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9
10 **Attorney For Defendant,**
11 **Michael Colello**

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 **UNITED STATES OF AMERICA,**) **CR 99-904(A) – CBM**
15)
16 **Plaintiff,**) **NOTICE OF MOTION AND**
17) **MOTION BY DEFENDANT**
18 **v.**) **MICHAEL COLELLO FOR ORDER**
19) **DISMISSING “CONCEAL /**
20) **DISGUISE” THEORY IN COUNT**
21) **TWENTY-SIX DUE TO FAILURE TO**
22) **STATE AN OFFENSE, OR**
23) **PROVIDING ALTERNATIVE**
24) **RELIEF; MEMORANDUM OF**
25) **POINTS AND AUTHORITIES**
26)
27) **DATE: May 21, 2001**
28) **TIME: 1:30 p.m.**
) **CTRM: HON. Consuelo B. Marshall**
)

24 **TO: THE U.S. GOVERNMENT, THROUGH ITS COUNSEL OF RECORD,**
25 **ASSISTANT U.S. ATTORNEYS JEFFREY B. ISAACS AND PAMELA L.**
26 **JOHNSTON:**

27 **PLEASE TAKE NOTICE that on May 21, 2001, at 1:30 p.m., before the**

28 **Honorable Consuelo B. Marshall, Judge of the United States District Court, defendant**

1 **Michael Colello will move the Court for an order**

- 2 **a. Under Fed.R.Crim.P. 8, dismissing the “conceal / disguise” theory in Count**
3 **Twenty-Six for failure to state an offense under 18 U.S.C. 1956(a)(2)(B)(i);**
4 **or in the alternative,**
5
6 **b. Under Fed.R.Crim.P. 8, severing the “promote” and “conceal / disguise”**
7 **theories into two separate counts on the ground that they are duplicitous; or**
8 **in the alternative,**
9
10 **c. Under Fed.R.Crim.P. 14, directing the government to make an election as**
11 **between the two theories; or in the alternative,**
12
13 **d. Under case authority cited herein, instructing the jury that it must find that**
14 **the government has proven all the elements of both theories in order to**
15 **convict Mr. Colello on Count Twenty-Six.**

16 **The motion is brought under Federal Rules of Criminal Procedure 7(c)(1), 8 and**
17 **14, as well as the case authorities cited herein.**

18 **The motion is brought pursuant to this notice of motion, the accompanying**
19 **memorandum of points and authorities, all papers contained in the district court file, and**
20 **any additional evidence the court permits counsel to introduce at the hearing on the**
21 **motion.**

22
23 **DATED: April 27, 2001**

Respectfully Submitted,

24
25 _____
26 **GREGORY NICOLAYSEN**
27 **Counsel for Defendant,**
28 **Michael Colello**

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4

5 **A. The Charges Against Defendant Michael Colello**

6 **Defendant Colello is charged in the First Superseding Indictment in the following**

7

8 **counts:**

9 **5. Counts Twenty Six through Thirty Three (money laundering);**

10 **6. Counts Thirty Five through Forty-One (obstruction of justice);**

11 **7. Counts Forty Two (forfeiture).**

12

13 **Mr. Colello is not charged in the underlying fraud scheme pertaining to the Cross**

14 **Financial Services factoring fraud, which is charged in Counts One Through Twenty Five**

15 **(the “CFS factoring fraud”). The only remaining count, which is Count Thirty Four, is**

16 **specific to defendant Fox.**

17

18

19 **B. Relief Sought by this Motion**

20 **This motion is specific to the money laundering conspiracy in Count Twenty-Six,**

21 **and specifically that portion of Count Twenty-Six that charges Colello under 18 U.S.C.**

22 **1956(a)(2)(B)(i) with conducting monetary transfers designed to “conceal and disguise the**

23 **nature, the location, the source, the ownership, and the control of the proceeds of specified**

24 **unlawful activity, namely mail fraud, wire fraud, and interstate transportation of**

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1 fraudulently obtained property(.)”¹ For the sake of simplicity, this money laundering
2 theory in Count Twenty-Six will be referred to as the “conceal / disguise theory.”
3

4 By this motion, defendant Colello requests an order

- 5 1. Under Fed.R.Crim.P. 8, dismissing the “conceal / disguise” theory in Count
6 Twenty-Six for failure to state an offense under 18 U.S.C. 1956(a)(2)(B)(i);
7 or in the alternative,
- 8 2. Under Fed.R.Crim.P. 8, severing the “promote” and “conceal / disguise”
9 theories into two separate counts on the ground that they are duplicitous; or
10 in the alternative,
- 11 3. Under Fed.R.Crim.P. 14, directing the government to make an election as
12 between the two theories; or in the alternative,
- 13 4. Under case authority cited herein, instructing the jury that it must find that
14 the government has proven all the elements of both theories in order to
15 convict Mr. Colello on Count Twenty-Six.
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23 ¹ Count Twenty-Six alleges two separate theories of money laundering conspiracy: (1)
24 promoting the carrying on of specified unlawful activity, under 18 U.S.C.
25 1956(a)(2)(A); and (2) conducting transfers to conceal and disguise the nature, source,
26 location, ownership of proceeds of specified unlawful activity, under 18 U.S.C.
27 1956(a)(2)(B)(i). This motion focuses on the second of these two theories. If this
28 motion is denied, a separate motion will be filed seeking, as an alternative remedy, an
order that severs the two theories into two separate conspiracy counts to avoid
confusing the jury at trial.

