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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 322513-III

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION III**

**INTELLIGENT WIRELESS PRODUCTS, INC., a Washington
corporation; CYFRE, LLC, a California limited liability
company; and LAWRENCE KOVAC and JANE DOE KOVAC,
husband and wife, and the marital community composed therein,**

Appellants,

v.

SERVATRON, INC.,

Respondent.

**APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Case No.: 11-2-05197-2
Honorable Tari S. Eitzen**

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Servatron claims that it should be excused from providing notice to the Kovacs' counsel of its motion for default because defense counsel failed to filing a formal notice of appearance. But Washington law provides that counsel need not formally appear if he acknowledges that the case exists in court and manifests an intent to defend. The Kovacs' counsel met this standard by informing Servatron that he represented the Kovacs in this matter and engaging in settlement discussions over telephone and through 17 emails over the course of several months.

The Brief of Respondent Servatron, Inc. ("Response") is rife with legal conclusions that are unsupported by its cited case law. Despite Servatron's claims,

- "appearance" under CR 55 does not require defense counsel to physically appear in court, file court documents, or be a Washington licensed attorney;
- motions to set aside default are not time barred if the underlying order is void because CR 55 notice was not provided to defendant; and
- Washington courts do not have jurisdiction over a non-Washington resident with no contacts to the state or involvement in the complained of acts.

II. AUTHORITY

A. **Servatron repeatedly misstates the standard of review.**

Although Servatron admits that the standard of review for a determination based on uncontested facts is de novo, Servatron repeatedly argues that this Court should apply an abuse of discretion standard. (Response at 6-7 (admitting standard); 1-2, 5-6, 10, 20, 25, 31, 37, 38(mis-stating standard).) There are no contested facts here: Servatron admitted that it did not serve the motion for default and that it communicated extensively with the Kovacs' attorney beforehand.

B. **The Kovacs were entitled to notice of the motion for default because they “appeared” within the meaning of CR 55 but Servatron did not provide notice.**

Servatron erroneously claims that 1) “appearance” requires physically appearing in Court, 2) non-Washington attorneys cannot appear, and 3) threats to bring a motion for default constitute notice under CR 55 (c). Each of Servatron's theories fails.

1. **The Kovacs' counsel satisfied *Morin*'s requirement that the defendant must acknowledge that the dispute exists in court and manifest intent to defend.**

Citing *Morin*, Servatron claims that “appearance” under CR 55 necessitates that the Kovacs physically “appear in court in some way.” (Response at 10; *see id.* at 11-13.) But *Morin* states otherwise. *Morin* holds that a defendant must “apprise the plaintiffs of [his]

intent to litigate the case.” *Morin v. Burris*, 160 Wn.2d 745, 755 (2007). Defendant’s action “must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court*.” *Id.* at 756 (emphasis in original). *Morin* does not mandate a physical appearance in court. *See id.* And there is good reason: in Washington, a physical appearance is not required until very late in the litigation process—it is possible to litigate an entire case up until trial without ever physically appearing in court. *See* CR 1-56.

And even if Servatron meant a written notice of appearance rather than physically appearing in court, a written notice is not required and the Kovacs satisfied the *Morin* standard. After Servatron initiated suit, attorney Faraz Mobassernia contacted Servatron’s counsel about the case and engaged in extensive settlement discussions spanning months and consisting of multiple telephone calls and at least 17 emails. (CP at 145-206.) Mobassernia acknowledged the case, and his correspondence with Servatron’s counsel clearly indicates intent to litigate:

- On April 5, 2012, Mobassernia emailed Servatron’s counsel using the subject line “re: Servatron v. Intelligent Wireless Products,” and indicated that he “emailed the court in Washington...regarding the filing of this complaint.” (CP at 146.) Understanding that Mobassernia referenced the case pending in Spokane County Superior

Court, Servatron’s counsel emailed back and provided the case number. (*Id.* at 146.)

