectfully submitted,

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**ATTORNEYS’ COST CERTIFICATE**

The true and actual amount paid for printing the foregoing Brief was $0.00.

/s/ Mark Hinshaw

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this brief contains 5,239 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Cambria 14 point font.

/s/ Mark Hinshaw 8/29/16

Mark R. Hinshaw AT0009119 Date

**CERTIFICATE OF FILING**

The undersigned hereby certifies that on the day of of 20 , one (1) copy of Appellant’s proof brief was filed via EDMS with the Clerk of the Iowa Supreme Court.

/s/ Mark Hinshaw

Mark R. Hinshaw AT0009119

**PROOF OF SERVICE**

I certify that on , 20 , I e-mailed a copy of this document to the attorneys of record who are listed below.

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Email \*\*\*\*\*\*\*\*\*\*

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