1 As noted above, the principal remedy sought by this motion is dismissal of the
2 conceal / disguise theory under Federal Rule of Criminal Procedure 7(c)(1), on the ground
3 that this theory in Count Twenty-Six fails to state an offense under 18 U.S.C.
4 1956(a)(2)(B)(i). The other three remedies listed above are in the alternative if the
5 dismissal request is denied.
6

7 As discussed more fully below, dismissal is warranted for failure to state an offense
8 on two grounds:
9

10 1. First, challenging the facial validity of the indictment, the defense contends that
11 the conceal / disguise theory is legally defective in that it is based on the untenable claim
12 that Colello and his co-conspirators sought to conceal / disguise illegal proceeds of the
13 Cross Financial Services (“CFS”) factoring business by acquiring *worthless* letters of
14 credit.² That contention, which is evident from a facial reading of the indictment and
15 which is the crux of the conceal / disguise theory, contradicts the most fundamental
16 premise of section 1956(a)(2)(B)(i) by suggesting that someone would seek to conceal /
17 disguise illegal proceeds by conducting a financial transfer aimed at acquiring something
18 that has no value. This idea is absurd and warrants dismissal of the conceal / disguise
19 component of Count Twenty-Six under Rule 7(a).
20
21

22 2. Second, while the indictment quotes the “conceal / disguise” language from
23 Section 1956(a)(2)(B)(i), the factual allegations in Count Twenty-Six asserts a theory that
24

25
26 ² The concept of “worthless” letters of credit is a fundamental theme throughout Count
27 Twenty-Six and serves as the pivotal fact on which the government has based its entire
28 money laundering conspiracy theory.

1 is not based on the concealment of, but rather merely the spending of, illicit proceeds from
2 the CFS factoring business. As part of the “promote” theory of money laundering, the
3 government asserts that illicit CFS funds were used to purchase the letters of credit for the
4 business purpose of allowing CFS to use them for deceptive asset enhancement purposes.
5

6 In making this assertion, the government puts the “promote” theory at odds with
7 the “conceal / disguise” theory by acknowledging, on the face of the indictment that the
8 defendants were not in actuality trying to conceal or disguise the CFS funds by acquiring
9 the letters of credit. Instead, the defendants allegedly were simply spending CFS money to
10 acquire these letters of credit, ostensibly to promote the underlying fraud. Because section
11 1956 criminalizes the concealment, not the spending, of illicit proceeds, the “conceal /
12 disguise” theory in Count Twenty-Six is fatally defective in failing to properly plead a
13 concealment-based charge of money laundering. Thus, dismissal is warranted under Rule
14 7(c).
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19 C. Brief Summary Of Money Laundering Charges In Count Twenty-Six

20 In reviewing this motion, it is important to focus on the fact that Count Twenty-Six
21 charges a money laundering conspiracy on the basis of two distinct theories:

- 22 (1) First, the “promote” theory;
- 23 (2) Second, the “conceal / disguise” theory.

24
25 The promote theory alleges that Colello and the co-defendants conspired to commit
26 international money laundering by causing transfers of funds between financial
27
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1 institutions in the U.S. and Switzerland, “with the intent to promote the carrying of
2 specified unlawful activity(.)”³ The specified unlawful activity at issue is the CFS factoring
3 fraud.⁴
4

5 The conceal / disguise theory alleges that Colello and the co-defendants conspired
6 to commit international money laundering by causing transfers of funds between financial
7 institutions in the U.S. and Switzerland, knowing that the funds came from some form of
8 unlawful activity, and knowing that the transfers were “designed, in whole or in part, to
9 conceal and disguise the nature, the location, the source, the ownership, and the control of
10 the proceeds of” the CFS factoring fraud.⁵
11

12 These two theories are not only distinct but contradictory. This is because the
13 factual assertions in Count Twenty-Six hinge on a single phrase which is central to the
14 promote theory but which renders the conceal / disguise theory legally defective.
15

16 That phrase is “worthless letter of credit.”

17 This phrase comprises the theme around which Count Twenty-Six has been
18 developed. Indeed, page 23 of the indictment contains the following bold-faced heading:
19 “Fraudulent And Worthless Letters Of Credit.” The phrase, “worthless letter of credit,”
20 is repeated like the refrain in a song, as Count Twenty-Six describes the transactional
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24 ³ Indictment at Count Twenty-Six, par. 36, page 22, lines 16-18.

25 ⁴ Mr. Colello is not charged as a defendant in Counts One through Twenty-Five, which
26 are fraud charges pertaining directly to the CFS factoring fraud. Mr. Colello appears
27 for the first time as a defendant in the indictment in Count Twenty-Six.

28 ⁵ Indictment at Count Twenty-Six, par. 36, page 22, lines 22-28.

