No. 12-2889
(consolidated with 12-2940, 12-2972, 12-2976,12-3078, 12-4556 and 12-4685)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

MOSHE BUCHNIK, MICHAEL YARON, SANTO SAGLIMBENI, EMILIO A/K/A "TONY" FIGUEROA, CAMBRIDGE ENVIRONMENTAL & CONSTRUCTION CORP., D/B/A NATIONAL ENVIRONMENTAL ASSOCIATES, OXFORD CONSTRUCTION & DEVELOPMENT CORP., and ARTECH CORP.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(Honorable George B. Daniels)

OPPOSITION OF APPELLEE UNITED STATES OF AMERICA TO APPELLANT MOSHE BUCHNIK'S MOTION FOR RELEASE PENDING APPEAL

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PRELIMINARY STATEMENT

On February 2, 2012, a jury sitting in the Southern District of New York convicted Moshe Buchnik of wire fraud and conspiracy to commit wire fraud for making false representations and paying kickbacks to an employee of New York Presbyterian Hospital (the Hospital), in exchange for receiving contracts for asbestos abatement, air monitoring, and construction. The Honorable George B. Daniels sentenced Buchnik to forty-eight months' imprisonment. Sent. Tr. 90.[1]

Buchnik moved for bail pending appeal. The District Court denied the motion, finding that Buchnik had not demonstrated "(1) by clear and convincing evidence that he is not likely to flee; (2) that the appeal is not for the purpose of delay; (3) that the appeal raises a substantial question of law or fact likely to result in reversal, an order for a new trial, or a sentence that does not include a term of imprisonment." Bail Decision. Buchnik reported to prison on December 17, 2012.

Before Buchnik reported to prison, one of his co-conspirators, Michael Yaron, filed a motion for release pending appeal with this Court, raising several of the

[1] All the materials cited in this opposition (except for the PSR) are attached as exhibits to the declaration of Stephen J. McCahey, lead trial counsel for the Government in this case. "Tr." refers to the trial transcript pages in Ex. B; "05/17/12 Tr." refers to the transcript pages from the May 17, 2012 hearing in Ex. C; "Sent Tr." refers to the sentencing transcript pages in Ex. D; "GX" refers to Government exhibits or, in the case of audio recordings, transcripts thereof, in Ex. E; "June 28 Order" refers to the District Court's Memorandum Decision and Order of June 28, 2012 (Doc. 174) in Ex. K; and "Bail Decision" refers to the District Court's Order of August 27, 2012 (Doc. 198) in Ex. N.

same claimed errors that Buchnik does here regarding the admission of certain consensual audio recordings between David Porath, a then-cooperating witness, and Emilio "Tony" Figueroa, a co-conspirator of Buchnik and Yaron. Dkt. 60-1, McCahey Decl., Ex. O. This Court denied the motion on December 12, 2012, without oral argument. Dkt. 138, McCahey Decl., Ex. P.

The same outcome is warranted here. Like Yaron, Buchnik is a dual Israeli-American citizen who has not carried his burden of presenting clear and convincing evidence that he is unlikely to flee now that he is facing a significant prison term. And, as with Yaron, Buchnik's appeal will not raise a substantial issue of law or fact resulting in a reversal, a new trial, or a reduction in his sentence. The United States does not believe that oral argument is necessary.

STATEMENT OF THE FACTS

A. The Charged Offenses

On June 15, 2011, the grand jury issued a Superseding Indictment charging Buchnik with wire fraud in violation of 18 U.S.C. §§ 1343, 1346, and 2, and conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349. McCahey Decl., Ex. A. The Superseding Indictment alleged that Yaron and Buchnik paid kickbacks to Santo Saglimbeni, a Hospital employee, so that he and another Hospital employee, Emilio "Tony" Figueroa, would "steer[] [over $42 million of] air monitoring services, asbestos abatement services, and later, construction

