

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

THE DISTRICT COURT OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMBROSIO D. CONSTANTINO, JR.,

Defendant.

CRIMINAL CASE NO. 15-00029

**DECISION AND ORDER
RE DEFENDANT’S MOTION
FOR RECONSIDERATION**

This matter is before the court on Defendant Ambrosio D. Constantino, Jr.’s Motion for Reconsideration. *See* ECF No. 207. The court heard the parties’ arguments on November 4, 2016, and after having considered the matter, the court hereby **GRANTS** the motion for the reasons discussed more fully herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 27, 2015, the Defendant was charged by Indictment with Theft of Government Property, in violation of 18 U.S.C. §§ 641 and 2, for Count 1; and Aggravated Identity Theft, in violation of 18 U.S.C. §§ 1028A(a)(1) and (2), for Count 2.

On December 7, 2015, the United States filed a Stipulation to Continue Jury Selection and Trial Date and Related Filing Dates, because the parties were pursuing an agreement for pretrial diversion, which at the time was being evaluated by the U.S. Probation Office. *See* ECF

1 No. 58. On that same day, the court issued an order denying the motion. *See* ECF No. 59.
2 Thereafter, at the request of the parties, the court held a status hearing. *See* ECF No. 60. At the
3 hearing, the court reconsidered and vacated the trial date pursuant to 18 U.S.C. § 3161(h)(2). *Id.*
4 The court “preliminarily” granted the Pretrial Diversion Agreement, and it ordered the parties to
5 make the necessary revisions and for the U.S. Probation Office (“USPO”) to prepare a pretrial
6 diversion report to determine Defendant’s suitability for supervision. *Id.*

7 After the December 7, 2015 hearing, the court held four additional teleconference and/or
8 status hearings on this matter: December 16 and 29, 2015, and January 8 and 11, 2016. At the
9 January 8, 2016 hearing, the Chief U.S. Probation Officer stated on the record that her office was
10 instructed by the court to stop the investigation and accordingly, the preparation of a pretrial
11 diversion report was halted.

12 At the January 11, 2016 hearing, the court revoked its “preliminary” granting of the
13 Pretrial Diversion Agreement and instead, denied it in its entirety. The court articulated its
14 reasons for rejecting the Pretrial Diversion Agreement based on the following issues, and I will
15 also now expound on my reasoning:

- 16 ▪ Culpability issue: the court was concerned that there were three prosecutors
17 involved in this case, including the U.S. Attorney herself, her then-First Assistant,
18 and an Assistant U.S. Attorney. Each of them were confused about the facts and
19 assessment of the case, particularly as to who was more or less culpable—the
20 Defendant himself, or his codefendant, Franklin R. Babauta (“Babauta”). The
21 three prosecutors who appeared before this court at the same hearing and/or
22 another hearing in the case at bar expressed differing opinions as to who was
23 more culpable. One said the Defendant. The other said Babuata. The third
24 prosecutor said they were equally as culpable.
- Disparity issue: the court expressed its concern over the fact that the Office of the
U.S. Attorney (“USA”) did not offer a Pretrial Diversion Agreement to other
defendants whose offenses were considered less serious or similar to the instant
offense. The court specifically stated on the record that “it’s critical to my
decision” what the court believed to be a disparity in treatment among defendants
by the USA. This disparity in treatment, would in fact, eventually affect the
court’s sentencing decision which would in turn affect the *integrity of the court*.
In particular, a defendant who had not received a Pretrial Diversion Agreement

1 offer and was later found or pled guilty, could be sentenced to a specific time and
2 carry with him a felony conviction for the rest of his life yet, another defendant
3 would escape the court's imposition of sentence altogether and not be burdened
4 with a felony conviction because he received the benefit of an offer of a Pretrial
5 Diversion Agreement and successfully completed its terms. There was no rhyme
6 or reason as to who received the offer and who did not. The two defendants
7 involved in this case were high ranking officers of the National Guard and other
8 defendants similarly situated were low ranking members. Both the Defendant and
9 Babauta received a Pretrial Diversion Agreement offer from the USA. Many
10 others did not.

