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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL YARON, MOSHE BUCHNIK, 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 MICHAEL YARON'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 Michael Yaron 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 Yaron to sixty months' imprisonment. Sent. Tr. 55.[1]

Yaron orally moved for bail pending appeal. The District Court denied bail because Yaron did not prove by clear and convincing evidence that he was unlikely to flee and there was no substantial issue on appeal. Sent. Tr. 56-61. Those determinations are correct.

Yaron is a wealthy dual Israeli-American citizen, whom the Government has viewed as a potential flight risk since before trial. *See*

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[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; "Order" refers to the District Court's Memorandum Decision and Order of June 28, 2012 (Doc. 174) in Ex. J.

Letter, July 15, 2010, McCahey Decl., Ex. F; PSR ¶ 93. As the District Court observed at sentencing, "now he's facing with certainty five years in prison," he "[c]learly" poses a risk of fleeing to Israel. Sent. Tr. 61. This, by itself, warrants denial of the motion.

Moreover, Yaron's appeal will not raise a substantial issue. Yaron claims three errors related to the admission of certain audio recordings between a then-cooperating witness and one of Yaron's co-conspirators. Those recordings were properly admitted, were only a small fraction of the overwhelming evidence of guilt presented at trial (14 minutes of an approximately three-week trial), and were cumulative of other evidence. Thus, there is no basis to believe that any of the claimed errors affected Yaron's conviction or sentence.

Yaron's report date is December 17, 2012.

STATEMENT OF THE FACTS

A. The Charged Offenses

On June 15, 2011, the grand jury issued a Superseding Indictment charging Yaron 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 Moshe 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 p. 11) 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 Saglimbeni and Figueroa, Hospital employees, 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, in approximately 2002, the conspirators expanded the 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. GX 1508-01.

The jury convicted Yaron of wire fraud and conspiracy to commit wire fraud and separately 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.

C. The Post-Trial Motions

Yaron moved for acquittal due to insufficient evidence. He also sought 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 returned to the United States on February 16, 2012 (after the trial here was complete). Yaron sought a new trial, claiming 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 Yaron's rights under the Compulsory Process Clause. Mem. In Supp. Defs.' Mot. For New Trial, at 1-2, McCahey Decl., Ex. G.

The District Court denied the motion for acquittal, noting "the abundance of evidence presented to, and considered by, the jury." Order 10. The District Court also denied the motion for a new trial because Yaron 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. Order 8-11.

D. Sentencing

The District Court sentenced Yaron to sixty months' imprisonment and imposed a $500,000 criminal fine and a $200 special assessment. Sent. Tr. 55. The District Court denied Yaron's request for bail pending appeal (which the Government opposed). Sent. Tr. 55-61. As the District Court explained, "there's been no substantial issues of error in the trial or in the determination by the jury that would warrant a reversal of this conviction." *Id.* at 57. Moreover, Yaron did not present clear and convincing evidence that he is unlikely to flee the country, given "the fact that he has had at least two, if not three prior felony convictions [for mail fraud and other offenses], that this is the first time he is facing substantial prison time and that he has resources and other places to go." *Id.* at 59; PSR ¶¶ 59-67 (listing Yaron's prior convictions).

ARGUMENT

THE COURT SHOULD DENY YARON'S MOTION FOR BAIL PENDING APPEAL

I. This Court Reviews A District Court Decision Denying Bail Pending Appeal For Clear Error.

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 also 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 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 where there is "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. The District Court Did Not Clearly Err In Denying Bail Pending Appeal.

A. Yaron Has Not Presented Clear And Convincing Evidence That He Is Unlikely To Flee.

Under 18 U.S.C. § 3143(b), it is the defendant's burden to prove "by clear and convincing evidence" that he is unlikely to flee. *See Randell*, 761 F.2d at 125 (the defendant has the burden of persuasion). The District Court correctly concluded that Yaron failed to meet that burden. Yaron is a dual Israeli-American citizen whose net worth is over $3 million. Letter, July 15, 2010, McCahey Decl., Ex. F; PSR ¶ 93. "[N]ow he's facing with certainty five years in prison," he "[c]learly" poses a risk of fleeing to Israel. Sent. Tr. 61; *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.").