- On April 17, 2012, Mobassernia followed up again, asking Servatron’s counsel to call him because he had “come up with a good solution to this matter.” (CP at 150.)
- Through April and June 2012 counsel negotiated settlement terms via email and teleconference in an attempt to resolve the outstanding litigation. (*See* CP at 184-206.) The parties’ counsel—as well as Mr. Kovac and Servatron’s president, Todd Byers—engaged in the settlement discussions. (*See id.* at 201-03.)
- Then, on June 4, 2012, Servatron’s counsel demanded that Mr. Kovac accept Servatron’s settlement terms by the end of the week, threatening to “move forward with the default process and/or litigation.” (CP at 154.)
- Mobassernia promptly responded on June 5 requesting an extension, noting that Mr. Kovac’s mother was “on her death bed,” and stating that Mr. Kovac was already beginning to implement terms of the proposed agreement. (*See* CP at 154.)
- On June 5, Servatron’s counsel agreed to the extension and pressed defendants to settle, stating “we need the defendants to accept our settlement terms by [June 15] or

we'll go into litigation mode—including moving for default.” (CP at 154.)

- On June 6, Servatron’s counsel sent Mobassernia a copy of the scheduling order “in case we move back to the litigation track” —indicating Servatron’s understanding that Mobassernia intended to defend the Kovacs in the lawsuit. (*See* CP at 154.)
- By June 21, 2012, settlement discussions had fallen apart. (CP at 153 and 215 at ¶ 3.) Mobassernia’s final email to Servatron’s counsel stated “what’s going on????” (*Id.* at 153.) Servatron’s counsel never responded. (*Id.*)
- Without contacting Mobassernia or serving him with a copy of the motion, Servatron moved for an order of default on July 11, 2012. (CP at 26 and 144 at ¶ 5.)

All of these communications were made in the context of the pending litigation. And statements made by Servatron’s counsel confirm that he understood that Mobassernia represented defendants in the case—why else would he provide Mobassernia with the case number and scheduling order?

This Court’s recent application of *Morin* in another case also confirms that a party need not physically appear in court—or interact with the court at all. In *Meade v. Nelson*, 174 Wn. App. 740, 744-45 (2013), the plaintiff sent an “ER 408 Settlement Demand”

letter to defense counsel, and defense counsel counteroffered. Like Servatron, the plaintiff in *Meade* terminated settlement discussions and filed a motion for default without providing notice. *Id.* The *Meade* Court held that defense counsel’s unanswered counteroffer, “referencing the case and potential evidentiary issues,” satisfied *Morin. Id.* at 834.

And in *Old Republic*, this Court reversed the trial court and ordered the default judgment vacated, holding that defendants were entitled to notice after defense counsel told plaintiff’s counsel he was “representing the [defendants] in this action” during a telephone call. *Old Republic Nat. Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC*, 142 Wn.App. 71, 73-75 (2007)(per curiam).

Servatron cannot distinguish the facts of this case from *Meade* and *Old Republic*. As in *Meade*, Mobassernia engaged in settlement discussions—although here, Mobassernia’s discussions with Servatron’s counsel were in greater depth and extended over several months. And, like plaintiff’s counsel in *Old Republic*, Servatron’s counsel acknowledged that Mobassernia represented the Kovacs by sending him the case and the scheduling order, and engaged Mobassernia in settlement discussions. The trial court’s denial of the motion to set aside default directly conflicts with *Morin*, *Meade*, and *Old Republic*.

Servatron relies exclusively on *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 400 (2008) to argue that

Mobassernia's communications with Servatron were insufficient. But in *Rosander*, the plaintiff properly served the notice of motion for default by serving it on an unrepresented insurance company's corporate headquarters. *Id.* Although the *Rosander* court also stated that the insurance company's communications with the plaintiff were insufficient to constitute a notice of appearance, these comments are dicta—and based on a misunderstanding of *Morin*.

The *Rosander* court erroneously stated that the Supreme Court required an appearance in court in *Morin*. But that is not the holding. Instead, *Morin* only requires that the Kovacs “apprise the plaintiffs of their intent to litigate the case [and] acknowledge *that a dispute exists in court.*” *Id.* at 756 (emphasis in original). The Kovacs were never required to apprise the court of anything; only to acknowledge that the dispute was in court, and that they intended to defend.