- 11 ■ In addition, I specifically stated on the record that Federal Public Defender John
12 Gorman had expressed in open court the unfairness in the handling of Pretrial
13 Diversion Agreements by the USA. In particular, he argued that Pretrial Diversion
14 Agreements were not offered in cases to defendants similarly situated with less
15 aggravating factors, including but not limited to their official ranks at the National
16 Guard. He complained in this case as well as in other cases heard before
17 Magistrate Judge Joaquin V.E. Manibusan that Pretrial Diversion Agreements
18 were not evenly handed out. For example, Mr. Gorman cited to a simple
19 misdemeanor crime dealing with a minor offense involving a youthful first-time
20 offender caught stealing lipstick worth \$2.00 from the Navy Exchange. Clearly,
21 such comments caught this court's attention. The youthful offender who stole the
22 lipstick was subject to a catastrophic consequence, having to live with a federal
23 misdemeanor conviction and sentence for the rest of his life.
- 24 ■ Lack of an official pretrial diversion program for felony and misdemeanor cases,
operations agreement and memorandum of understanding between the USA and
USPO: This court has asked its Chief U.S. Probation Officer to meet and confer
with the U.S. Attorney and her First Assistant to develop the program, the
agreement and memorandum of understanding. The only thing before this court is
the proposed memorandum of understanding, and I was just told the U.S. First
Assistant wishes to revise it. The court also suggested that the Federal Public
Defender be involved in the process as he handles most of the criminal cases and
could provide valuable insight on behalf of the Federal Public Defender and CJA
panel members. I am not sure if he was invited to the meetings.
- The court further noted that Pretrial Diversion Agreements in felony cases is new
to this court.

21 In light of the rejection of the Pretrial Diversion Agreement, the case went to trial and on
22 February 3, 2016, the jury found the Defendant guilty of both Counts 1 and 2. *See* ECF No. 135.
23 Defendant subsequently filed a motion for a judgment of acquittal, which the court denied. *See*
24 ECF No. 193. On the day of sentencing, May 31, 2016, defense counsel asked for continuance of

1 the sentencing hearing and requested that he be allowed to file the instant motion. *See* ECF No.
2 201.

3 **II. DISCUSSION**

4 The Defendant seeks the court to do two things: (1) reconsider its previous decision in
5 rejecting the Pretrial Diversion Agreement between the Defendant and the USA; and (2) upon
6 the Defendant's completion of the conditions set forth in the Pretrial Diversion Agreement over a
7 prescribed period of time, that the court set aside the jury verdict of guilty on both Counts 1 and
8 2, and enter a judgment of acquittal. *See* ECF No. 207. Defendant relies on two cases, *United*
9 *States v. Nickle*, 2016 WL 1084759 (9th Cir. Mar. 21, 2016), and *United States v. Fokker*
10 *Services B.V.*, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016), both of which were decided after the
11 conclusion of the trial of this case.

12 a. *United States v. Nickle*

13 In *Nickle*, the Ninth Circuit vacated and remanded the case back to the district court,
14 when it found that the district court judge overstepped his bounds when he rejected the
15 defendant's guilty plea. Under FED. R. CRIM. P. 11(b), "the court must determine that the plea is
16 knowing, voluntary and intelligent, and has a factual basis." *Nickle*, 2016 WL 1084759, at *2.
17 The factual-basis requirement is to ensure that the defendant knows the conduct of the offense
18 that he is pleading guilty to. *Id.* The defendant in *Nickle* provided sufficient factual basis. *Id.* at
19 *1. However, the judge refused to accept the guilty plea because there was not "enough
20 information" to his liking. *Id.*