1 context in which the money laundering allegedly occurred.⁶

2 The promote theory depends entirely on this concept of the “worthless letter of
3 credit,”in alleging that the defendants used these letters of credit to deceive CFS
4 investors.⁷ The thrust of the government’s claim is that the defendants included the face
5 value of these letters of credit in the CFS balance sheet for the purpose of enhancing the
6 company’s assets; because these letters of credit were worthless, their use for asset
7 enhancement purposes was a deception on the CFS investors.
8
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10 While the concept of worthlessness is central to the promote theory, it puts the
11 government in an irreconcilable dilemma: if the letters of credit are worthless, which is the
12 predicate for alleging that they were used to promote the CFS factoring fraud, then it
13 makes no sense for the government to allege that the defendants sought to conceal /
14 disguise the illegal proceeds of the CFS fraud by using those proceeds to acquire worthless
15 items.
16

17 As discussed in the following section, the conceal / disguise theory advanced by the
18 government in the indictment simply cannot be supported as a matter of law and thus fails
19 to state an offense under 18 U.S.C. 1956(a)(2)(B)(i). Consequently, this Court should
20 dismiss that portion of Count Twenty-Six that is based on the conceal / disguise theory. If
21 dismissal is denied, the Court should grant one of the proposed alternate remedies in order
22 to resolve the conceptual problems that the government has created by pleading both the
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25 ⁶ Indictment at Count Twenty-Six, par. 39, page 24, line 6; par. 40, page 24, line 13; par.
26 41, page 24, line 24.

27 ⁷ Indictment at Count Twenty-Six, par. 41, page 24, lines 24-25.

28

1 promote and conceal / disguise theories within a single money laundering count.

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4 II.

5 THIS COURT SHOULD DISMISS COUNT TWENTY-SIX

6 AS TO THE CONCEAL / DISGUISE THEORY

7 UNDER FEDERAL RULE 7(c)(1) FOR FAILURE

8 TO STATE AN OFFENSE UNDER 18 U.S.C. 1956(a)(2)(B)(i)
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10
11 A. Standards Under Rule 7(c)

12 Fed.R.Crim.P. 7(c)(1) requires that an indictment be a "plain, concise and definite
13 written statement of the essential facts constituting the offense charged." Under this rule,
14 a criminal defendant is entitled to an indictment that states the essential elements of the
15 charge against him. *See, Jones v. United States*, 526 U.S. 227, 232 (1999); *Hamling v.*
16 *United States*, 418 U.S. 87, 117 (1974) ("[A]n indictment is sufficient if it, first, contains
17 the elements of the offense charged and fairly informs a defendant of the charge against
18 which he must defend, and, second, enables him to plead an acquittal or conviction in bar
19 of future prosecutions for the same offense."). An indictment that fails to allege the
20 essential elements of the crime charged offends both the Fifth and Sixth Amendments.
21 *See, Russell v. United States*, 369 U.S. 749, 760-61 (1962).
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25 While an indictment "should be read in its entirety, construed according to
26 common sense, and interpreted to include facts which are necessarily implied()," *United*
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28

1 States v. Givens, 767 F.2d 574, 584 (9th Cir.1985) (citations omitted), quoted in United
2 States v. King, 200 F.3d 1207, 1217 (9th Cir. 1999), even such a broad reading of Count
3
4 Twenty-Six does not satisfy the pleading requirements of Rule 7(c) because it advances a
5 theory of money laundering that contradicts the “promote theory” in Count Twenty-Six
6 and is intrinsically absurd.

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9 **B. Dismissal Is Warranted Due To The Government’s Theory Of “Worthlessness”**

10 **1. General Standards Under 18 U.S.C. 1956 re: Conceal / Disguise**

11 To establish a violation of Section 1956(a)(2)(B)(i), the Government must prove (1)
12 a defendant transported, transmitted, or transferred a monetary instrument or funds (or
13 attempted to do so); (2) from a place in the United States to a place outside the United
14 States, or vice-versa; (3) the defendant knew the property involved was the proceeds of
15 some form of unlawful activity, and (4) the defendant knew the transportation or transfer
16 was designed in whole or in part to conceal or disguise the nature, location, source,
17 ownership or control of specified unlawful activity. *See generally*, United States v. Carr,
18 25 F.3d 1194, 1206 (3d Cir. 1994) , cert. denied, 513 U.S. 1086 (1995).
19
20

21 The counterpart to the “conceal / disguise” theory in Section 1956(a)(2)(B)(i) is
22 Section (a)(1)(B)(i), which addresses exactly the same theory except that it does so in the
23 context of financial transactions, rather than financial transfers.⁸ While 18 U.S.C. 1956
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25 _____
26 ⁸ Similarly, the “promote” theory has the same counterpart as the “conceal / disguise
27 theory”: section 1956(a)(1)(A)(i) applies that theory in the context of financial
28 transactions, while subsection (a)(2)(A) applies it in the context of financial transfers.

