UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

1/22/2015

UNITED STATES OF AMERICA,	
-v-	**12 Cr. 887 (ALC)**
THOMAS CONRADT, et al.,	**ORDER**
Defendants.	

ANDREW L. CARTER, JR., United States District Judge:

Under Rule 11(b)(3) of the Federal Rules of Criminal Procedure, a district court judge has an obligation up through the entry of judgment to vacate a previously-accepted guilty plea and enter a plea of not guilty on behalf of a defendant if it becomes clear that there no longer is a sufficient factual basis for the plea. *See, e.g.*, *United States v. Culbertson*, 670 F.3d 183, 191 n. 4 (2d Cir. 2012) (citing *United States v. Smith*, 160 F.3d 117, 121 (2d Cir. 1998)). The Second Circuit has said that, in determining whether such a factual basis exists, judges should "match[] the facts in the record with the legal elements of the crime." *United States v. Calderon*, 243 F.3d 587, 589-90 (2001) (alteration in original) (citing *United States v. Smith*, 160 F.3d 117, 121 (2d Cir. 1998)). Facts considered to be in the record can include not only the defendant's allocution, but also any representations made by counsel for the defense and the government on the record and the allegations in the indictment. *Smith*, 160 F.3d at 121.

In this case, after reviewing the Second Circuit's decision in *United States v. Newman*, Nos. 13–1837–cr (L), 13–1917–cr (con), 2014 WL 6911278 (Dec. 10, 2014), as well as all the facts in the record with respect to the guilty pleas of Defendants Thomas Conradt, David Weishaus, Trent Martin and Daryl Payton, this Court advised the parties on December 18, 2014 that it was inclined to vacate their guilty pleas. Specifically, the Court was skeptical that the

pleas were sufficient in light of *Newman*'s clarification of the personal benefit and tippee knowledge requirements of tipping liability for insider trading. *See* 2014 WL 6911278, at *9-*13. The Court reserved decision, however, in light of the Government's request for an opportunity to submit briefing in support of their position that *Newman*'s analysis does not apply in insider-trading cases prosecuted under a misappropriation theory. After having reviewed that submission, as well the Defendants' submissions in response, the Court hereby **VACATES** each of the aforementioned guilty pleas and enters pleas of **NOT GUILTY** on behalf of those Defendants.

Specifically, this Court finds that, as indicated in *Newman*, the controlling rule of law in the Second Circuit is that "the elements of tipping liability are the same, regardless of whether the tipper's duty arises under the 'classical' or the 'misappropriation' theory." 2014 WL 6911278, at *4 (citing *SEC v. Obus*, 693 F.3d 276, 285-86 (2d Cir. 2012)); *see also Obus*, 693 F.3d at 285-86 ("The Supreme Court's tipping liability doctrine was developed in a classical case, but the same analysis governs in a misappropriation case.") (citation omitted). Additionally, even if *Newman* did not specifically resolve the issue, the Court is swayed by the fact that *Newman*'s unequivocal statement on the point is part of a meticulous and conscientious effort by the Second Circuit to clarify the state of insider-trading law in this Circuit. Accordingly, even assuming *arguendo* that the Government is correct that the cited language in *Newman* is dicta, it is not just any dicta, but emphatic dicta which must be given the utmost consideration. *See Jimenez v. Walker*, 453 F.3d 130, 142 (2d Cir. 2006) ("Dicta deserve close

consideration; emphatic dicta, all the more.").[1] Finally, the Court notes that it agrees with *Newman*'s articulation of the requirements of tipping liability and its statement that such analysis applies equally in misappropriation cases. *Accord SEC v. Yun*, 327 F.3d 1263, 1274-80 (11th Cir. 2003).

At the January 23, 2015 status conference, the Court will address Defendants Benjamin Durant and Daryl Payton's Motion to Dismiss the Indictment (ECF Nos. 148, 160, at 6 n.4), as well as the Government's request that, under *United States v. Mennuti*, 639 F.2d 107 (2d Cir. 1981), and its progeny, this Court evaluate the sufficiency of the Government's intended proof at trial. The Court excuses each one of the Defendants from personally appearing at the conference, and the Clerk of Court is respectfully directed to terminate ECF numbers 162, 164 and 165.

SO ORDERED.

Dated: January 22, 2015

New York, New York

ANDREW L. CARTER, JR.
United States District Judge

[1] The Government's related argument that prior Second Circuit decisions have held that a personal benefit to the tipper is not required in misappropriation cases is similarly unavailing. *Newman* construes each one of the authorities the Government cites in this regard to be consonant with its holding. *See, e.g.*, *Newman*, 2014 WL 6911278, at *4, *6-*7. Moreover, the relevant language from *United States v. Libera*, 989 F.2d 596 (2d Cir. 1993), on which the Government relies most heavily in support of this proposition, has itself been construed to be mere implication in dicta. *SEC v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) (observing of *Libera*: "[t]he Second Circuit strongly implied, also in dicta, that there was no need to make an affirmative showing of benefit in cases of misappropriation").