21 The Ninth Circuit held that "[a] district court's discretion in this area is limited. It can
22 only reject a plea for lack of a factual basis if the defendant denies committing a specific element
23 of the offense or protests his innocence even after demonstrating that he understands the charge."
24 *Id.* (internal brackets and quotation marks omitted). The Ninth Circuit also noted that had it not

1 been for the district court’s error, the defendant would not have been in a worse situation—
2 having been convicted of “two offenses that carried substantially higher maximum sentences
3 than the single offense to which he was ready to plead guilty.” *Id.*

4 **b. *United States v. Fokker Services B.V.***

5 In *Fokker*, the case arose from the interplay between the operation of a deferred
6 prosecution agreement (“DPA”)¹ and the running of time limitations under the Speedy Trial Act.
7 2016 WL 1319266, at *1. The parties in that case agreed that the company defendant would
8 continue to cooperate with the federal government for a period of 18 months under the terms of
9 the DPA, and in return, the federal government would dismiss the criminal charges against it. *Id.*
10 The government then filed the DPA, the criminal charges against the defendant, and a joint
11 motion to suspend the speedy trial clock pending the defendant’s successful completion of the
12 terms of the DPA. *Id.* The district court denied the motion to stop the speedy trial clock. The
13 district court’s actions were detailed as follows:

14 The district court then held a series of status conferences, during which it
15 repeatedly emphasized its concerns about the absence of any criminal
16 prosecution of individual company officers . . . The court requested several
17 additional written submissions from the government. The government was
18 asked to explain why the interests of justice supported the court’s approval of
19 the deal embodied by the DPA, and also to address whether Fokker’s initial
20 disclosures to the government had in fact been voluntary . . . The district court
21 later expressed that it might still reject the DPA because it was “too good a
22 deal for the defendant.”

23 . . . the district court denied the joint motion for the exclusion of time. In
24 explaining the reasons for its decision, the court criticized the government for
failing to prosecute any “individuals . . . for their conduct.” . . . According to

21 ¹ A DPA as described in *Fokker* is when “the government formally initiates prosecution but agrees to dismiss all
22 charges if the defendant abides by negotiated conditions over a prescribed period of time. Adherence to the
23 conditions enables the defendant to demonstrate compliance with the law. If the defendant fails to satisfy the
24 conditions, the government can then pursue the charges based on facts admitted in the agreement.” 2016 WL
1319266, at *1.

23 For purposes of this case, the Pretrial Diversion Agreement is similar to a DPA. Prosecution has been initiated but is
24 deferred while the Defendant demonstrates compliance with the law for a specific period of time. Upon successful
completion of the conditions set forth in the Pretrial Diversion Agreement during the prescribed timeframe, the USA
would then move to dismiss the indictment.

1 the court, approval of an agreement in which the defendant had been
2 “prosecuted so anemically for engaging in such egregious conduct for such a
3 sustained period of time and for the benefit of one of our country’s worse
4 enemies” would “promote disrespect for the law.” The court further noted that
5 certain employees had been permitted to remain with the company; that the
6 DPA contained no requirement for an independent monitor; and that the
7 amount of the fine failed to exceed the revenues Fokker gained from the
8 illegal transactions.

9 *Fokker*. 2016 WL 1319266, at *3-4.

10 The District of Columbia Appellate Court noted that “[t]he district court’s order marks
11 the first time *any* federal court has denied a joint request by the parties to exclude time pursuant
12 to a DPA.” *Id.* at *4 (emphasis added). Finding that the district court exceeded its authority under
13 the Speedy Trial Act, the appellate court vacated and remanded the case. In doing so, the
14 appellate court explained that “[w]hile the exclusion of time is subject to the approval of the
15 court, *there is no ground for reading that provision to confer free-ranging authority in district
16 courts to scrutinize the prosecution’s discretionary charging decisions.*” *Id.* (emphasis added)
17 (internal quotation marks omitted). The court’s rejection of an agreement under 18 U.S.C. §
18 3161(h)(2), “would amount to a substantial and unwarranted intrusion on the Executive Branch’s
19 fundamental prerogatives.” *Id.* at *7. As it has been long settled, the decision to charge, who to
20 charge, and what to charge rests solely within the Executive branch without any involvement,
21 oversight, or second-guessing by the Judicial branch. *Id.* at *4-11.

