

1 GREGORY NICOLAYSEN (CA 98544)  
2 Encino Bank Bldg  
3 16000 Ventura Blvd  
4 Ste 500  
5 Encino, CA 91436  
6 (818) 998-2706  
7 Fax (818) 998-8427

6 Attorney For Defendant,  
7 Michael Colello

8

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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

) CR 99-904(A) – CBM

13

Plaintiff,

)

) NOTICE OF MOTION AND

14

) MOTION BY DEFENDANT

15

v.

) MICHAEL COLELLO FOR

16

) DISMISSAL OF COUNT TWENTY-

17

) SIX AS TO “PROMOTE” THEORY

) OF MONEY LAUNDERING

) CHARGED UNDER 18 U.S.C.

18

MICHAEL COLELLO,

) 1956(a)(2)(A) AS DUPLICITOUS;

19

Defendant

) MEMORANDUM OF POINTS AND

) AUTHORITIES

20

)

) DATE: May 21, 2001

21

) TIME: 1:30 p.m.

22

) CTRM: HON. Consuelo B. Marshall

)

23

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

26

27

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

28

Consuelo B. Marshall, Judge of the United States District Court, defendant Michael

1 Colello will move the Court for an order dismissing the conspiracy charge in Count  
2 Twenty-Six of the Indictment that is brought pursuant to 18 U.S.C. 1956(a)(2)(A), which  
3 is the “promote” component of the money laundering statute, on the ground of duplicity.  
4

5 The motion is brought under Fed.R.Crim.P. 8(a) and 12(b)(2), as well as the case  
6 law cited herein.

7 The motion is brought pursuant to this notice of motion, the accompanying  
8 memorandum of points and authorities, all papers contained in the district court file, and  
9 any additional evidence the court permits counsel to introduce at the hearing on the  
10 motion.  
11

12  
13 DATED: April 30, 2001

Respectfully Submitted,

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18 GREGORY NICOLAYSEN  
19 Counsel for Defendant,  
20 Michael Colello  
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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 Superseding Indictment in the following  
7  
8 counts:

- 9 1. Counts Twenty Six through Thirty Three (money laundering);  
10 2. Counts Thirty Five through Forty-One (obstruction of justice);  
11 3. Counts Forty Two (forfeiture).

12 Mr. Colello is not charged in the underlying fraud scheme pertaining to the Cross  
13 Financial Services factoring fraud, which is charged in Counts One Through Twenty Five  
14 (the “CFS factoring fraud”). The only remaining count, which is Count Thirty Four, is  
15 specific to defendant Fox.  
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19 **B. Relief Sought By This Motion**

20 This motion is specific to the money laundering conspiracy charged in Count  
21 Twenty-Six and specifically that part which charges a conspiracy based on 18 U.S.C.  
22 1956(a)(2)(A), to wit, that the defendants conspired to launder funds “with the intent to  
23 promote the carrying on of specified unlawful activity.” For the sake of simplicity, this  
24 will be referred to in this motion as the “1956(a)(2)(A) charge.”  
25

26 This motion seeks an order that dismisses the 1956(a)(2)(A) charge on the ground  
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1 that it is duplicitous. As discussed more fully below, the indictment as presently drafted  
2 contains two different “promote” theories in Count Twenty-Six, thus presenting multiple  
3 conspiracies charged as a single conspiracy. As such, the “promote” component of Count  
4 Twenty-Six is duplicitous, and dismissal is thereby warranted.  
5

6  
7 **C. Brief Summary Of Money Laundering Charges In Count Twenty-Six**

8  
9 In reviewing this motion, it is important to focus on the fact that Count Twenty-Six  
10 charges a money laundering conspiracy on the basis of two distinct theories:

11 (1) First, the “promote” theory under 1956(a)(2)(A);

12 (2) Second, the “conceal / disguise” theory under 1956(a)(2)(B)(i).

13  
14 The conceal / disguise is the subject of a separate motion to dismiss.<sup>1</sup> This motion  
15 pertains solely to the promote theory in the 1956(a)(2)(A) charge.

16 The promote theory alleges that Colello and the co-defendants conspired to commit  
17 international money laundering by causing transfers of funds between financial  
18 institutions in the U.S. and Switzerland, “with the intent to promote the carrying of  
19 specified unlawful activity(.)”<sup>2</sup> The transactional context within which the promote theory  
20 has been framed involves the defendants’ acquisition of five letters of credit, which are  
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25 <sup>1</sup> See “Notice of Motion and Motion by Defendant Michael Colello for Order Dismissing  
26 “Conceal / Disguise” Theory in Count Twenty-six Due to Failure to State an Offense,  
or Providing Alternative Relief”, calendared for hearing on May 21, 2001, at 1:30 p.m.