services contracts at [the Hospital] to companies owned or controlled by defendant YARON and/or defendant BUCHNIK." *Id.* ¶¶ 24, 36. As part of the kickback scheme, defendants committed numerous fraudulent acts – including the creation of a sham corporation, Artech Corp. (Artech), by Saglimbeni "to conceal the kickbacks he received from defendants YARON and BUCHNIK." *Id.* ¶¶ 30, 31, 33. The conduct violated the Hospital's competitive bidding procedures, *id.* ¶¶ 18, 20, and a New York City Department of Environmental Protection regulation (DEP Regulation) "requir[ing] that any air monitoring company be completely independent of any asbestos abatement company that was performing work on the same asbestos abatement project," *id.* ¶¶ 21, 27. And the scheme was designed both to "obtain money and property from [the Hospital] by means of false and fraudulent pretenses" and to deprive the Hospital of "its intangible right to the honest and faithful services of its employees." *Id.* ¶¶ 23, 36.

B. The Trial

The trial lasted approximately three weeks. The Government presented fifteen witnesses and over 250 exhibits. The evidence included four excerpts from two consensual audio recordings (described more fully on pp. 10-11, 17) between David Porath, a then-cooperating witness, and Figueroa, a co-conspirator who was unaware of the recordings.

The evidence at trial established that, from 2000 to at least January 2008, Yaron and Buchnik conspired with Hospital employees Saglimbeni and Figueroa to defraud the Hospital. Specifically, beginning in 2000, Yaron and Buchnik paid kickbacks to Saglimbeni so that essentially all asbestos removal work at the Hospital was awarded to National Environmental Associates (NEA), Tr. 1198, and all air monitoring work was awarded to E.Tal Environmental Consultants, Inc. (E.Tal), Tr. 1202, 1207 – companies owned and/or controlled by Yaron and Buchnik. Tr. 538, 540, 632-33, 686-91, 708-10. Moreover, defendants made numerous, material misrepresentations to conceal the true relationship between NEA and E.Tal, so that E.Tal could be the air monitor on NEA's asbestos removal work in violation of the DEP Regulation. *See* GX 121, 122, 123, 124, 125, 303, 613, 614, 615. This deception also enabled Saglimbeni to circumvent the Hospital's competitive bidding policy to ensure that NEA always received the asbestos work. Tr. 542-47, 723-31, 1207.

The evidence also established that Buchnik subverted the competitive bidding process for awarding the asbestos removal contracts by asking one of his subcontractors to submit a fake bid that Buchnik prepared and by opening at least one sealed bid from another contractor (using a steamer) before preparing NEA's bid. Tr. 542-48, 726-28.

The evidence further established that, in approximately 2002, the conspirators expanded the kickback scheme to include construction contracts awarded to Oxford Construction & Development Corp. (Oxford), a firm owned by Yaron. Tr. 989, 1265. At this time, Saglimbeni created a sham corporation, Artech, to conceal the kickback payments he received, and Yaron and Buchnik funneled over $2.3 million through five intermediaries to Artech (using some wire transfers). GX 1504, 1505, 1508-01; Tr. 1787-97.[2]

The jury convicted Buchnik of wire fraud and conspiracy to commit wire fraud and found both "a scheme to fraudulently obtain money or property from [the Hospital]" and "a scheme to fraudulently deprive [the Hospital] of the honest and faithful services of its employees through kickbacks." Tr. 2617-18.

C. The Motion for a New Trial

Buchnik moved for a new trial because of Porath's unavailability at trial. Porath initially cooperated with the Government but stopped, and later was indicted while he was in Israel. Porath was arrested in Israel on November 27, 2011. On January 5, 2012 (a few days before the trial here was to begin), an Israeli magistrate declared Porath extradictable, and Porath waived appeal. Porath was

[2] Buchnik's motion erroneously suggests that the kickbacks to Saglimbeni started in 2003 with the construction contracts. Mot. 3. The evidence at trial showed that Yaron and Buchnik paid Saglimbeni kickbacks on the asbestos and air monitoring contracts starting in at least 2000, Tr. 540, 710-11, and that Buchnik had given envelopes of cash and a Rolex to Saglimbeni's predecessor, Tr. 2032-34.

returned to the United States on February 16, 2012 (after the trial here was complete). Buchnik claimed that the Government "deliberately kept [him] out of the jurisdiction until after the defendants' trial" and "concealed from the Court and from defense counsel" that Porath could "be called as a witness" and "consent[ed] to return" in violation of Buchnik's rights under the Compulsory Process Clause. Mem. In Supp. of Defs.' Mot. For New Trial, at 1-2, McCahey Decl., Ex. H.