Moreover, *Rosander* was decided before *Meade* and *Old Republic*, each of which directly contradict Servatron's claim that a written notice of appearance must be filed with the court. Finally, the Kovacs did contact the court—Mobassernia called the court, and was told by court staff that they couldn't find the case. CP at 146.

2. The Kovacs' appearance is not defective because Mobassernia was not licensed in Washington.

Servatron claims that Mobassernia's engagement in the litigation doesn't constitute appearance under CR 55 because he is

not licensed to practice law in Washington. (Response at 17.) Servatron relies on *Seek Systems*. (*Id.* at 18.) But in *Seek Systems* a corporate defendant sought to set aside default, claiming that a single phone call made by a customer service representative to plaintiff disputing liability and offering to settle did not constitute “appearance.” *Seek Sys., Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn.App. 266, 267-68 (1991). The court rejected defendant’s argument, noting that “if [Defendant] had hired an attorney, that might be a factor manifesting an intent to defend.” *Id.* at 621. Here, the Kovacs did hire an attorney—Mobassernia. And as Servatron concedes, Mobassernia could appear *pro hac vice* or partner with local counsel—and likely would have if he had been served with a notice of motion for default. (*See* Response at 20).

3. Threatening to file a motion for default in the future does not constitute notice of a later-filed motion under CR 55.

Servatron is not excused from providing notice to the Kovacs simply because its counsel threatened to move for default during settlement negotiations. Servatron claims that it informed the Kovacs of its intent to move for default, but they “failed to heed its warnings.” (Response at 16.) Servatron cites no authority for the proposition that this type of warning satisfies CR 55’s notice requirement. (*See* Response at 16-17.) And it doesn’t: CR 55(a)(3) unequivocally provides that “[a]ny party who has appeared in the

action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion.” Servatron did not serve a written notice of motion nor did it serve the supporting affidavit—for the bizarre reason that Servatron’s counsel claimed that he personally believed that the Kovacs’ defenses were meritless, and that serving the required notice would therefore be futile. (January 24, 2014 Transcript of Oral Argument (“Tr.”) at 11:24-25.).

4. **Refraining from engaging in “sneaky and unfair” behavior does not exempt Servatron from its notice obligations.**

Servatron also argues that “*Meade* supports the superior court’s refusal to vacate the default judgment” because Servatron didn’t engage in “sneaky and unfair” behavior. (Response at 16-17.) But Servatron mischaracterizes *Meade* and takes statements by the trial court judge out of context.

Meade does not hold that only “sneaky and unfair” behavior voids a default judgment. In fact, it holds the opposite. In *Meade*, the trial court stated, “clearly there was an intent to defend this case and it’s a bit disingenuous to argue that the correspondence and the contacts did not constitute that.” *Meade*, 174 Wn.App, 748 (referring to defense counsel’s engagement in settlement discussions and correspondence). Based on this finding, the trial court set aside the default; this Court affirmed. *Id.* at 749. Although the *Meade* court

also lambasted the “gotcha practice of law” the plaintiff engaged in by not simply asking the *Meade* defendant to file his answer, the court did not require similar “sneakiness” to set aside defaults where the motion for default was not served.

And even if the Kovacs did have to prove “sneaky and unfair” behavior, Servatron engaged in it. Servatron’s conduct is not dissimilar from the plaintiff in *Meade*, and the *Meade* court’s comments are instructive. Mobassernia and Servatron’s counsel had engaged in months of settlement discussions—marked by a clear intent to defend. Yet Servatron now claims that after months of negotiation with Mobassernia there was no appearance. And, if Servatron had said ““Hey, where is your answer?”” —as the *Meade* court suggested was the proper course of conduct—or simply provided notice of the motion for default, this case would not be before this Court on appeal.

