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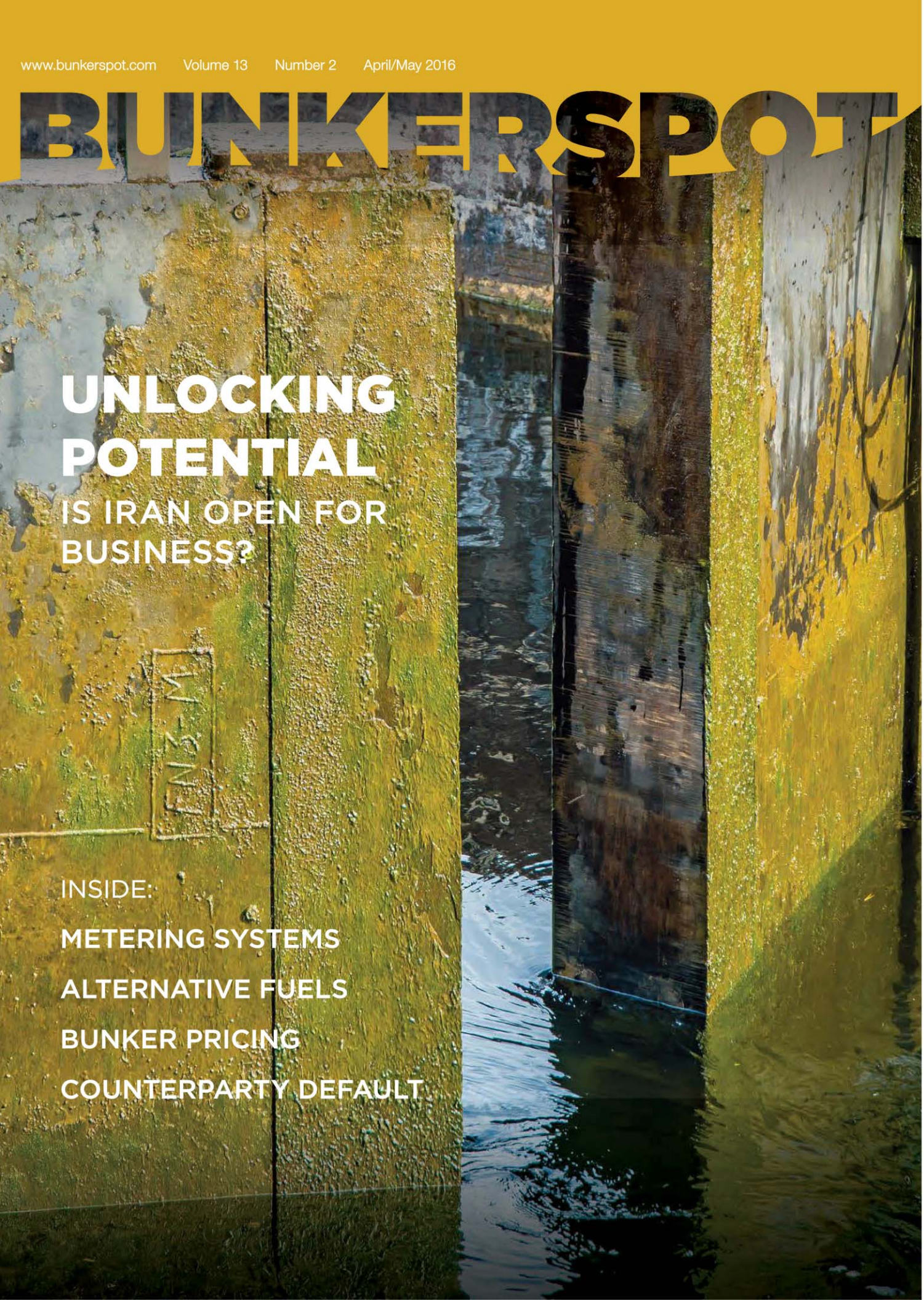

UNLOCKING POTENTIAL

IS IRAN OPEN FOR BUSINESS?

INSIDE:

METERING SYSTEMS

ALTERNATIVE FUELS

BUNKER PRICING

COUNTERPARTY DEFAULT

General counsel

The US removal of some sanctions against Iran in January was initially heralded as a trading 'breakthrough'. However, as Steve Simms of Simms Showers explains, what is permissible in doing business with Iran remains a legal quagmire

The US Civil War (also called the 'War Between the States', while some in the Southern United States call it 'The War of Northern Aggression') ended in 1865, 151 years ago. Historians say that a study of this war helps to understand much about the United States as it is now – and this includes a way to understand the US post-January 2016 sanctions against Iran.