The District Court denied the motion because Buchnik failed to prove any of the three elements of a Compulsory Process Clause claim under *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), and *Buie v. Sullivan*, 923 F.2d 10 (2d Cir. 1990): bad faith by the Government, materiality, and lack of fundamental fairness. June 28 Order at 8-11. As the District Court explained, there was no evidence that "the government deliberately delayed Porath's return" and that claim was "entirely contravened by [the declaration of Patricia L. Petty, Office of International Affairs, who handled the extradition]." *Id.* at 9. Moreover, Porath "was now a non-cooperating witness facing three felony counts" who could "have invoked his Fifth Amendment Right not to incriminate himself." *Id.* at 10. Even assuming that Porath testified, there was no basis to assume that testimony would have helped Buchnik, because Buchnik did not "proffer any specific testimony that Porath would have given that is exculpatory or favorable to the defense." *Id.* Finally, the District Court found that, even if there was error, "there was no prejudicial impact

on the outcome of the trial" because the jury separately found both money and property fraud and honest services fraud, and there was an "abundance of evidence" supporting those charges. *Id.*

D. Sentencing and Bail

The District Court sentenced Buchnik to forty-eight months' imprisonment and imposed a $500,000 criminal fine and a $200 special assessment. Sent. Tr. 90-91. Buchnik moved for bail pending appeal, which the Government opposed both because of the risk of flight and the lack of a substantial issue on appeal. Gov't Mem. in Opp. to Def. Buchnik's Mot. for Release Pending Appeal (Doc. 196), McCahey Decl., Ex. M. The District Court denied the motion on those grounds. *See* p. 1 *supra* (quoting the Bail Decision).

ARGUMENT

THE COURT SHOULD DENY BUCHNIK'S MOTION FOR RELEASE PENDING APPEAL

I. The Defendant Has The Burden Of Proving That The Conditions For Bail Pending Appeal Are Satisfied.

The bail statute provides that a defendant must be detained pending appeal unless a judicial officer finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released" and "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in – (i) reversal, (ii) an

order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b). This provision reflects Congress's view that "once a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances." *United States v. Miller*, 753 F.2d 19, 22 (3d Cir. 1985) (citation omitted); *see United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985) (following the "analysis of section 3143(b) that the Third Circuit enunciated in *Miller*").

A "substantial question" is "a 'close' question or one that very well could be decided the other way." *Randell*, 761 F.2d at 125. Moreover, bail is inappropriate unless the question is likely to result in a reversal or a new trial on all counts on which the defendant is incarcerated. *Id.*

On appeal, this Court defers to a district court's bail decisions, and will reverse only for "clear error" – that is, only if "on the entire evidence," the Court is "left with the definite and firm conviction that a mistake has been committed." *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) (citation and internal quotation marks omitted). The burden of persuasion "on all the criteria set out in subsection (b)" rests "on the defendant." *Randell*, 761 F.2d at 125.

II. Buchnik Does Not Satisfy The Conditions For Release Pending Appeal.

A. Buchnik Has Not Presented Clear And Convincing Evidence That He Is Unlikely To Flee If Released.

It is the defendant's burden to prove "by clear and convincing evidence" (18 U.S.C. § 3143(b)) that he is unlikely to flee. *See Randell*, 761 F.2d at 125. The District Court correctly concluded that Buchnik failed to meet that burden. Bail Decision. Buchnik is a dual Israeli-American citizen with assets of over $1 million. PSR ¶ 95. Now that he is facing four years in jail, he poses a substantial risk of fleeing to Israel. *Cf. United States v. Aleynikov*, 676 F.3d 71, 75 (2d Cir. 2012) ("Bail pending appeal was denied because Aleynikov, a dual citizen of the United States and Russia, was feared to be a flight risk.").