C. The Kovacs’ motion to set aside default is not time barred.

Servatron claims that the Kovacs’ motion is time barred by CR 60(b)—but the time limitation Servatron relies on only applies to relief sought under CR 60(b)(1)-(3). CR 60(b)(“The motion shall be made ... for reasons (1), (2) or (3) not more than 1 year after the judgment...was entered or taken.”) The Kovacs seek relief under CR 60(b)(5) and (11).

Courts must set aside judgment if the judgment is void. CR 60(b)(5). *See Ahten v. Barnes*, 158 Wn.App. 343, 350 (2010) (“courts have a mandatory, nondiscretionary duty to vacate void judgments.”). Motions to vacate void judgments under CR 60(b)(5) may be brought at any time. *Morris v. Palouse River & Coulee City R.R., Inc.*, 149 Wn.App. 366, 371 (2009) (confirming that motion to vacate seven year old order was timely); *Colacurcio v. Burger*, 110 Wn.App. 488, 497 (2002).

Citing inapposite law, Servatron argues that the Kovacs cannot rely on CR 60(b)(5) because the judgment is only “voidable,” not “void.” (Response at 23.) Servatron is wrong. It is well established that default judgments are void if the motion for default was not served as required by CR 55 (c). *See e.g. Ellison v. Process Sys. Constr. Co.*, 112 Wn. App. 636, 644 (2002); *Shreve v. Chamberlin*, 66 Wash.App. 728, 731-32 (1992); *Matia Inv. Fund, Inc. v. City of Tacoma*, 129 Wn.App. 541, 545 (2005) (*rev’d on other grounds by Morin*, 160 Wn.2d at 749-50); *Colacurcio*, 110 Wn.App. at 497 (*Kimball v. Ichikawa*, 168 Wn.App. 1006 (2012) notes that this case is abrogated by *Morin*, but on other grounds). *Accord Ware v. Phillips*, 77 Wn.2d 879, 883-84 (1970) (lack of notice caused judgment to be void on due process grounds). “If the court enters an order of default in a case where an appearing party lacks notice, the defaulted party is entitled as a matter of right to have the judgment set aside.” *Ellison*, 112 Wn.App. at 642 (citing to CR 60(b)(5) in its

decision to uphold the trial court's order setting aside default judgment after defendant employer only sent two pre-litigation letters to an employee, but failed to formally appear); *see also Old Republic*, 142 Wn.App. at 75 (Defendants "entitled to vacate the default judgment as a matter of law" when notice not provided).

Attempting to undercut well-established precedent, Servatron cites *In re Marriage of Ortiz*, which held that an invalid escalation clause in a child support portion of a dissolution decree did not render the decree void, just voidable. 108 Wn.2d 643, 649 (1987). Servatron also relies on *Marley v. Dep't of Labor & Indus. of State*, 125 Wn.2d 533, 540 (1994), where the Court was faced with a widow's attempt to overturn the Department of Labor and Industries' order denying her benefits. 125 Wn.2d 533, 534. But *In re Marriage of Ortiz* and *Marley* are inapposite, as neither case analyzes CR 60 or default judgments entered without proper notice to an appearing party. *See* 108 Wn.2d 643; 125 Wn.2d 533.

Servatron next argues that this Court should ignore decades of precedent because one case, *Colacurcio*, is allegedly bad law because it misreads *Tiffin v. Hendricks*, 44 Wn.2d 837 (1954). (Response at 26.) But *Colacurcio*'s reliance on *Tiffin* is proper. In *Tiffin*, the trial court entered default despite plaintiff's failure to provide notice to defendants. 44 Wn.2d at 839-40. The *Tiffin* Defendants asked the Washington Supreme Court to hold that the default judgment was "tantamount to a void judgment." *Id.* at 841.

The Supreme Court agreed with defendants, ordering the trial court to vacate default judgment because “the court has no authority to enter a default judgment...[and] defendant may have such a default judgment set aside as a matter of right.” *Id.* at 847. While *Tiffin* predates the current Civil Rules, the Supreme Court’s recitation of a trial court’s lack of authority to enter default without proper notice remains good law. Applying *Tiffin*, *Colacurcio* held that where notice under CR 55 is required but not provided, “the default order and the subsequent default judgment were void.” 110 Wn.App. at 497.