22 Explaining the “approval of the court” language contained in 18 U.S.C. § 3161(h)(2), the
23 appellate court examined the Senate Committee Report accompanying the Speedy Trial Act and
24 found that “a court’s approval authority for the exclusion of time under a DPA to have a
particular focus: i.e., to assure that the DPA in fact is geared to enabling the defendant to
demonstrate compliance with the law, and is not instead a pretext intended merely to evade the
Speedy Trial Act’s time constraints.” *Id.* at *8.

c. Application of *Nickle* and *Fokker* in the instant case

1 *Nickle* is distinguishable from the instant case in that *Nickle* dealt with a plea agreement
2 and not a Pretrial Diversion Agreement. The acceptance of a plea agreement and the use of a
3 Pretrial Diversion Agreement to stop the speedy trial clock are governed by different statutes
4 and/or Federal Rules of Criminal Procedure. However, this court recognizes *Nickle*'s limited
5 applicability to this case. The acceptance of a guilty plea is governed under FED. R. CRIM. P. 11,
6 the same rule that this court relied upon and cited to when it rejected the Pretrial Diversion
7 Agreement.² In addition, this case is similar to *Nickle* in that had the court accepted the Pretrial
8 Diversion Agreement, the Defendant would not have been in a significantly worse situation. The
9 Defendant would have had no criminal conviction upon the dismissal of the Indictment after the
10 successful completion of the Pretrial Diversion Agreement conditions over a prescribed period of
11 time. Instead, the Defendant now has two criminal convictions and is faced with a mandatory
12 minimum of two years imprisonment.

13 Despite the similarity, this court does not find *Nickle* to have much weight on its decision
14 in the reconsideration. The law articulated in *Nickle* is well established—that the court cannot
15 reject a guilty plea, unless there is insufficient factual basis for it. 2016 WL 1084759, at *1. That
16 is not the case here. The court did not reject a guilty plea but rather, it rejected a Pretrial
17 Diversion Agreement.

18 When this court preliminarily accepted the Pretrial Diversion Agreement, it vacated the
19 trial date under the Speedy Trial Act pursuant to 18 U.S.C. § 3161(h)(2), which states that “[a]ny
20 period of delay during which prosecution is deferred by the attorney for the Government
21 pursuant to written agreement with the defendant, *with the approval of the court*, for the
22 purposes of allowing the defendant to demonstrate his good conduct.” 18 U.S.C. § 3161(h)(2)

23 _____
24 ² The court cited to FED. R. CRIM. P. 11(c)(1)(A) and 11(c)(3)(A). Similarly, a court in the Eastern District of New
York cited to FED. R. CRIM. P. 11(c)(1)(A) in deciding the court's authority whether to accept or reject a DPA. *See*
United States v. HSBC Bank USA, N.A. and HSBC Holdings PLC, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

1 (emphasis added).

2 That preliminary acceptance of the Pretrial Diversion Agreement was later revoked by
3 this court as discussed *supra*. At the time of the Pretrial Diversion Agreement rejection and with
4 very little caselaw on this issue, the court was unaware of the meaning of the “approval of the
5 court” as contained in 18 U.S.C. § 3161(h)(2).

6 Similar to *Fokker*, the Eastern District of New York reasoned that based on the Senate
7 Committee Report of the Speedy Trial Act, the standard that applies when evaluating whether to
8 grant “approval” to a DPA or Pretrial Diversion Agreement “appears” to be “whether a deferred
9 prosecution agreement is truly about diversion and not simply a vehicle for fending off a
10 looming trial date.” *HSBC Bank*, 2013 WL 3306161, at *3.