Buchnik claims that "there is no serious concern" that he will flee because he has lived in the United States for a long time, has family here, surrendered his passports upon arrest, and reported to jail as ordered by the court. Mot. 7, 20-22. But, given that Buchnik is 54 years old and facing a substantial prison sentence, none of these things provide the "high degree of certainty" that Buchnik is unlikely to flee that the bail statute – and the "clear and convincing evidence" standard – requires. *See United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) ("clear and convincing evidence" is proof creating a "high degree of certainty"); *cf. United States v. Kenney*, 603 F. Supp. 936, 939 (D. Me. 1985) ("Defendant has not demonstrated by clear and convincing evidence that he is unlikely to flee" because

he was facing a 10-year sentence and "his reputed close ties to his family cannot fairly be said to overcome the risk that he may come to perceive his personal, long-term interests in his liberty as more important").

B. There Are No Substantial Issues On Appeal.

As did Yaron in his motion for release, Buchnik raises three issues related to the admission of consensual audio recordings between Porath, who was then cooperating with the Government, and Figueroa, a co-conspirator who was unaware of the recordings. The recordings were made in June 2005 while the Hospital was conducting an audit that the conspirators were afraid would uncover their conspiracy. The Government sought to admit four substantive excerpts (totaling fourteen minutes) from the tapes on the ground that Figueroa's statements were admissions and co-conspirator statements made in furtherance of the conspiracy. The Government "laid a proper foundation to admit those tapes into evidence through [FBI Special Agent Fortunato]," 5/17/12 Tr. 6, and the District Court admitted them into evidence after "very scrupulously examin[ing]" the tapes, 05/17/12 Tr. 64-65, and requiring redaction of a potentially testimonial statement by Porath. Tr. 1709-37; GX 1701-01, 1702-01.

For the same reasons as with Yaron, none of the three issues Buchnik raises regarding the admission of the tapes are "substantial" because the District Court's rulings were correct. Moreover, though powerful, the tapes were cumulative of

other evidence and only a small fraction of the overwhelming evidence of guilt. *See* June 28 Order at 10 (discussing the "abundance of evidence" supporting the jury's findings of both money and property fraud and honest services fraud). Thus, even if there were error, it had no effect on Buchnik's conviction or sentence.

Buchnik also raises a fourth issue related to the computation of his offense level. Mot. 17-19. But this argument ignores probative evidence of loss to the Hospital and does not warrant relief either.

1. Admission of the Porath tapes did not violate the Confrontation Clause.

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment's Confrontation Clause bars the introduction of out-of-court testimonial statements in criminal proceedings unless the declarant is unavailable to testify and the defendant previously had the opportunity to cross-examine the witness. Buchnik appears to acknowledge that Figueroa's statements on the tapes did not violate the Confrontation Clause, because Figueroa did not know about the recordings, and therefore his statements were nontestimonial. Mot. 12-13. But Buchnik argues that Porath's statements are testimonial, because he "certainly" knew about the recordings. *Id.*

This argument fails. In *United States v. Burden*, 600 F.3d 204, 225 (2d Cir. 2010), this Court held that a cooperating witness's statements "made to elicit inculpating statements by others present" were not testimonial statements subject

to exclusion under *Crawford*. *See also Bierenbaum v. Graham*, 607 F.3d 36, 49 (2d Cir. 2010) (nontestimonial statements "do not implicate the Confrontation Clause"). The District Court "very scrupulously examined" the audio recordings to ensure that all of Porath's statements played to the jury complied with *Burden*. 05/17/12 Tr. 64-65, 82; *id.* at 68 ("There's not a single statement that I think you can point me to by Porath that you say is a testimonial statement that raises a confrontation issue."); Tr. 1709-17, 1737 (requiring a redaction of a potentially testimonial statement by Porath).