1 does not provide examples of transfers, subsection (c)(3) provides the following examples
2 of transactions:

3 a purchase, sale, loan, pledge, gift, transfer, delivery, or other
4 disposition, and with respect to a financial institution includes
5 a deposit, withdrawal, transfer between accounts, exchange of
6 currency, loan, extension of credit, purchase or sale of any
7 stock, bond, certificate of deposit, or other monetary
8 instrument, use of safety deposit box, or any other payment,
9 transfer, or delivery by, through, or to a financial institution,
10 by whatever means effected[.]

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14 It is appropriate to examine the analogous provision in subsection (a)(1)(B)(i) in
15 interpreting the statutory reach of subsection (a)(2)(B)(i), given the slight distinction
16 between the two subsections. The Third Circuit expressly acknowledged this point in
17 analogizing to the definitional standards of scienter for (a)(1)(B)(i) laundering in resolving
18 the scienter issue as applied to (a)(2)(B)(i) laundering. In United States v. Carr, 25 F.3d
19 1194 (3rd Cir. 1994), the Court observed:

20
21 The only distinction between subsections 1956(a)(1) and
22 1956(a)(2)(B) is that the former criminalizes the laundering of
23 property, rather than funds. Because we find this distinction
24 so slight, we believe that Congress intended the definition of
25 Sec. 1956(c)(1), which is quoted above, to apply equally to
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1 violations of the money laundering statute which involve
2 funds instead of property.

3
4 25 F.3d at 1204.

5 Thus, it is helpful to examine the illustrations provided by subsection (c)(3) in
6 regard to subsection (a)(1)(B)(i) laundering to assess the types of acts contemplated by
7 subsection (a)(2)(B)(i). In doing so, it becomes apparent that the overall statutory scheme
8 in 18 U.S.C. 1956 contemplates that money laundering acts that fall under the statute
9 must be designed to involve *value on both sides of the financial act at issue*. For example,
10 subsection (c)(3) expressly includes “a purchase, sale, (and) loan,” as well as “purchase or
11 sale of any stock, bond, certificate of deposit, or other monetary instrument,” as examples
12 of subsection (a)(1)(B)(i) laundering. By their nature, such transactions are designed to
13 achieve equivalency, or at least something of value, in exchange for the illegal proceeds
14 that are involved in the purchase, sale or loan. These are not transactions designed to
15 acquire something that is worthless. This analysis applies even as to a gift, which is also
16 included as an illustration in subsection (c)(3), since gifts imply a reciprocal value, albeit
17 non-monetary.
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21 The argument that a laundering act under 18 U.S.C. 1956 must be designed to
22 involve equivalency, or at least something of value, on both sides of the financial act is
23 supported in the case law, even though the circuits have not expressly articulated this
24 proposition in so many words. *See generally, United States v. Campbell*, 977 F.2d 854 (4th
25 Cir. 1992), cert. denied, 502 U.S. 846 (1991) (use of drug funds to purchase real estate
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1 constituted money laundering); United States v. Martin, 933 F.2d 609, 611 (8th Cir. 1991)
2 (purchase of stock with illegal cash constituted money laundering); United States v.
3 Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990) (purchase of house).
4

5 In addition to being consistent with case law, the value-oriented interpretation of
6 the statute comports with Congressional intent, as discussed below.
7

8 2. Statutory Interpretation Of The “Conceal / Disguise” Component Of

9 18 U.S.C. 1956

10 As a general proposition, the starting point in statutory interpretation is the
11 statute's plain meaning, if it has one. Tang v. Reno, 77 F.3d 1194, 1196 (9th Cir.1996)
12 ["In interpreting a statute, we must examine its language. If 'the statute is clear and
13 unambiguous, that is the end of the matter.' " (quoting Sullivan v. Stroop, 496 U.S. 478,
14 482 (1990))]; United States v. Hagberg, 207 F.3d 569, 574 (9th Cir. 2000), citing Reno v.
15 National Transp. Safety Bd., 45 F.3d 1375, 1379 (9th Cir.1995) ("[T]he plain meaning of
16 language in a regulation governs unless that meaning would lead to absurd results.").
17
18

19 Moreover, the Supreme Court has made clear that any ambiguity in a criminal
20 statute will be construed in favor of the accused. United States v. Bass, 404 U.S. 336, 347
21 (1971).
22

23 If this Court determines that the validity of the Indictment cannot be resolved
24 solely by applying a plain reading of the statute, the legislative history of 18 U.S.C. 1956
25 must be considered. The Ninth Circuit has expressly observed that the legislative history
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1 is to be examined if the statute does not have a plain meaning that resolves an issue of
2 statutory interpretation that is pending before the Court. In United States v. Bahe, 201
3 F.3d 1124, 1129 (9th Cir. 2000), which raised an issue of statutory interpretation in regard
4 to 18 U.S.C. 3583 pertaining to Supervised Release, the Circuit provided the following
5 useful observations:
6