27 <sup>2</sup> Indictment at Count Twenty-Six, par. 36, page 22, lines 16-18.  
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1 outlined as follows in paragraph 39 of the indictment:<sup>3</sup>

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<u>Date</u>	<u>Face Amount</u>	<u>Purported Beneficiary</u>
8/27/93	\$1,350,000	Alvin Buschman
9/17/93	\$1,000,000	Doris Ann Mendenhall
11/2/93	\$1,000,000	W.H. Spencer
1/24/94	\$4,000,000	Cross Financial Services, Inc.
4/6/94	\$2,000,000	Cross Financial Services, Inc.

The indictment alleges that “[t]hese letters of credit were fraudulent and worthless in that they contained terms and conditions that the purported beneficiaries could not satisfy, and were never intended by defendant Colello and his associates to be paid.”<sup>4</sup>

As drafted, paragraphs 39 and 40 of the indictment purport to place all of the beneficiaries in the same position, that is, as victims of worthless letters of credit.

However, that does not remain the government’s position. In subsequent paragraphs, Count Twenty-Six proceeds to contradict the notion that all the beneficiaries occupy the same position as victims of worthless letters of credit. By the conclusion of Count Twenty-Six, the allegations portray Buschman and Mendenhall as victims, while CFS (and its principals) are fraudsters – even though they are all beneficiaries under their respective letters of credit.

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<sup>3</sup> Indictment at Count Twenty-Six, par. 39, page 24, lines 3-12.

<sup>4</sup> Indictment at Count Twenty-Six, par. 40, page 24, lines 13-16.



1 letters of credit is the fraud scheme that was allegedly perpetrated on each of them.

2           This letter of credit fraud scheme against Buschman and Mendenhall appears for  
3 the very first time in Count Twenty-Six. It is not part of the CFS factoring fraud alleged  
4 in Counts One through Twenty-Five. For this reason, Count Twenty-Six presents *two*  
5 *distinct fraud schemes*, each comprising a separate “specified unlawful activity” under  
6 section 1956(a)(2)(A).  
7

8           Thus, from a facial reading of Count Twenty-Six, the government’s theory of  
9 money laundering as to the Buschman and Mendenhall letters of credit is essentially this:  
10 the defendants defrauded Buschman and Mendenhall into paying funds to acquire  
11 worthless letters of credit and proceeded to conduct financial transfers of these  
12 individuals’ funds to overseas accounts to acquire such worthless letters of credit, with the  
13 intent to promote a *specified unlawful activity, namely the letter of credit fraud scheme that*  
14 *was being perpetrated against Buschman and Mendenhall.*  
15

16           By this theory, Buschman and Mendenhall are victims in their position as  
17 beneficiaries under the letters of credit.  
18

19           In sharp contrast to the Buschman and Mendenhall letters of credit, the two CFS  
20 letters of credit totalling \$6,000,000 were acquired to promote an entirely different  
21 “specified unlawful activity,” namely the CFS factoring fraud.<sup>6</sup> From a facial reading of  
22 Count Twenty-Six, the government’s theory is essentially this: CFS (through its  
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26           <sup>6</sup> Mr. Colello is not charged as a defendant in Counts One through Twenty-Five, which  
27 are fraud charges pertaining directly to the CFS factoring fraud. Mr. Colello appears  
28 for the first time as a defendant in the indictment in Count Twenty-Six.

1 principals) used CFS investor funds to conduct overseas transfers to acquire the two  
2 worthless letters of credit, with the intent to promote a *specified unlawful activity, namely*  
3 *the CFS factoring fraud against existing and future investors*, by including these worthless  
4 letters of credit as assets in the company's balance sheet.  
5

6 By this theory, CFS (and its principals) is a fraudster in its position as beneficiary  
7 under the letters of credit.  
8

9 By bifurcating the two "promote" theories of money laundering in Count Twenty-  
10 Six and thereby identifying the distinct "specified unlawful activity" under each theory, it  
11 becomes apparent as to why the indictment alleges that Buschman and Mendenhall are  
12 beneficiary-victims, while CFS is a beneficiary-fraudster. This dichotomy only makes  
13 sense once the two conspiracies within Count Twenty-Six are separated and viewed  
14 independently of each other.  
15

16 It is inescapable, therefore, that multiple "promote" conspiracies are being charged  
17 as a single conspiracy in Count Twenty-Six. Because this raises the defect of duplicity,  
18 this Court should dismiss the 1956(a)(2)(A) charge in Count Twenty-Six.  
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II.