Buchnik identifies two statements by Porath that he deems testimonial because they were used to establish "two critically important facts." Mot. 11. "First, Porath made the detailed factual assertion that Santo (Saglimbeni) signed and filled out every one of those reqs (requisitions)." *Id.* "Second, Porath made the detailed, factual assertion that ETAL (an air monitoring company connected to Yaron and Buchnik and NEA (an asbestos abatement company connected to Yaron and Buchnik) were connected and that this connection was the 'worst part' of conduct that was clearly unlawful." *Id.*

But, as the District Court explained, both of these statements were made to elicit incriminating admissions by Figueroa and were therefore nontestimonial under *Burden*. 5/17/12 Tr. 70-71 (The Court: Porath's statement about the NEA-E.Tal. connection was made to elicit the "incriminating" admission by Figueroa

that "'[i]f [the auditors] find out [about the connection], we're done.'"); Tr. 1713-17 (same); Tr. 1726 (The Court: "And Figueora says every one of them. That's the whole point. I looked at this in minute detail. . . . Obviously Mr. Figueroa thinks that [Santo] signed them all. Whether [Santo] signed them all or not is not the import of the statement. . . .").[3]

Buchnik argues (Mot. 12) that *Burden* is distinguishable because the informant there sought to "capture a criminal transaction" in the act, whereas Porath sought to generate "evidence of past criminal acts." This distinction is untenable, however, because the evidence clearly showed that the conspiracy was ongoing when the recordings were made. *See*, *e.g.*, Tr. 1919-26, 1933 (recordings made in June 2005); GX 1503; Tr. 1323-24, 2067-74 (the conspiracy continued until at least January 2008).

Buchnik also claims (Mot. 12) that *Burden* is distinguishable because Porath made factual assertions. But as the Court made clear in *Burden*, the key is the "purpose" of the comments, not their form. 600 F.3d at 225. Because Porath's statements were made for the purpose of "elicit[ing] inculpating statements by

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[3] Indeed, the transcript of the recording confirms that Porath was simply confirming what Figueroa – who worked directly for Saglimbeni – had already strongly implied. *See* GX 1702-02B, at 101-02 (Figueroa: "[The Hospital's internal auditor is] going through every manifest, every single fucking proposal, every single requisition, everything. Guess who signed every one of those reqs." Porath: "Santo." Figueroa: "Who filled out every one of those reqs?" Porath: "Santo." Figueroa: "Every one of 'em.'").

others present," and not "accusing," they are nontestimonial. *Id.* (expressly holding that such statements were nontestimonial "even to the extent that [the confidential informant] knew his statements could be used at a future trial").[4]

In any event, even if Porath's statements were testimonial, any error in admitting them clearly did not affect Buchnik's conviction or sentence. As the District Court explained, "[t]he incriminating part" of the recordings were not Porath's statements but Figueroa's. 05/17/12 Tr. 70. The rest was not "in dispute" and was "already in front of the jury" through other evidence. *See, e.g.*, Tr. 1714 (The Court: "Then Figueroa says, which is the significance of this exchange, if they find out, it's done. That's the import of the conversation, not whether there was an E.Tal-NEA connection or whether or not they were looking at the E.Tal-NEA connection or whether or not these individuals should be concerned about the disclosure of the E.Tal-NEA connection. Quite frankly I don't think any of that is in dispute. That's already in front of the jury."); *see also* Tr. 451-52, 514, 540, 680-83, 709-11, 714, 975. In addition, the tapes were only a small part of the "abundance of evidence" supporting the charges. June 28 Order at 10.

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[4] The *Burden* Court explained that the portion of *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004), relied on by Buchnik (Mot. 12) "was dictum" and not controlling. *Burden*, 600 F.3d at 223-24.