Servatron also claims that failure to give notice under CR 55 merely constitutes an irregularity, and is thus subject to CR 60(b)(1)’s time limitations. (Response at 24.) But Servatron’s sole cited authority does not stand for this proposition. In *Gage*, this Court specifically noted that it offered “no opinion whether a failure to provide notice pursuant to CR 55(a)(3) *might also justify vacation of a default judgment on grounds other than an “irregularity”* within the meaning of CR 60(b)(1).” *Gage v. Boeing Co.*, 55 Wn.App. 157, 165 (1989).

D. Other reasons justify setting aside the default.

Even if this Court holds that the default judgment order is not void, the trial court still erred by not granting relief under CR 60(b)(11).¹ CR 60(b)(11) gives courts latitude to relieve a party from a final judgment for reasons not otherwise enumerated in CR 60(b). *Topliff v. Chicago Ins. Co.*, 130 Wn.App. 301, 305, *review denied* 157 Wn.2d 1018 (2006). The reasons permitted by CR 60(b)(11) must relate to “irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.” *State v. Keller*, 32 Wn.App. 135, 141 (1982) (*citing Marie’s Blue Cheese Dressing, Inc. v. Andre’s Better Foods, Inc.*, 68 Wn.2d 756, 758 (1966)). Because this Court’s “primary concern is whether the default judgment is just and equitable,” the Court examines the “unique facts and circumstances” of each case. *Id.* (internal quotes and citations omitted).

The Kovacs were not provided notice of the motion for default, which deprived them of their right to object to the motion. The equities favor setting aside the default judgment and letting the parties litigate the case on the merits.

¹ Servatron inaccurately claims that the Kovacs never raised CR 60(b)(11) as a basis for relief. *See* CP at 126-27 (citing CR 60(b)(11) and *Topliff*, 130 Wn. App. 301 (affirming trial court’s order vacating default judgment pursuant to 60(b)(11)).

E. The Court Lacks Personal Jurisdiction over Mrs. Kovac.

1. Servatron fails to establish personal jurisdiction over Mrs. Kovacs.

As Servatron concedes, a “default judgment entered without personal jurisdiction is void.” *Morris*, 149 Wn.App. at 371; *see e.g. Allstate Ins. Co. v. Khani*, 75 Wn.App. 317, 323 (1994); *Leen v. Demopolis*, 62 Wn. App. 473, 478 (1991). Where a Court lacks personal jurisdiction, a default judgment must be set aside. CR 60 (b)(5).

The plaintiff has the burden of establishing jurisdiction. *Davis v. Opacki*, 170 Wn.App. 1049 (2012) *review denied*, 176 Wn.2d 1026 (2013). Servatron attempts to turn this burden on its head, arguing that Mrs. Kovac failed to prove by clear and convincing evidence that the court lacked personal jurisdiction. Servatron claims that the burden is on the party “attacking *the service* to show by clear and convincing proof that the service was improper.” (Response at 32 (emphasis added).) Servatron either misunderstands or deliberately misrepresents the law. Service of process is not at issue here. *Davis v. Opacki*—binding authority—contradicts Servatron’s claim and puts the burden squarely on Servatron’s shoulders to prove that Mrs. Kovacs is subject to the Court’s personal jurisdiction.

She is not. Servatron relies on Washington’s long arm statute, but that provides that the court’s jurisdiction extends to any person “who in person or through an agent...transact[s] any business within

this state” or “commission[s] a tortious act within this state.” RCW 4.28.185. And the Court only has jurisdiction over the defendant related to the business transacted in Washington. *Id.* Servatron must accordingly establish that (1) Mrs. Kovac purposefully did some act or consummate some transaction in Washington, (2) the cause of the action arose from or is connected with this transaction, and (3) the traditional notions of fair play and substantial justice are not offended. *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn.App. 643, 653 (2010).