7 Where statutory "language is not clear, Congress's intent must still be
8 ascertained." Tang, 77 F.3d at 1197. In interpreting § 3583(d), we must
9 therefore consider " '[t]he purpose, the subject matter, the context [and] the
10 legislative history' of this statute." [Ninth Circuit citations omitted].
11 Indeed, "the meaning of statutory language, plain or not, depends on
12 context." Holloway v. United States, 526 U.S. 1 (1999) (internal quotation
13 marks and citations omitted). Context in this regard relates to "the design
14 of the statute as a whole and its object and policy." Gozlon-Peretz v. United
15 States, 498 U.S. 395, 407 (1991) (quoting Crandon v. United States, 494 U.S.
16 152, 158 (1990)). We therefore turn to an examination of the statute's
17 legislative history, its language and structure as a whole, the governing case
18 law, and the applicable Sentencing Guidelines.
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22 3. Application Of Facts To Legal Standards

23
24 The government's "conceal / disguise" theory in Count Twenty-Six clashes directly
25 with Congressional intent. In alleging that the object of the conceal / disguise conspiracy
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1 was essentially to reduce illicit proceeds from the CFS fraud to worthless items, the
2 government unwittingly asserts that the defendants purposely sought to fulfill Congress'
3 intent in enacting the money laundering statutes, 18 U.S.C. 1956 and 1957, as part of the
4 Anti-Drug Abuse Act of 1986. The broad purpose of these statutes was "to render the
5 money derived from illegal activities *worthless* and hit the criminal 'where he bruises, and
6 that is right in the pocketbook.'" (italics added). Maura E. Fenningham, *Note, A Full*
7 *Laundering Cycle is Required: Plowing Back the Proceeds to Carry On Crime is the*
8 *Crime Under 18 U.S.C. § 1956(a)(1)(A)(i)*, 70 Notre Dame L. Rev. 891, 893 (1995)
9 (citations omitted). *See, United States v. Leonard*, 61 F.3d 1181, 1185 n.2 (5th Cir. 1996)
10 (citing Note with approval). This conflict with Congressional intent serves to further
11 support the defense position that, as a matter of statutory construction, 18 U.S.C.
12 1956(a)(1)(B)(i) and (a)(2)(B)(i) contemplate that the financial transactions and transfers
13 will involve something of value on both sides.

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17 Moreover, while section 1956 does not expressly contain the phrase, "thing of
18 value," the concept that transactions involve some form of value is rooted in numerous
19 federal criminal statutes involving financial crimes and thus is an essential component of
20 white collar crime enforcement in the federal courts. *See, United States v. Nilsen*, 967 F.2d
21 539, 542 (11th Cir. 1992) (stating that "Congress' frequent use of 'thing of value' in
22 various criminal statutes has evolved the phrase into a term of art which the courts
23 generally construe to envelope both tangibles and intangibles"), *cert. denied*, 507 U.S. 103
24 (1993), cited in *United States v. Marmolejo*, 86 F.3d 404, 411-412 (5th Cir. 1996); *United*
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28

1 States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979) (“Like the District Judge, we are
2 impressed by Congress’ repeated use of the phrase ‘thing of value’ in section 641 and its
3 predecessors. These words are found in so many criminal statutes throughout the United
4 States that they have in a sense become words of art.”).

6 Thus, to imply a “value” requirement to section 1956(a)(2)(B)(i) would be entirely
7 consistent with Congressional intent across the board in the drafting of white collar
8 criminal legislation.

10 The indictment in the case at bar is in direct conflict with Congressional intent. It
11 alleges that the illicit proceeds of the CFS factoring fraud were used to obtain worthless
12 letters of credit. While the Ninth Circuit has held that the proceeds of the specified
13 unlawful activity may be worthless, United States v. Akintobi, 159 F.3d 401, 404-405 (9th
14 Cir. 1998), the allegation in this case is quite different.⁹ Here, the indictment charges the
15 defendants with undertaking financial transfers to *acquire something that is worthless* as
16 an act of concealing / disguising the illicit proceeds. Thus, in this case it is not the
17 proceeds themselves that are worthless but the items being obtained through the transfers
18 of the proceeds to overseas accounts. On these allegations, the indictment contradicts the
19 fundamental concept of value that is rooted in the case law that addresses money
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24 ⁹ It is important to emphasize that the motion to dismiss is not predicated on the lack of
25 value of the concealed proceeds, but rather on the lack of value of the items procured
26 with those proceeds. As the Ninth Circuit has held in Akintobi, the value of the
27 concealed proceeds is not pertinent in determining whether those proceeds have been
28 laundered. *See also*, United States v. Ward, 197 F.3d 1076, 1083 (11th Cir. 1999) (“The
district court erroneously focused on the nominal value of the concealed assets in
concluding that the funds at issue were not laundered.”).