11 The district court in *United States v. Saena Tech Corporation* examined both holdings in
12 the district court decisions in *Fokker* and *HSBC Bank*, and followed suit. *See Saena Tech Corp.*,
13 140 F.Supp.3d 11 (D.D.C. 2015). These three courts also found that as long as the DPA does not
14 implicate the integrity of the court, there is no reason for the rejection of the DPA. *See id.* at 35;
15 *Fokker*, 2016 WL 1319266, at *11 (“court has authority to reject a DPA if it contains illegal or
16 unethical provisions.”); *HSBC Bank*, 2013 WL 3306161, at *6-7 (the court noted that the DPA
17 before it “reveal no impropriety that implicates the integrity of the Court and therefore [would]
18 warrant[] the rejection of the agreement.” The court went through a myriad of examples to
19 include requiring the defendant to *indefinitely* cooperate in *any* and *all* investigations even at the
20 risk of violating the law or other’s constitutional rights.).

21 The Ninth Circuit has not examined what standard or factors the district courts should
22 employ when determining whether to approve or reject a DPA or Pretrial Diversion Agreement,
23 under 18 U.S.C. 3161(h)(2). Other circuits are also silent on this issue as recognized by the court
24 in *HSBC Bank. Id.* *3.

1 However, the court finds *Fokker*, *HSBC Bank*, and *Saena Tech Corp.* to be instructive.
2 With the Ninth Circuit not having yet addressed this particular issue but after having discovered
3 the legislative purpose of the statute—that the court’s approval was only to ensure that neither
4 the government nor the defendant abuse or evade the speedy trial clock and anything beyond that
5 “would amount to a substantial and unwarranted intrusion on the Executive Branch’s
6 fundamental prerogatives”, this court finds it incumbent upon itself to reconsider its previous
7 decision to reject the Pretrial Diversion Agreement. *See Fokker*, 2016 WL 1319266, at *7.

8 There is no evidence on the record that the parties in this case proposed the Pretrial
9 Diversion Agreement to circumvent the Speedy Trial Act. In fact, prior to preliminarily
10 accepting the Pretrial Diversion Agreement, the court thoroughly reviewed the agreement and
11 found the provisions contained therein to be acceptable as evidenced by the court’s acceptance of
12 it. Although the proposed provisions of the Agreement for Pretrial Diversion (*see* Gov’t Ex. 11,
13 ECF No. 208-3) did not “reveal impropriety that implicated the integrity of the Court”, the entire
14 handling of the offers of Pretrial Diversion Agreement to some defendants and not to others
15 clearly subjects defendants to disparate and unfair treatment when it comes to a final disposition
16 of their case. Disparate sentencing treatments reveal an impropriety that implicates the integrity
17 of this Court, and the court had to exercise its supervisory power.

18 As Justice Marshall stated in his dissenting opinion in *United States v. Payner*, “[o]f
19 utmost importance, the supervisory power serves to protect the integrity of the federal courts.”
20 447 U.S. 727, 744 (2007) (internal quotations omitted). “This is a federal criminal case, and this
21 Court has supervisory jurisdiction over the proceedings . . . If it has any duty to perform in this
22 regard, it is to see that the waters of justice are not polluted.” *Mesarosh v. United States*, 352
23 U.S. 1, 14 (1956). The court here is being asked to place its formal imprimatur on the Pretrial
24 Diversion Agreement and to make various findings with respect to the Speedy Trial Act. Citing

1 to Judge John Gleeson in *HSBC Bank*, “for whatever reason or reasons, the contracting parties
2 have chosen to implicate the Court in their resolution of this matter. There is nothing wrong with
3 that, but a pending federal criminal case is not window dressing. Nor is the Court, to borrow a
4 famous phrase, a potted plant.” 2013 WL 3306161, at *5.