During the US Civil War, the US federal government attempted to blockade the Southern (Confederate) ports from virtually all international commerce. This was the US federal government's first significant use of sanctions. The war had two chief opposing generals, General Lee (pronounced, '**generally**'), the Southern (Confederate) states' general, and General Ulysses S. Grant (known as '**U.S. Grant**'), the Northern (US federal government) general. **U.S. Grant** and his US government won the US Civil War. '**Generally**' (General Lee) lost.

In July 2015, the United States and other countries working through the International Atomic Energy Agency (IAEA) indicated to Iran that they would lift sanctions if Iran substantially reduced its nuclear

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programmes. The IAEA certified that Iran had complied with this request and subsequently declared 16 January 2016 as the Implementation Day for lifting sanctions.

The international bunkering industry hoped for a sanctions lift that would significantly open Iranian trade both to bunker purchases and sales involving Iran and to provisions to vessel traffic to and from Iran. Many European countries, including the United States, lifted most sanctions involving trade with Iran (although some still continue).

The United States has pressed various sanctions against Iran since the taking of American hostages and the United States Embassy in the 1980s. Considering that it was the United States that initiated sanctions, it follows that now, after January 2016 and the lifting of most of international sanctions against Iran, it remains US policy which still forms the implementation of Iran sanctions and their enforcement. After January 2016's 'Implementation Day', US sanctions still significantly affect bunker suppliers, traders, brokers, and their customers which otherwise have no contact with the United States.

So, then, what did the United States do about sanctions on and after Implementation Day on 16 January 2016?

Did the United States lift all sanctions? (No.)

Did the United States lift no sanctions? (No.)

Did the United State lift some sanctions? (Yes, but…) For everyone? (Yes, but…) For just some? (Yes, but…)

Is this confusing and unclear? Yes, and from the US policy standpoint, that's intentional. A central principle of US sanctions against Iran is to keep much of the sanctions unclear. US policy continues to be to keep those considering sales and purchases to or from Iran-related entities guessing about whether that trade violates sanctions. The significant opportunities that Iran trade presents, however, also continue to lead bunker traders, brokers, suppliers and their customers to develop tactics to trade without violating the sanctions.

Here is where the story of '**Generally**' and '**U.S. Grant**' becomes helpful.

About a year into the Civil War, the Confederacy in 1862 appointed General Robert E. Lee as its main general. General Lee was an extraordinary tactician. He was from a military family, was a master of strategy, and closely studied his opponents to exploit opportunities. Throughout the war, he attempted and sometimes succeeded to evade US sanctions to provision his troops and outwit his opponents.

Opposing him was General Ulysses S Grant. His approach to battle was different from General Lee's. Grant's tactics involved primarily attacking the enemy head-on with massive numbers of men, losing many of them as casualties but still overwhelming the tactics of his opposition.

On Implementation Day 16 January, 2016, there was a **U.S. grant** lifting 'secondary sanctions', which **generally** were sanctions the United States had directed at non-US persons. US regulation defines the term 'US person' to include any US citizen, permanent resident alien, entity organised under US law or US state or local jurisdiction, including foreign branches, and any person in the United States. So, **generally**, if you or your company is a 'US person', sanctions still apply to your or your company's trade involving Iran.

Foreign entities owned or controlled by 'US persons', however, now **generally** may engage with Iranian entities, but, only to the extent US regulations exempt these activities. So, **generally**, it now is not sanctionable for non-US persons to sell to or buy directly from Iran-related entities. But, subject to this **U.S. grant**, there must be continued significant care taken with each transaction involving an Iran-related entity to:

1. Assure that payment is not made in United States dollars by electronic or other means ('transiting' through the US financial system);
2. Assure that no US person is involved in the transaction;
3. Assure that no person, entity or vessel involved in the transaction is on the List of Specially Designated Nationals and Blocked Persons (SDN List), the Foreign Sanctions Evaders (FSE) List, and/or the Non SDN Iran Sanctions Act (NS–ISA) List. Although many vessels, entities or persons have been removed from these lists since Implementation Day, many still remain;
4. Assure that the Islamic Revolutionary Guard Corps (IRGC) and its designated agents or affiliates are not involved with the transaction. As is well known, the 'IRGC' controls many elements of the Iran economy. Therefore, any transaction with most Iranian entities – unless specifically named as exempted **generally** – should continue to be questioned as possibly subject to sanctions;
5. Assure that no part of the transaction involves any of a number of US 'Designation Authorities', which include those:
   - banning support for terrorism (Executive Order 13224, blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism);
   - involving Iran's human rights abuses; involving transfers of goods or technologies to Iran that are likely to be used to commit serious human rights abuses against the people of Iran; and persons who engage in censorship or similar activities with respect to Iran (Executive Orders 13553 and 13628);
   - relating to the provision of information technology used to further serious

human rights abuses (Executive Order 13606);
- involving proliferation of weapons of mass destruction and their means of delivery, including ballistic missiles: Executive Orders 12938 and 13382;
- supporting persons involved in human rights abuses in Syria or for the Government of Syria (Executive Orders 13572 and 13582); or
- supporting persons threatening the peace, security, or stability of Yemen (Executive Order 13611).