1 laundering under sections (a)(1)(B)(i) and (a)(2)(B)(i). As such, that portion of Count
2 Twenty-Six pertaining to the conceal / disguise theory should be dismissed under Rule 7(c)
3 for failure to state an offense under 18 U.S.C. 1956(a)(2)(B)(i).
4

5
6 **C. Dismissal Is Warranted Due To The Government's Focus On Spending, Rather Than**
7 **Concealment, In Count Twenty-Six**
8

9 In order to obtain a conviction for international money laundering under 18 U.S.C.
10 § 1956(a)(2)(B)(i), the government must prove that the defendant intended to conceal the
11 nature, location, source, ownership, or control of the proceeds of the unlawful activity.
12 United States v. Dobbs, 63 F.3d 391, 397-98 (5th Cir. 1995), cited with approval in United
13 States v. Cihak, 137 F.3d 252, 262 (5th Cir. 1998).
14

15 This proposition has been adopted by several circuits. Citing Dobbs with approval,
16 the Second Circuit, in United States v. Stephenson, 183 F.3d 110 (2d Cir. 1999), joined
17 several circuits in holding that 18 U.S.C. 1956 is a concealment statute, not a spending
18 statute, and thus does not criminalize the spending of illicit proceeds to cover business
19 expenses. The following comments from the opinion are instructive:
20

21 Joining a number of other circuits, we hold that Subsection (i)
22 of the money laundering statute does not criminalize the mere
23 spending of proceeds of specified unlawful activity. See, e.g., -
24 United States v. Dobbs, 63 F.3d 391, 398 (5th Cir. 1995)
25 ("where the use of the money was not disguised and the
26
27
28

1 purchases were for family expenses and business expenses . . . ,
2 there is . . . insufficient evidence to support the money
3 laundering conviction"); United States v. Rockelman, 49 F.3d
4 418, 422 (8th Cir. 1995) (money laundering statute should not
5 be interpreted to criminalize ordinary spending of drug sale
6 proceeds); United States v. Garcia-Emanuel, 14 F.3d 1469,
7 1476 (10th Cir. 1994) (Section 1956(a)(1) "is a concealment
8 statute -- not a spending statute"); United States v. Sanders,
9 929 F.2d 1466, 1472 (10th Cir. 1991) (money laundering
10 statute should not be interpreted to criminalize ordinary
11 spending of drug proceeds). By its express terms, the statute
12 requires proof that a financial transaction involving drug
13 proceeds was designed "to conceal or disguise the nature, the
14 location, the source, the ownership, or the control of the
15 proceeds of specified unlawful activity." 18 U.S.C. §
16 1956(a)(1)(B)(i). Thus, absent proof of intent to conceal, an
17 ordinary purchase made with ill-gotten gains does not violate
18 the money laundering statute.

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23 183 F.3d at 120-121.

24
25 In Dobbs, a leading case in the Fifth Circuit, the Court reversed a money
26 laundering conviction where bank transfers were undertaken without being designed to

1 disguise the identity of the defendant but rather, were merely undertaken to pay expenses.
2 In reaching this holding, the Court discussed the purpose behind the “conceal / disguise”
3 component of section 1956:
4

5 The purpose of the money laundering statute is to reach
6 commercial transactions intended (at least in part) to *disguise*
7 *the relationship of the item purchased with the person providing*
8 *the proceeds* and that the proceeds used to make the purchase
9 were obtained from illegal activities. (italics added)
10

11 63 F.3d at 397-98. The Fifth Circuit has recently reaffirmed this proposition. United
12 States v. Powers, 168 F.3d 741, 748 (5th Cir. 1999).
13

14 The groundwork for the Fifth Circuit’s ruling in Dobbs was provided by the Tenth
15 Circuit in United States v. Sanders, 929 F.2d 1466, 1470-1473 (10th Cir.), cert. denied, 507
16 U.S. 938 (1993), which was cited with approval in Dobbs, 63 F.3d at 397, and again in
17 Powers, 168 F.3d at 748. In Sanders, the Circuit reversed money laundering convictions
18 where vehicle purchases were openly disclosed without any attempt to conceal or disguise
19 use of funds. The Circuit made the following observations:
20

21 We reject the government's argument that the money
22 laundering statute should be interpreted to broadly
23 encompass all transactions, however ordinary on their face,
24 which involve the proceeds of unlawful activity. To so
25 interpret the statute would, in the court's view, turn the
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money laundering statute into a "money spending statute."
This interpretation would be contrary to Congress' expressly
stated intent that the transactions being criminalized in the
statute are those transactions "designed to conceal or disguise
the nature, the location, the source, the ownership, or the
control of the proceeds of specified unlawful activity." 18
U.S.C. § 1956(a)(1)(B)(i). Thus, by the express terms of the
statute, a design to conceal or disguise the source or nature of
the proceeds is a necessary element for a money laundering
conviction. n2 In other words, the purpose of the money
laundering statute is to reach commercial transactions
intended (at least in part) to disguise the relationship of the
item purchased with the person providing the proceeds and
that the proceeds used to make the purchase were obtained
from illegal activities.

929 F.2d at 1472. The Sanders court went on to observe that its position was supported by
the Legislative History of the money laundering statute:

The legislative history supports our interpretation of the
statute. Senate Report No. 99-433 accompanied Senate Bill
No. 2683 which contained the same language as that passed
Public Law 99-570, "The Money Laundering Control Act of

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1986." 100 Stat. 3207-17. The Senate Report states: "Section 1956(a)(1) is the basic money laundering offense. . . . This section . . . appli[es] its coverage to those transactions that can be said to constitute the core of money laundering -- transactions designed to conceal or disguise the nature, location, source, ownership, or control of criminal proceeds, or to evade Federal or State cash reporting requirements. This language is intended to include transactions designed to conceal the identity of the participants to the transaction, where it can also be proved that the funds involved in the transaction are in fact the proceeds of the crime. *Id.* at 10.