2. The Government did not use deception to prevent Porath's cross-examination.

Buchnik also argues that the Government "utilized deception to prevent the defendants from cross examining Porath." Mot. 13. But there was no deception by the Government here. The Government told defendants and the District Court on January 4 that Porath "is no longer cooperating with the Government, and is now in Israel awaiting extradition to the United States to stand trial." Mem. in Supp. of Mot. In Limine Concerning Chain of Custody to Authenticate Consensual Recordings (Doc. 128-1), at 3, McCahey Decl., Ex. G. That statement was true when made and throughout the duration of the trial here. Defendants never asked for additional information about Porath's extradition status or gave any indication that they wanted to call him as a defense witness until after their convictions, *see* 5/17/12 Tr. 19, 47,[5] so there was no reason for the Government to provide any updates. The District Court expressly found that there was no evidence of bad faith by the Government. June 28 Order at 9.

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[5] The Government made clear before trial that it never intended to call Porath as its own witness, nor was it required to do so, since Porath's statements were nontestimonial. *See* 5/17/12 Tr. 6 ("The Court: "My ruling is based on the determination that even if Porath had been here in the courtroom at the time they offered the tapes, they had no responsibility, nor necessity, to call Porath in order to admit those tapes into evidence. They laid a proper foundation to admit those tapes into evidence through the agent.").

Moreover, Buchnik is also incorrect (Mot. 14) that Porath was "available" and could have been "cross examined had the court adjourned the trial just two weeks." Porath had been indicted and had a Fifth Amendment right against self-incrimination. *See United States v. Turkish*, 623 F.2d 769, 774 (2d Cir. 1980) (defendant's Sixth Amendment compulsory process right does not "displace" witness's privilege against self-incrimination). Buchnik provides no reason to believe that Porath would, in fact, have answered any questions on the stand.

While Buchnik speculates that, "had Porath been available to be cross examined, it would have been clear that he and Figueroa were not discussing the Artech payments at all, but a completely different arrangement," Mot. 5; 5/17/12 Tr. 24-25 (counsel for Yaron suggesting this), Buchnik does not explain what that "arrangement" is or why it would be exculpatory.[6] Thus, as the District Court found, Buchnik has failed to carry his burden to "proffer any specific testimony that Porath would have given that is exculpatory or favorable to the defense." June 28 Order at 10.[7]

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[6] As discussed above (in note 2), the kickbacks were not limited to the Artech payments; Yaron and Buchnik also paid kickbacks to Saglimbeni on the asbestos removal and air monitoring contracts before then.

[7] Buchnik's claim here is more limited than that below – that the Government deliberately delayed Porath's return to the United States. The District Court found that there was no evidence supporting that claim and it was "entirely contravened by Petty's declaration." June 28 Order at 9; *see also* Declaration of Patricia L.

3. Figueroa's statements were in furtherance of the conspiracy.

The Government sought to admit Figueroa's statements on the tapes against Buchnik as co-conspirator statements in furtherance of the conspiracy. As the evidence at trial demonstrated, Porath worked for NEA, Tr. 684, and was a member of the conspiracy at that time, Tr. 704-12. Moreover, Figueroa's statements on the tapes furthered the conspiracy because they helped "maintain trust and cohesiveness," *United States v. Rahme*, 813 F.2d 31, 35-36 (2d Cir. 1987), discussed its progress, *United States v. Mulder*, 273 F.3d 91, 103 (2d Cir. 2001), or informed Porath about its status and hierarchy, *United States v. Russo*, 302 F.3d 37, 46-47 (2d Cir. 2002). *See* Mem. in Opp. To Defs.' Mot. In Limine To Preclude The Admission of Consensual Recordings (Doc. 118), at 5-9, McCahey Decl., Ex. F.

Buchnik does not directly challenge any of this. Instead he argues (Mot. 15-16) that Figueroa's statements cannot be "in furtherance of the conspiracy," as a matter of law, because "[t]he Government was not able to provide any evidence that Porath was involved in the conspiracy at the point-in-time he recorded his

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Petty, Office of International Affairs, ¶¶ 8-12, 15, McCahey Decl., Ex. J (explaining that the extradition was timely and in accordance with standard DOJ procedures and that no one asked her to delay Porath's extradition).

conversation with Figueroa [in June 2005]" and "Figueroa's statements to Porath are idle in nature, informal, in the realm of gossip." This argument is unavailing.