**BECAUSE MULTIPLE "PROMOTE" CONSPIRACIES  
ARE CHARGED AS A SINGLE CONSPIRACY IN  
COUNT TWENTY-SIX, THIS COURT SHOULD DISMISS  
THE 1956(a)(2)(A) CHARGE BASED ON DUPLICITY**

**A. Applicable Legal Standards**

Attempts by prosecutors "to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions" are viewed "with disfavor." Grunewald v. United States, 353 U.S. 391, 404 (1957), cited in United States v. Licciardi, 30 F.3d 1127, 1131 (9<sup>th</sup> Cir. 1994). Thus, it is important to note at the outset that the duplicity objection asserted by this motion is directed at a conspiracy count.

The doctrine of duplicity and its rationale were discussed by the Ninth Circuit in United States v. Aguilar, 756 F.2d 1418 (9<sup>th</sup> Cir 1985):

Charging two offenses in one count of an indictment is contrary to Rule 8(a) of the Federal Rules of Criminal Procedure, which provides that an indictment contain "a separate count for each offense." *Id.* The joining in a single count of two or more distinct offenses is termed "duplicity." *See generally*, 1 Wright, Federal Practice and Procedure § 142 (2nd ed. 1982); 8 Moore's Federal Practice § 8.03 (2nd ed.

1 1984). The vices of duplicity arise from breaches of the  
2 defendant's Sixth Amendment right to knowledge of the  
3 charges against him, since conviction on a duplicitous count  
4 could be obtained without a unanimous verdict as to each of  
5 the offenses contained in the count. *See, United States v. UCO*  
6 *Oil Company*, 546 F.2d 833, 835 (9th Cir. 1976). A duplicitous  
7 indictment also could eviscerate the defendant's Fifth  
8 Amendment protection against double jeopardy, because of a  
9 lack of clarity concerning the offense for which he is charged  
10 or convicted. *See Id.; Abney v. United States*, 431 U.S. 651  
11 (1977).

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15 756 F.2d at 1420 n.2, cited with approval in *United States v. Savage*, 67 F.3d 1435, 1439  
16 (9th Cir. 1995). A duplicitous indictment may also eviscerate the defendant's Fifth  
17 Amendment protection against double jeopardy, because of a lack of clarity concerning  
18 the offense for which he is charged. *See, Abney v. United States*, 431 U.S. 651, 654 (1977).

19  
20 Rule 12(b)(2) of the Federal Rules of Criminal Procedure requires a defendant to  
21 raise "prior to trial" any objections "based on defects in the indictment." Challenges  
22 based on the alleged duplicity of an indictment fall squarely within Rule 12(b)(2)'s  
23 mandate. *United States v. Klinger*, 128 F.3d 705, 708 (9th Cir. 1997), citing *United States*  
24 *v. Gordon*, 844 F.2d 1397, 1400 (9th Cir. 1988). Duplicity objections are appropriately  
25 made before trial "because a duplicity claim is directed at the face of the indictment and  
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28

1 not at the evidence presented at trial.” Gordon, supra, 844 F.2d at 1400.

2       Several Ninth Circuit opinions have had occasion to analyze the law regarding  
3 duplicity in indictments. *See, e.g., Gordon, supra* (conspiracy count in indictment was  
4 duplicitous, and thus violated defendants' right to unanimous jury verdict, where count  
5 alleged conspiracy to defraud Government in administration of weapon program, and  
6 conspiracy to obstruct grand jury investigation of fraud); United States v. Aguilar, 756  
7 F.2d 1418, 1422 (9th Cir. 1985)(information, each count of which charged defendant with  
8 "acting as" officer of United States Immigration and Naturalization Service and  
9 "obtaining money in such character," suffered from duplicity, since each count alleged  
10 two separate and distinct offenses).