929 F.2d at 1472, n.2. Accord: United States v. Lovett, 964 F.2d 1029 (10th Cir. 1992) (money laundering conviction reversed on facts substantially similar to Sanders, where purchases of vehicles were done openly without attempt to conceal identity of purchaser).

In the case at bar, the standards discussed in the cases above simply have not been satisfied by the indictment. Here, the government alleges that CFS funds were transferred from the United States to accounts in Switzerland "for the purposes of (a) obtaining fraudulent and worthless letters of credit with which to defraud and deceive CFS investors and other victims(.)"¹⁰ Count Twenty-Six contains numerous allegations regarding specific overseas transfers of funds from the United States to Switzerland, covering each of

¹⁰ Indictment at Count Twenty-Six, par. 41, page 24, lines 21-25. The reference to CFS investor funds is articulated on line 21 as "\$4.7 in fraudulently obtained funds."

1 the letters of credit at issue in this case.¹¹

2 None of these allegations advances a prosecutorial theory that the transfers were
3 designed to *conceal or disguise* the “relationship of the item purchased (letters of credit)
4 with the person providing the proceeds (defendants in Count Twenty-Six).” *See, Dobbs,*
5 *supra*, 63 F.3d at 397-398. Nor does the indictment allege any facts to suggest that the
6 transfer of funds for the acquisitions of the letters of credit were “designed to conceal the
7 identity of the participants to the transaction.” *Sanders, supra*, 929 F.2d at 1472. *Cf.*
8 *United States v. Reynolds*, 64 F.3d 292, 297 (7th Cir. 1995) (concealment under statute
9 found where defendant knew funds were proceeds of thefts of union dues and directed
10 their deposit into account specifically to avoid detection).

11 Rather than allege a concealment theory, the indictment alleges a spending theory.
12 Count Twenty-Six charges that the defendants transferred the illicit proceeds to acquire
13 letters of credit that would be used to promote the fraud scheme against the very same
14 investors whose funds comprise the illicit proceeds used to buy these letters of credit. This
15 cyclical concept of using investor monies to buy letters of credit to deceive the same (and
16 future) investors is the essence of the “promote” theory of money laundering, and it does
17 not at all hinge on a conceal / disguise claim.

18 To the contrary, the government does not even seem interested in claiming that the
19 transfers of funds to Switzerland were designed to conceal or disguise the relationship
20 between the letters of credit and the persons funding their acquisition. If anything, the

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27 ¹¹ Indictment at Count Twenty-Six, pars. 43, page 25, line 8, to Overt Act 27 in par. 63,
28 page 32, line 20.

1 ARE DUPLICITOUS, OR DIRECT THE GOVERNMENT
2 TO MAKE AN ELECTION BETWEEN THE TWO
3 THEORIES PURSUANT TO FED.R.CRIM.P. 14
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5
6 **A. Duplicitous Charges Requires That Count Twenty Six Be Severed Into Two Counts**

7 **If the Court denies the motion to dismiss the “conceal / disguise” charge in Count**
8 **Twenty-Six, the defense respectfully requests that the Court sever the “promote” and**
9 **“conceal / disguise” charges into two counts on the ground that they are duplicitous, i.e.**
10 **each theory contains a separate and distinct offense. As such, severance is appropriate**
11 **under Fed.R.Crim.P. 8, on the ground that separate and distinct offenses may not be**
12 **joined into one. *See, United States v. Aguilar, 756 F.2d 1418, 1420 n.2 (9th Cir. 1985), in***
13 **which the Court states as follows:**
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17 **Charging two offenses in one count of an indictment is**
18 **contrary to Rule 8(a) of the Federal Rules of Criminal**
19 **Procedure, which provides that an indictment contain "a**
20 **separate count for each offense." *Id.* The joining in a single**
21 **count of two or more distinct offenses is termed "duplicity."**
22 ***See generally 1 Wright, Federal Practice and Procedure § 142***
23 ***(2nd ed. 1982); 8 Moore's Federal Practice § 8.03 (2nd ed.***
24 ***1984).* The vices of duplicity arise from breaches of the**
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1 defendant's Sixth Amendment right to knowledge of the
2 charges against him, since conviction on a duplicitous count
3 could be obtained without a unanimous verdict as to each of
4 the offenses contained in the count. *See, United States v. UCO*
5 *Oil Company*, 546 F.2d 833, 835 (9th Cir. 1976). A duplicitous
6 indictment also could eviscerate the defendant's Fifth
7 Amendment protection against double jeopardy, because of a
8 lack of clarity concerning the offense for which he is charged
9 or convicted. *See id.*; *Abney v. United States*, 431 U.S. 651,
10 654, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977).