While "both the declarant and the party against whom the statement is offered [must] be members of the conspiracy, there is no requirement that the person to whom the statement is made also be a member." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir. 1989) (internal citation omitted). It is sufficient if the recipient of the statement has inside knowledge about the conspiracy. *See id.* (co-conspirator statement to uninvolved but knowledgeable employee was admissible).

Even if Porath were no longer a member of the conspiracy, he readily falls within this category. As the District Court correctly explained: "Mr. Porath [was] not a rank outsider." Tr. 1718. "It doesn't matter" if Porath had formed his own company, because Figueroa was "sharing information about the conspiracy that he knows Porath was a part of and he knows and he believes that is still going on as far as the government is concerned." *Id.* at 1722. "[I]f Mr. Porath was a co-conspirator at any time and now an investigation is going on and now they are afraid somebody is going to be a weak link, everyone would want Figueroa to say to Porath keep your mouth shut, OK, we are being investigated, everybody has to close ranks, nobody can say anything. . . . That's a reasonable interpretation of this conversation." *Id.* at 1724.

Moreover, Buchnik is wrong (Mot. 15) that Figueroa's statements were "idle," "recounting [] past events." As discussed above (at pp. 12-14), the conspiracy was ongoing at the time, and Figueora's statements were highly incriminating. Thus, the cases Buchnik cites (Mot. 15) are clearly inapposite.

4. The District Court properly calculated Buchnik's offense level.

In sentencing Buchnik, the District Court found that the Hospital had a loss from the fraudulent kickback scheme, but its exact amount could not reasonably be determined from the record. Sent. Tr. 26, 68-69. Accordingly, the District Court used "the gain that resulted from the offense [$2.4 million] as an alternative measure of loss" for purposes of calculating the offense level, as permitted by Application Note 3(B) to United States Sentencing Guideline § 2B1.1: "The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined." That led to a 16-level increase in Buchnik's offense level. U.S.S.G. § 2B1.1(b)(1).[8]

Buchnik challenges this increase on the ground that "there was simply no evidence of loss." Mot. 17-18. But, as the District Court explained, this argument "ignore[s] three pieces of evidence." Sent Tr. 68-69. First, Saglimbeni "had an incentive to give [contracts] to these defendants without regard to the consideration

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[8] Because gain cannot be used as an alternative measure of loss for determining restitution, the District Court awarded no restitution from Buchnik. Sent. Tr. 6-7.

of whether or not someone would do the same quality of work for a cheaper price." *Id.* at 69. Second, "there's direct evidence on at least one instance of opening a bid to see what the bid was so they could make sure and/or readjust their bid." *Id.* Third, "more importantly," there was "evidence that on at least one occasion, if not more than one occasion, that the defendant submitted a false [rigged] bid . . . in addition to the bid they made," which eliminated the opportunity for a lower bid. *Id.* Buchnik never explains why any of these determinations are clearly erroneous. *See United States v. Lacey*, 699 F.3d 710, 719 (2d Cir. 2012) ("As with any finding of fact, this Court reviews the district court's loss determination for clear error.").

Buchnik's reliance on U.S.S.G. § 2B1.1 n.3(A)(v)(II) is misplaced. Even if applicable, that Note merely provides that the loss "includes" the costs of repeating or correcting the procurement. *Id.* Loss also includes other reasonably foreseeable pecuniary harm, such as loss due to overpayment on a contract, which is what the District Court found to be the loss here. Because its amount could not reasonably be calculated from the record, the District Court properly relied on Note 3(B) in using the $2.4 million in kickbacks as a reasonable alternative measure.

CONCLUSION

The Court should deny Buchnik's motion for release pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point Times New Roman font.

March 14, 2013 /s/ Nickolai G. Levin
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CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on March 14, 2013, I electronically filed the foregoing OPPOSITION OF APPELLEE UNITED STATES OF AMERICA TO APPELLANT MOSHE BUCHNIK'S MOTION FOR RELEASE PENDING APPEAL with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I also sent three copies to the Clerk of the Court by FedEx Overnight Delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

March 14, 2013

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