11       The pivotal consideration in evaluating a conspiracy charge for duplicity is whether  
12 the conspiracy count at issue charges two distinct, separate conspiracies, or whether it  
13 merely charges a conspiracy to commit more than one offense. While the latter does not  
14 suffer from duplicity, United States v. Bauer, 84 F.3d 1549, 1560 (9<sup>th</sup> Cir. 1995), the former  
15 does. Applying this well-established proposition, the Ninth Circuit in Gordon, supra,  
16 found the conspiracy count duplicitous because it impermissibly charged two conspiracies  
17 in a single count, to wit, conspiracy to defraud the government in administration of the  
18 weapons program and conspiracy to obstruct a grand jury investigation of said fraud.  
19

20       In reaching this conclusion, the Court in Gordon formulated the following test:  
21

22               To determine whether Count I charged one or two  
23 conspiracies, we look at 'whether there was one overall  
24

1 agreement among the various parties to perform various  
2 functions in order to carry out the objectives of the  
3 conspiracy.' [citation] The relevant factors in determining the  
4 existence of such an 'overall agreement' are the nature of the  
5 scheme, the identity of the participants, the quality, frequency  
6 and duration of each conspirator's transactions, and the  
7 commonality of times and goals.  
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10 844 F.2d at 1401. Applying its own test, the Ninth Circuit in Gordon made the following  
11 factual observations:

12 Looking at these factors, we find that Count I charged two  
13 conspiracies -- one to defraud the United States in the  
14 administration of the Trident Missile Program, and another to  
15 obstruct the grand jury investigation. The nature of the  
16 scheme suggests two conspiracies. The primary agreement  
17 between Gordon, Loeswick and Edler was to use inside  
18 information to secure government contracts for Edler  
19 Industries in return for payoffs. The evidence does not show  
20 that the parties contemplated or discussed any plans for a  
21 cover-up. We cannot imply a subsidiary conspiracy to conceal  
22 the crime. [citation omitted] The conspiracy to obstruct  
23 justice was pursuant to a separate agreement, made after  
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1 Loeswick was subpoenaed by the grand jury. The  
2 commonality of time factor also points to two conspiracies.  
3  
4 The last kickback transaction occurred in August-September  
5 1983 while the conspiracy to obstruct the grand jury  
6 investigation did not begin until Loeswick was subpoenaed in  
7 March of 1984.

8  
9 Id. Accord: United States v. Hardy, 762 F.Supp. 1403, 1409 (D.HI. 1991) (conspiracy  
10 count deemed duplicitous, applying Gordon test).

11  
12 **B. Application Of Facts To Legal Standards**

13  
14 The same analysis applied in Gordon applies with equal force to the instant case.  
15 Count Twenty-Six of the indictment appears to charge two conspiracies – one to transfer  
16 the personal funds of Buschman and Mendenhall overseas to acquire worthless letters of  
17 credit to promote a letter of credit fraud scheme specifically against them (which appears  
18 for the first time in Count Twenty-Six); and another conspiracy to transfer CFS investor  
19 funds overseas to acquire worthless letters of credit to promote the CFS factoring fraud,  
20 which is the mail / wire fraud charged in Counts 1-25.

21  
22 As in Gordon, the nature of the two laundering schemes here suggests two  
23 conspiracies. The indictment alleges that the agreement between the defendants to  
24 launder funds by making overseas transfers to acquire the Buschman / Mendenhall letters  
25 of credit was designed to promote a fraud scheme directed at Buschman / Mendenhall  
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1 individually. Each of them was allegedly a victim of his / her respective fraud scheme.  
2 The indictment makes this point amply clear by expressly alleging that the defendants  
3 made misrepresentations and material omissions to Buschman / Mendenhall regarding the  
4 worthlessness of these letters of credit, resulting in the loss of their personal investments.<sup>7</sup>  
5 As part of this fraud scheme, Buschman / Mendenhall entered into a payment  
6 arrangement independent of CFS and the CFS investor funds. By sending their funds  
7 directly to the Siemens account, thereby bypassing CFS, Buschman / Mendenhall operated  
8 independently of the CFS investors, which means their funds were not part of the proceeds  
9 of the CFS factoring fraud. It follows, therefore, that the CFS factoring fraud and the  
10 letter of credit fraud against Buschman / Mendenhall are two entirely distinct frauds, each  
11 forming a separate “specified unlawful activity” under section 1956(a)(2)(A).  
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15 In sharp contrast, the agreement between the defendants to launder funds by  
16 making overseas transfers to acquire the CFS letters of credit was designed to promote the  
17 CFS factoring fraud. Thus, the victims of this fraud scheme are not specific individuals as  
18 Buschman / Mendenhall are in their fraud scheme, but rather, the generic pool of present  
19 and future CFS investors. Moreover, the monies that were used to acquire the CFS  
20 letters of credit were CFS investor funds, and are not in any way connected to Buschman /  
21 Mendenhall. Further, the promotional objective behind this fraud scheme takes into  
22 account such strategic ploys as the use of the worthless letters of credit for asset  
23 enhancement purposes on the CFS balance sheet, a strategy that has no relevance  
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27 <sup>7</sup> Indictment at Count Twenty-Six, paragraphs 43 and 48, on pages 25 and 26.  
28