5 Accordingly, the court subsequently rejected the Pretrial Diversion Agreement because it
6 was concerned that there was no official pretrial diversion program or an operations agreement
7 or a memorandum of understanding between the USA and USPO. Without this agreement, the
8 court felt that it would not be able to proceed properly in approving any Pretrial Diversion
9 Agreement. In addition, the court was concerned of what it deemed to be a disparity of treatment
10 among the defendants being prosecuted by the USA, and the fact that the prosecutors were
11 uncertain as to the culpability of Constantino and his codefendant, Babauta. The culpability issue
12 was of concern to this court since it goes towards the defendants’ sentencing exposure, in the
13 event the defendants were unable to comply with their respective Pretrial Diversion Agreements
14 and the case results in a guilty plea or guilty verdict, and the court proceeds with sentencing. To
15 this day, the court’s concerns remain.

16 However, at the time it rejected the agreement, this court was unaware of its very limited
17 role and authority in rejecting a Pretrial Diversion Agreement pursuant to 18 U.S.C. §
18 3161(h)(2). This unawareness was not based on pure ignorance of the law but rather, it was
19 based on the lack of case law on this particular issue. The Ninth Circuit itself and many other
20 circuits have not examined the standard applied in approving or rejecting a Pretrial Diversion
21 Agreement pursuant to 18 U.S.C. §3161(h)(2). *Fokker* appears to be the first appellate court to
22 examine this issue and after having reviewed the legislative history of the statute in question, this
23 court agrees that its role in approving a Pretrial Diversion Agreement pursuant to 18 U.S.C. §
24 3161(h)(2) is very limited in that it must only ensure that the parties are not submitting a Pretrial

1 Diversion Agreement to evade the speedy trial clock. The court recognizes this new legal
2 authority and what it must now do and as such, the court grants the motion for reconsideration.

3 **d. Lack of signature/approval by USPO**

4 The Government's primary argument in opposing the Defendant's motion for
5 reconsideration is that the Pretrial Diversion Agreement was "conditioned upon an investigation
6 by the U.S. Probation Office and a favorable determination of the Defendant's suitability." ECF
7 No. 208, at 5. Since none of these conditions occurred, the Government argues that the Pretrial
8 Diversion Agreement is unenforceable. *Id.*

9 Chapter 8 of the Guide to Judiciary Policy governs the USPO's Pretrial Diversion
10 Investigation. Under Section 820.10, a diversion agreement is executed when it is "signed by the
11 diversion candidate, the defense attorney, the prosecutor, and either the chief pretrial services
12 officer or chief probation officer."³ The USA's Criminal Resource Manual Section 712(F) states
13 that a Pretrial Diversion Agreement "is signed by the offender, his/her attorney, the prosecutor,
14 and either the Chief Pretrial Services Officer or the Chief Probation Officer." Based on these
15 internal policies, it is clear that the signature of the Chief U.S. Probation Officer is required.

16 The Pretrial Diversion Agreement as submitted to the court and later withdrawn by USA
17 when the court did not accept it, shows that the document was signed by the Defendant, his
18 defense counsel, and the Assistant U.S. Attorney assigned to the case. *See* Gov't Ex. 11, ECF
19 No. 208-3, at 5. The signature block for the Chief U.S Probation Officer was left blank and not
20 signed.

21 The problem with the Government's argument is that the conditions precedent, *i.e.*,
22 determination of the Defendant's suitability for diversion program and the signature/approval of

23 ³ This section notes that "[i]n some districts, a judicial official also signs the document." Section 820.10 of the
24 Pretrial Diversion Investigation Guide. In this district, the court expects the future memorandum of understanding to
include the signature of a judicial official.

1 the Chief U.S. Probation Officer, did not occur because the court specifically ordered the Chief
2 U.S. Probation Officer to stop the investigation in determining Defendant's suitability. *See*
3 January 8, 2016 hearing recording at 12:09. The court's order to stop the investigation was based
4 on the concerns discussed above.