Yaron's suggestion that the District Court applied the wrong legal standard (Defs.' Mot. For Release Pending Appeal ("Mot.") at 4) is incorrect. The District Court correctly recognized that the test was whether Yaron presented clear and convincing evidence that he was unlikely to flee but simply held that Yaron failed to carry his burden of proof. *See* Sent Tr. 58 ("The standard is that I should make a finding that there's no likelihood that he will flee, and I cannot make that finding. This is your burden, not their burden."); *id.* at 59 ("you're not going to convince me that I'm going to bet my money on the fact that he won't flee").

Yaron's argument "that the record reflects that [he] is not likely to flee" (Mot. 6) is unavailing. While he surrendered his passport and has family ties and business in Philadelphia, that is not enough to carry his "high burden" of proving by "clear and convincing evidence" that he is unlikely to flee now that he is 67 years old and facing a substantial prison sentence. *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.

Yaron argues that there are three substantial issues related to 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 and the conspirators were aware of the audit's potentially devastating effect on the 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 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.

The District Court's rulings were correct. Moreover, though powerful, the tapes were cumulative of other evidence and a small fraction of the overwhelming evidence of guilt. Indeed, the jury separately 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, and there was an "abundance of evidence" supporting both charges. Order 10. Thus, even if there were error, it had no effect on Yaron's conviction or sentence.

1. There was no *Crawford* violation.

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. Yaron concedes that Figueroa's statements on the tapes did not violate the Confrontation Clause because they "were not testimonial." Mot. 8

n.4. (citing *United States v. Saget*, 377 F.3d 223 (2d Cir. 2004)). Yaron nevertheless argues that Porath's statements are testimonial because Porath was aware of the recordings. Mot. 7-10.

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).

Yaron identifies no specific testimonial statements by Porath admitted into evidence, and there are none. Indeed, defendants focused below on Porath's non-testimonial statements regarding the connection between NEA and E.Tal. 05/17/12 Tr. 71. But, as the District Court

explained, this statement elicited the "incriminating" admission by Figueroa that "'[i]f [the auditors] find out [about the connection], we're done.'" *Id.* at 70-71; *see also* Tr. 1713-17 (same).

Yaron argues (Mot. 8) that *Burden* is distinguishable because that case involved "criminal conduct in progress" while "Mr. Porath's purpose was to record his own (and Mr. Figueroa's) narrative factual statements about past conduct." 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).

Yaron is also wrong (Mot. 9-10) that Porath was an available trial witness. 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).

In any event, even if Porath's statements were testimonial, any error in admitting them clearly did not affect Yaron'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. 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."). In addition, the tapes were only a small part of the "abundance of evidence" supporting the charges. Order 10.

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

Yaron also argues (Mot. 11-13) that Figueroa's statements on the recordings were "not in furtherance of the conspiracy," because "Mr. Figueroa knew that Mr. Porath had started a new [competing] company," and "Mr. Figueroa's key statements related past events" and "served no current purpose in the conspiracy." But these arguments were properly rejected by the District Court.

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) (co-conspirator statement to uninvolved but knowledgeable employee was admissible) (internal citation omitted). Moreover, statements may be "in furtherance" of a conspiracy by "maintain[ing] trust and cohesiveness," *United States v. Rahme*, 813 F.2d 31, 35-36 (2d Cir. 1987), discussing the progress of a conspiracy, *United States v. Mulder*, 273 F.3d 91, 103 (2d Cir. 2001), or informing participants about its status and hierarchy, *United States v. Russo*, 302 F.3d 37, 46-47 (2d Cir. 2002).

Thus, as the District Court properly 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.