1 **whatsoever to the letter of credit fraud scheme perpetrated on Buschman / Mendenhall.**

2 **Thus, the nature of the laundering schemes referenced in Count Twenty-Six**  
3 **establishes two conspiracies.**  
4

5 **The identity of the participants in each laundering scheme also points to two**  
6 **conspiracies. While it is true that Buschman was a CFS investor and thus is a “hybrid”**  
7 **insofar as he was both an investor and an individual purchaser of a letter of credit, there is**  
8 **no overlap whatsoever between Mendenhall and the CFS investors because Mendenhall**  
9 **was never a CFS investor and, as noted above, her funds to acquire the letters of credit**  
10 **never went through the CFS bank accounts. In short, the acquisition of the letter of credit**  
11 **for Mendenhall does not have any connection to the acquisition of the CFS letters of**  
12 **credit. Thus, Mendenhall is separate and apart from the defendants’ alleged intent to**  
13 **promote the CFS factoring fraud through the CFS letters of credit. By the same token,**  
14 **the CFS investors are separate and apart from the defendants’ alleged intent to promote**  
15 **the letter of credit fraud against Mendenhall. Viewed from this perspective, the identity of**  
16 **the participants in each laundering scheme is distinctive and points to two conspiracies.**  
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20 **The commonality of goals also points to two conspiracies. The laundering scheme**  
21 **to promote the letter of credit fraud against Buschman / Mendenhall involved isolated**  
22 **transactions directed at each of them as individual purchasers. The defendants’ goal was**  
23 **simply to sell them a letter of credit. Each of them bought on a one-time basis. By**  
24 **contrast, the laundering scheme to promote the CFS factoring fraud was aimed at the**  
25 **entire pool of existing investors, as well as prospective investors who might rely on the**  
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1 asset-enhanced balance sheet of CFS that reflects the \$6,000,000 face value of the letters of  
2 credit; in this way, the goal was to keep CFS afloat, raise more investor money, and  
3 perhaps have an exit strategy in the event the government challenged the adequacy of the  
4 company's asset base. *Continuity of business activity, rather than a one-time sales*  
5 *transaction*, was the goal underscoring the purchase of the CFS letters of credit. To fulfill  
6 this goal, CFS acquired not one, but two, letters of credit; and possibly three, depending  
7 on the characterization of the so-called Spencer letter of credit.<sup>8</sup>

10 Judged by these standards, the inescapable conclusion is that the 1956(a)(2)(A)  
11 charge in Count Twenty-Six is comprised of two conspiracies, each of which charges a  
12 "promote" theory of money laundering. Because multiple conspiracies have been charged  
13 as a single conspiracy, the doctrine of duplicity mandates dismissal of the 1956(a)(2)(A)  
14 charge.

16 III.

17 CONCLUSION

18 Based on the foregoing analysis, the defense respectfully requests that the Court  
19 dismiss the 1956(a)(2)(A) charge in Count Twenty-Six on the ground of duplicity.

21 DATED: April 30, 2001

Respectfully Submitted,

24 \_\_\_\_\_  
GREGORY NICOLAYSEN  
25 Counsel for Defendant,  
26 Michael Colello

27 <sup>8</sup> Indictment at Count Twenty-Six, par. 39, page 24, line 10.

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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 May 1, 2001, I served the foregoing document described as Notice of Motion and Motion by Defendant Michael Colello for Dismissal of “Promote” Theory Of Money Laundering In Count Twenty-Six,” by delivering a true copy to:**

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

**Pamela L. Johnston  
Ass't U.S. Attorney  
11<sup>th</sup> Floor  
312 No. Spring St.  
Los Angeles, CA 90012**

**Executed on May 1, 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**