So, an essential tactic considering Iran-involved sales and US sanctions **generally** continues to be, to scrutinise and make certain of who one is buying from or selling to – doing due diligence in advance to determine whether the counterparty is an Iran-owned or controlled entity, and if so, what Iranian person (or entity such as the IRGC, 'its designated agents or affiliates') actually controls the counterparty.

But how is it possible to actually know who controls your counterparty? US sanctions still prohibit both US and other persons from knowingly engaging in conduct that seeks to evade US restrictions on transactions with Iran or that causes the export of US goods or services from the United States to Iran.

What is the US standard for 'knowing' whether US sanctions still affect a transaction involving Iran? Generally, it is set out in the US Department of the Treasury, Office of Foreign Assets Control (OFAC) Guidance Relating to the Lifting of Certain US Sanctions Pursuant to the Joint Comprehensive Plan of Action on Implementation Day – including frequently asked questions (FAQs) – at: https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx, which includes the following:

> *For the purpose of these FAQs, with respect to conduct, a circumstance, or a result, the term 'knowingly' means that a person has actual knowledge, or should have known, of the conduct, the circumstance, or the result (see FAQ 289).*
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> ** * **
>
> *289. How will the following IFCA terms be interpreted: 'Iran', 'knowingly', 'significant', 'transfer', 'Iranian person included on the SDN List'? As a general matter [generally], we intend to rely, where applicable, on definitions of terms previously included in Treasury regulations.*

This of course is a **U.S. grant** of some, but not much clarity. Under US sanctions now, is even the word 'Iran' clear? The US Iranian Financial Sanctions Regulations ('IFSR', 31 CFR part 561) (IFSR) define 'Iran' as:

> *the Government of Iran and the territory of Iran and any other territory or marine area, including the exclusive economic zone and continental shelf, over which the Government of Iran claims sovereignty, sovereign rights, or jurisdiction, provided that the Government of Iran exercises partial or total de facto control over the area or derives a benefit from economic activity in the area pursuant to international arrangements.* (31 CFR § 561.329).

An 'Iranian person included on the SDN List' might also seem clear until one reads in the 'FAQs' that 'OFAC anticipates publishing on its website a list to assist in identifying Iranian persons included on the SDN List for purposes of IFCA and the E.O.'

The IFSR define 'knowingly' with respect to conduct, a circumstance, or a result, to mean that a person has actual knowledge, or should have known, of the conduct, the circumstance, or the result. (31 CFR § 561.314). 'FAQ 289' continues, describing the terms 'significant' and 'transfer':

> *As a general matter, in determining for purposes of IFCA and the E.O. whether transactions, financial transactions, or financial services are significant, the Department of the Treasury will rely on the interpretation set out in §561.404 of the IFSR. The IFSR provide a list of broad factors that can play a role in the determination whether transactions, financial services, and financial transactions are significant, including: (a) the size, number, and frequency of the transactions, financial services, or financial transactions; (b) the type, complexity, and commercial purpose of the transactions, financial services, or financial transactions; (c) the level of awareness of management and whether the transactions are part of a pattern of conduct; (d) the nexus of the transactions, financial services, and financial transactions and blocked persons; (e) the impact of the transactions, financial services, and financial transactions on statutory objectives; (f) whether the transactions, financial services, and financial transactions involve deceptive practices; (g) whether the transactions solely involve the passive holdings of Central Bank of Iran (CBI) reserves or repayment by the CBI of official development assistance or the transfer of funds required as a condition of Iran's membership in an international financial institution; and (h) other relevant factors that the Secretary of the Treasury deems relevant. We anticipate adopting a similar approach to interpreting the term 'significant' as it applies to goods or services.*
>
> *'Transfer' includes import, transshipment, export, or re-export, whether direct or indirect. [06 03 13]*

From this, how under the now (somewhat) lifted US sanctions, is a bunker trader, broker, or supplier, or its customer, to exercise the required due diligence when a transaction is 'significant' and involves a 'transfer'? What is required? When do you have 'actual knowledge' or 'should [you] have known'? How can you determine the extent of control of an entity by a SDN shareholder for the entity to be deemed a SDN? How do you determine for certain, if your counterparty is a US person, or an Iranian person? The **US grant** relating to all of these questions is intentionally unclear.