5 Had it not been for the court's instruction to the USPO to stop the investigation, the
6 USPO would have completed the determination of the Defendant's suitability, and the Chief U.S.
7 Probation Officer could have then determined if the Defendant was suitable and if so, the Chief
8 U.S. Probation Officer could have signed off on the Pretrial Diversion Agreement.

9 Accordingly, it would not be equitable for the court to deny the Defendant's motion for
10 reconsideration based on the argument that the conditions precedent was not met. They were not
11 met because of the court's order to the USPO, and the Defendant should not be penalized for this
12 reason.

13 e. **Procedural mechanism**

14 The Government's other primary argument is that there is no procedural mechanism for
15 this court to grant the motion for reconsideration and vacate the conviction after a guilty verdict
16 by the jury. *See* ECF No. 208. It "questions whether the Court can simply reconsider its earlier
17 decision rejecting a Pretrial Diversion Agreement, vacate the verdicts of guilty and enter an
18 acquittal – in the absence of a procedural mechanism to do so." *Id.* at 7. In addition, the
19 Government argues that the Defendant does not meet the applicable standard for a motion for
20 reconsideration.

21 "Motions for reconsideration are disfavored and should be granted only in rare
22 circumstances. A motion for reconsideration will be denied absent a showing of manifest error or
23 a showing of new facts or legal authority that could not have been brought to the Court's
24 attention earlier with reasonable diligence. Mere disagreement with an order is an insufficient

1 basis for reconsideration. Nor should reconsideration be used to ask the Court to rethink its
2 analysis.” *United States v. Bernal*, 2013 WL 4512355 (D. Ariz. Aug. 26, 2013), *aff’d.*, 599 F.
3 App’x 694 (9th Cir. Mar. 31, 2015) (citations, internal quotation marks and brackets omitted).

4 The court rejected the Pretrial Diversion Agreement on January 11, 2016. The case went
5 to trial and guilty verdict was returned on February 3, 2016. The appellate court decision in
6 *Fokker* was not issued until April 5, 2016. Therefore, there was no way for this legal authority to
7 have been brought to this court’s attention.⁴

8 **III. CONCLUSION**

9 Setting aside a jury verdict is not taken lightly by this court. However, based on the
10 discussion above, the court hereby **GRANTS** Defendant’s Motion for Reconsideration. The
11 court hereby **ORDERS** the following:

- 12 (1) The Chief U.S. Probation Officer shall work with U.S. Attorney to adopt an
13 official Pretrial Diversion Program, an operations agreement and a memorandum
14 of understanding governing the pretrial diversion program consistent with the
applicable provisions contained in the USA’s Criminal Resource Manual and the
USPO’s Pretrial Diversion Investigation Guide.
- 15 (2) Upon adoption of the above program, agreement and memorandum of
16 understanding, and approval by the Chief Judge, the USPO shall complete the
17 pretrial diversion (investigation) report to determine Defendant’s suitability for
supervision.
- 18 (3) If the Chief U.S. Probation Officer determines that the Defendant is suitable, she
19 shall inform the parties and shall proceed in signing the Pretrial Diversion
Agreement that was previously signed by the Defendant, his defense counsel, and
the Assistant U.S. Attorney assigned to this case.
- 20 (4) Upon completion of the signatures, the court will then make a finding of
21 approving the Pretrial Diversion Agreement pursuant to 18 U.S.C. § 3161(h)(2),
and the applicable Pretrial Diversion Program, an operations agreement and
22 memorandum of understanding adopted by this court.
- 23 (5) Upon the USA’s motion to dismiss the indictment after Defendant’s successful
24 completion of the diversion program, the court will set aside the jury verdict and

⁴ The decisions in *Saena Tech Corp.* and *HSBC Bank*, which were issued in 2015 and 2013, respectively, were not from an appellate court.

1 dismiss the case.

2 (6) The court hereby sets this matter for a status hearing on January 3, 2017, at 2:30
3 p.m.

4 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Dec 04, 2016