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14 As discussed earlier, the “promote” and “conceal / disguise” theories are entirely
15 inconsistent and should not, therefore, be included in the same count, assuming that the
16 court declines to dismiss the latter, as requested above in this motion. Just because both
17 theories are within the same criminal statute does not mean they belong in the same count,
18 particular where a factual predicate for one theory, namely the “worthless letter of credit,”
19 nullifies the rationale behind the second theory.
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22 **B. Alternative Remedy: Direct The Government To Make An Election Between The**
23 **“Promote” And “Conceal / Disguise” Theories**
24

25 As an alternative to granting a severance, the Court has the authority under
26 Fed.R.Crim.P. 14 to order the government to make an election between the two theories.
27

1 Rule 14 provides in pertinent part as follows:

2 If it appears that a defendant . . . is prejudiced by a
3 joinder of offenses . . . in an indictment . . . or by such joinder
4 for trial together, the court may order an election

6 In light of the contradictory nature of the two theories, it is appropriate in this case
7 to direct the government to make an election between the two theories. It appears that the
8 government made such an election in connection with the trial of co-defendants Owen Fox
9 and Douglas Cross, electing to proceed solely on the “promote” theory in Count Twenty-
10 Six.¹³

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20 IV.

21 ALTERNATIVELY, IF THE “PROMOTE” AND
22 “CONCEAL / DISGUISE” THEORIES ARE ALLOWED TO REMAIN
23 WITHIN COUNT TWENTY-SIX, THE COURT SHOULD

25 _____

26 ¹³ The government’s proposed jury instructions in the Fox / Cross trial contain money
27 laundering instructions pertaining to Count Twenty-Six that reflect only the “promote”
28 theory.

1 important observations about the government’s burden of proof to establish *both* the
2 “promote” and the “conceal / disguise” elements in order to convict where the two theories
3 are joined into a single count:
4

5 Each of the § 1956 counts charges (1) the offense of
6 transferring funds outside the United States with the intent to
7 promote the underlying acts of mail and wire fraud, 18 U.S.C.
8 § 1956(a)(2)(A)(i), and (2) the offense of transferring funds
9 outside the United States to conceal or disguise the nature, the
10 location, the source, the ownership or the control of the mail
11 and wire fraud proceeds, 18 U.S.C. § 1956(a)(2)(B)(i). These
12 counts do not raise the concern that the jury could have
13 convicted Savage with less than a unanimous verdict. The
14 jury instructions were not disjunctive. Rather, *the instructions*
15 *required the jury to find the elements of both offenses.* [italics
16 added]
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20 67 F.3d at 1439.

21 In holding that the government is required to prove both theories when they are
22 combined in the same count, the Ninth Circuit endorsed the ruling of the Seventh Circuit
23 in United States v. Jackson, 935 F.2d 832, 842 (7th Cir. 1991):
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25 Our conclusion is consistent with the Seventh Circuit's
26 analysis of the identical problem with respect to a charge
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1 brought under § 1956(a)(1), which, like § 1956(a)(2), has both
2 a promotion subsection, § 1956(a)(1)(A)(i), and a concealment
3 subsection, § 1956(a)(1)(B)(i). In United States v. Jackson, 935
4 F.2d 832, 842 (7th Cir. 1991), the indictment and jury
5 instructions interpreted § 1956(a)(1) as requiring the
6 government to prove that the charged transactions were both
7 intended to promote a continuing criminal enterprise and
8 were designed to conceal the source of the funds. The Seventh
9 Circuit concluded that combining the two offenses did not
10 warrant reversal *because the government had merely imposed*
11 *an additional burden on itself. Id.* This conclusion applies
12 equally to Savage's case. [italics added]
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17 Accordingly, if this Court declines to grant the remedies requested in the prior
18 sections of this memorandum, the defense respectfully requests that at trial, the Court
19 instructs the jury that the government must prove both the “promote” and the “conceal /
20 disguise” theories in order to convict Mr. Colello on Count Twenty-Six.
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22 V.

23 CONCLUSION
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25 Based on the foregoing arguments, the defense respectfully requests that the Court
26 issue an order
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1. Under Rule 8, dismissing the “conceal / disguise” theory in Count Twenty-Six for failure to state an offense under 18 U.S.C. 1956(a)(2)(B)(i); or,
2. Under Rule 8, severing the “promote” and “conceal / disguise” theories into two separate counts on the ground that they are duplicitous; or,
3. Under Rule 14, directing the government to make an election as between the two theories; or,
4. Under above-cited case authority, instructing the jury that it must find that the government has proven all the elements of both theories in order to convict Mr. Colello on Count Twenty-Six.

DATED: April 27, 2001

Respectfully Submitted,

GREGORY NICOLAYSEN
Counsel for Defendant,
Michael Colello

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PROOF OF SERVICE

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 16000 Ventura Blvd, Suite 500, Encino, CA 91436

On April 30, 2001, I served the foregoing document described as Notice of Motion and Motion by Defendant Michael Colello for Severance of Counts; Memorandum of Points and Authorities by delivering a true copy to:

**Jeffrey B. Isaacs
Ass't U.S. Attorney
11th Floor
312 No. Spring St.
Los Angeles, CA 90012**

**Pamela L. Johnston
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312 No. Spring St.
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Executed on April 30, 2001, at Los Angeles, CA. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

BRENDA R. DABNEY