Servatron offers no facts supporting—or even indicating—that Mrs. Kovac transacted business in Washington or was involved in the contract breaches at issue in this case. Servatron merely names Mrs. Kovac as a party, then attributes all of Mr. Kovac’s actions to Mrs. Kovac by defining “Kovac” to mean both individuals, as well as their marital community. (*See* CP 10.) Servatron does not bother providing a jurisdictional statement for Mrs. Kovac, and the statement provided for “Kovac” clearly pertains only to Mr. Kovac, as Mrs. Kovac was never an “officer, director, and shareholder of Cyfre.” (*See* CP 11 at ¶ 4.)

Even if the Complaint alleged facts sufficient to establish jurisdiction—which it does not—uncontroverted testimony establishes that Mrs. Kovac has no contacts with Washington, no involvement with defendants Intelligent Wireless and Cyfre LLC, and no contact with plaintiff Servatron. (*See* CP at 131, ¶ 8.)

Servatron offers no facts or evidence disputing this testimony. (*See* Response.) Rather, Servatron points to the trial court's findings—which were submitted by Servatron and based on inadequate statements in the Complaint that fail to distinguish between Mr. and Mrs. Kovac. (*Id.* at 36.) This is insufficient to meet the prima facie showing for personal jurisdiction over Mrs. Kovac.

Servatron also argues that Mr. Kovac's contacts in Washington are imputed to Mrs. Kovac through the marital community. In support of this argument, Servatron relies on *Barer v. Goldberg*, 20 Wn.App. 472 (1972). (Response at 37.) In *Barer*, the wife's parents sued her (former) husband for repayment of a loan, and the husband added his ex-wife as a third-party defendant, seeking a judgment for contribution. *Id.* The *Barer* Court held that personal jurisdiction extended to the wife, a California resident. *Id.* at 481. But in reaching this result it noted that:

- the wife was aware that her husband had borrowed money from her father;
- the loan was deposited into the couple's joint account;
- prior to divorcing, the couple intended to repay the loan together;
- the couple married in Washington, and lived in Washington prior to moving to California;
- they visited plaintiff-parents in Washington yearly; and
- the wife owned real property within Washington.

Id. at 475, 479, 480-81. The Court also held that personal jurisdiction extended to the wife because she acted as a business partner to her husband, who was managing the marital community. *Id.* at 481. Unlike the wife in *Barer*, Mrs. Kovac has no connection to the transaction at issue in the action, nor is there evidence that she has visited, lived in, or owed property in the state. Nor does Servatron present evidence that Mrs. Kovac is Mr. Kovac’s business partner—she was not even married to Mr. Kovac at the time the alleged breaches occurred. With no connections to the underlying transaction or to Washington, the trial court lacked jurisdiction over Mrs. Kovac.

III. CONCLUSION

The Kovacs respectfully request that this Court reverse the trial court’s order denying the motion to set aside default because the trial court 1) failed to apply the proper legal standard governing “appearances” under CR 55 and 2) entered judgment against Mrs. Kovac when it lacked personal jurisdiction over her.

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DATED this 23rd day of July, 2014.

Respectfully Submitted,

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6
7 **SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THE COUNTY OF SPOKANE**

9 SERVATRON, INC. a Washington
10 corporation,

11 Plaintiff,

12 vs.

13 INTELLIGENT WIRELESS
14 PRODUCTS, INC., a Washington
15 corporation; CYFRE, LLC, a California
16 limited liability company; and
17 LAWRENCE KOVAC and JANE DOE
18 KOVAC, husband and wife, and the
19 marital community composed therein,

20 Defendants.

Superior Court Case No. 11-2-05197-2

Court of Appeals Case No. 322513-III

CERTIFICATE OF SERVICE

21 The undersigned hereby certifies that on July 23, 2014, I caused the foregoing

22 • **REPLY BRIEF OF APPELLANT**

23 to be served via the method(s) listed below on the following parties:

24 **Via U.S. Mail and email to:**

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1 I certify under penalty of perjury under the laws of the United States and the State
2 of Washington that the foregoing is true and correct and that this certificate was executed
3 on July 23, 2014 at Seattle, Washington.



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5
6 Lindsey Rowson

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