'…How under the now (somewhat) lifted US sanctions is a bunker trader, broker, or supplier, or its customer, to exercise the required due diligence when a transaction is ''significant'' and involves a ''transfer''? What is required? When do you have ''actual knowledge'' or ''should [you] have known''?'

There is, however, an explicit **U.S. grant** that it is no longer sanctionable for non-US persons – including non-US financial institutions – to engage in and with the following activities and entities:

1. Financial and banking transactions with individuals and entities set out in Attachment 3 to the Joint Comprehensive Plan of Action ('JCPOA') of 14 July 2015 Annex II of the JCPOA, including the Central Bank of Iran ('CBI'), the National Iranian Oil Company ('NIOC'), the Naftiran Intertrade Company ('NICO'), the National Iranian Tanker Company ('NITC'), and other individuals and entities identified as the Government of Iran by OFAC; and
2. Significant financial transactions by Foreign Financial Institutions (FFIs) for the sale, supply or transfer to or from Iran of significant goods or services used in the energy, shipping or shipbuilding sectors of Iran, including, NIOC, NITC and the Islamic Republic of Iran Shipping Lines ('IRISL').

May non-US bunker suppliers and traders be involved with fuelling vessels sailing to or from Iran? Yes – **generally**, the United States as of January 2016 lifted secondary sanctions for the following Iran-related transactions:

1. Including bunkering for associated services including transportation necessary and ordinarily incident to the underlying activity for which sanctions have been lifted;
2. The transport to or from Iran of crude oil, natural gas, liquefied natural gas, petroleum, petroleum products or petrochemicals by non-US vessels; and
3. Involving provision to vessels transporting goods to assist Iran's petroleum industry development.

But, again, the US financial system may not be involved if there is to be a sale to or purchase from an Iranian person/entity. May, however, United States dollars now be used to buy Iran-origin fuel oil? Yes, as long as the purchase is from a non-Iranian entity (making sure, of course, that you know that the entity is not owned or controlled by an Iranian person).

There is another **general grant** – US 'License H' **generally** permits US-owned or US-controlled foreign entities to engage in transactions with the Government of Iran or a person subject to Iran Government jurisdiction which sanctions otherwise prohibit. But, General License H has a series of excluded activities, including:

1. The exportation to Iran, directly or indirectly of any goods, technology or services from the US prohibited by 31.C.F.R. § 560.204, without separate authorisation from OFAC;
2. Any transfer of funds to, from or through a US depository institution;
3. Any transaction involving a person on the SDN List that could be prohibited to a US person;
4. Any transaction involving a person on the List of Foreign Sanctions Evaders that could be prohibited to a US person;
5. Any activity involving any item subject to the Export Administration Regulations (EAR), that is prohibited by, or otherwise requires a license under part 744 of the EAR; or participation in any transaction involving a person whose export privileges have been denied under the EAR;
6. Any activity involving any military, paramilitary, intelligence or law enforcement entity of the Government of Iran, or any official, agent or affiliate thereof;
7. Any activity that is sanctionable under various Executive Orders relating to Iran's proliferation of weapons of mass destruction (including its ballistic missile programme), international terrorism, Syria, Yemen, or Iran's commission of human rights abuses against its citizens; and
8. Any nuclear activity involving Iran that is subject to the procurement channel established pursuant to paragraph 16 of United Nations Security Council Resolution 2231 (2015).

In addition to this, the post-January 2016 US Iran sanctions contain a 'snap-back' provision which the Joint Comprehensive Plan of Action (JCPOA) authorised. This provision permits the re-imposition of all US sanctions against Iran within 30 days after a determination that Iran has breached the JCPOA. So this means that if there is an un-performed transaction involving an Iranian person and the US declares 'snap-back', then that transaction (even though it had been permissible after January 2016) becomes subject to sanctions, within 30 days of the US 'snap-back' declaration.

January 2016 did bring a lift of some US sanctions, but the US sanctions policy to make sanctions application unclear, remained the same. Bunker brokers, traders and buyers, therefore, despite the announced 2016 sanctions lift, should continue to be cautious about entering into any transactions with Iran-related counterparties.

After January 2016, therefore, considering US sanctions, is it now more possible to do business with Iran-related counterparties? Yes, **generally**, remembering that, ultimately, **General Grant** won and **General Lee** surrendered.

When considering whether US sanctions after January 2016 may now apply to your Iran-related transaction, remember what happened to **General Lee** ... '**generally**'.

- **Note: Steve Simms has developed this feature from his presentation given at Petrospot's recent *Middle East Bunkering Convention* in Dubai in March.**

'If there is an un-performed transaction involving an Iranian person and the US declares ''snap-back'', then that transaction (even though it had been permissible after January 2016) becomes subject to sanctions, within 30 days of the US ''snap-back'' declaration'

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