Though Yaron generally challenges all of Figueroa's statements, the only specific statement Yaron identifies is Figueroa's statement that Saglimbeni was "giving them req[uisitions] so they would give him checks." Mot. 11. But that statement informed Porath of Saglimbeni's leadership role in the conspiracy: "It's all big shot, it's all big time Santo. . . . For what? For doing nothing. And he was writing—they were writing—he was writing, he was writing them req[uisitions] so they could write him checks." GX 1702-01, at 103. As such, the statement was in furtherance of the conspiracy because it informed Porath of its hierarchy. *See Russo*, 302 F.3d at 46-47.

In any event, there was significant other evidence of the *quid pro quo* between Saglimbeni and Yaron. *See, e.g.*, GX1503; Tr. 708-13, 2067-74. Moreover, there was an "abundance of evidence" of a scheme to deprive the Hospital of money or property by false representations.

Order 4. So again, any error admitting the statements clearly had no effect on Yaron's conviction or sentence.

3. The District Court was not required to hold a hearing on Yaron's Compulsory Process Clause claim.

Yaron also argues that "the District Court erred in declining to hold a hearing on whether the Government deliberated [sic] procured the informant's unavailability to testify." Mot. 13 (capitalization altered). But "[n]o rule of law requires a hearing [on prosecutorial intent] where the relevant facts can be ascertained from the record." *United States v. Pavloyianis*, 996 F.2d 1467, 1475 (2d Cir. 1993). The District Court found 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]." Order 9. A "hearing is not held to afford a convicted defendant the opportunity to 'conduct a fishing expedition.'" *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983) (citation omitted).

Yaron is wrong to suggest (Mot. 15-16) that the facts raise an inference of bad faith by the Government. As Petty's declaration made clear, Porath's extradition was timely and in accordance with standard

DOJ procedures. Petty Decl. ¶¶ 8-12, McCahey Decl., Ex. H. The Government never intended to call Porath as a witness, and defendants never indicated any desire to call him as a defense witness until after their convictions. *See* Order 9. Thus, there was no reason to try to expedite the extradition (assuming that was even possible).[2]

Likewise, Yaron argues (Mot. 14) that the Government should have told him "that Mr. Porath had given up his fight against extradition." But the failure to do so is not evidence of bad faith, as defendants gave no indication they wanted to call him as a witness and never asked for additional information about the status of the extradition proceedings. *See* Order 9.

In any event, even assuming bad faith, Yaron still would not have a viable claim, because he has not proven "that the testimony of the [] witness would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses" and that there was a lack of "fundamental fairness" which "necessarily prevent[ed] a fair trial." *Valenzuela-Bernal*, 458 U.S. at 873; *Buie*, 923

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[2] Yaron introduced a declaration from a law professor suggesting that expediting was possible, but it did not cite any examples involving extradition from Israel. Kittrie Decl. ¶¶ 1, 7-12, McCahey Decl., Ex. I.

F.2d at 12. As the District Court noted, Porath "was now a non-cooperating witness facing three felony counts" who could "have invoked his Fifth Amendment Right not to incriminate himself." Order 10. Even assuming that Porath testified, there was no basis to assume that testimony would have helped Yaron, because Yaron did not "proffer any specific testimony that Porath would have given that is exculpatory or favorable to the defense." *Id.* Moreover, 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.*

Yaron does not address these deficiencies (other than by briefly citing a declaration of his former counsel that the District Court found unpersuasive, *see* Mot. 16), much less explain how they would be eliminated by a hearing on bad faith. Yaron thus has not carried his burden of proving a substantial issue on appeal, and bail is improper.

CONCLUSION

The Court should deny Yaron's motion for bail pending appeal.

Respectfully submitted,

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November 29, 2012

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 New Century Schoolbook font.

November 29, 2012 /s/ Nickolai G. Levin
Attorney

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on November 29, 2012, I electronically filed the foregoing OPPOSITION OF APPELLEE UNITED STATES OF AMERICA TO MICHAEL YARON'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.

November 29, 2012

/s/ Nickolai G. Levin
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