

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

9

UNITED STATES DISTRICT COURT

10

CENTRAL DISTRICT OF CALIFORNIA

11

12

UNITED STATES OF AMERICA,

)

CR 99-904(A) – CBM

13

)

Plaintiff,

)

14

)

NOTICE OF MOTION AND

15

)

MOTION BY DEFENDANT

16

v.

)

MICHAEL COLELLO FOR ORDER

17

)

STRIKING SURPLUSAGE FROM

18

MICHAEL COLELLO,

)

MEMORANDUM OF POINTS AND

19

)

AUTHORITIES

20

)

Defendant

)

DATE: June 4, 2001

21

)

TIME: 1:30 p.m.

22

)

CTRM: HON. Consuelo B. Marshall

23

)

24

)

25

)

26

)

27

)

28

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

29

PLEASE TAKE NOTICE that on June 4, 2001, at 1:30 p.m., before the Honorable

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

1 Colello will move the Court for an order striking surplusage from Count 26 of the First
2 Superseding Indictment.

3
4 The motion is based on Rule 7(d) of the Federal Rules of Criminal Procedure.

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

10 DATED: May 5, 2001

Respectfully Submitted,

11
12
13 _____
14 GREGORY NICOLAYSEN
15 Counsel for Defendant,
16 Michael Colello
17
18
19
20
21
22
23
24
25
26
27
28

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

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 seeks an order striking surplusage from Count 26 of the First**

21 **Superseding Indictment (“Indictment”), specifically the allegations pertaining to a letter of**

22 **credit that the government claims the defendants sold to Doris Ann Mendenhall (“the**

23 **Mendenhall letter of credit”). These allegations are found in paragraphs 39, 48-49, 63**

24 **(Overts Act #1, 5, 6, 7, 8, 12.**

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II.

THIS COURT SHOULD STRIKE FROM COUNT 26
THE ALLEGATIONS PERTAINING TO THE MENDENHALL
LETTER OF CREDIT AS SURPLUSAGE UNDER RULE 7(d)

A. Applicable Legal Standards

Rule 7(d) of the Federal Rules of Criminal Procedure provides:

**The court on motion of the defendant may strike surplusage
from the indictment or information.**

B. The Allegations Regarding The Mendenhall Letter Of Credit Do Not Pertain To The
“Specified Unlawful Activity” Charged In Count 26 And Thus Constitute Surplusage

1. The Two Money Laundering Theories In Count 26: “Promote” And
“Conceal / Disguise”

**Count 26 alleges two theories of money laundering: transferring funds overseas to
“commit international money laundering for the following purposes: (1) to “promote” a
specified unlawful activity, under 18 U.S.C. 1956(a)(2)(A), and (2) to “conceal / disguise”
the nature, location, source, ownership and control of proceeds of specified unlawful
activity, under 18 U.S.C. 1956(a)(2)(B)(i).¹ The issue of whether these two theories**

¹ **Indictment at Count 26, paragraph 36, at page 22. The term “specified unlawful
(continued...)”**

1 constitute two separate conspiracies which are being charged as a single conspiracy, thus
2 raising the issue of duplicity, is the subject of a separate pretrial motion and is not
3 addressed in this motion.
4

5
6 **2. The “Specified Unlawful Activity” Is The CFS Factoring Fraud**

7 In alleging the “promote” and “conceal / disguise” theories, Count 26 expressly
8 references mail fraud and wire fraud as the specified unlawful activity.² While Count 26
9 does not expressly define the specified unlawful activity, it accomplishes this purpose by
10 incorporating paragraphs 2 through 27 of the Indictment, which is the mail / wire fraud
11 conspiracy alleged in Count 1.³ This conspiracy embodies the CFS factoring fraud, with
12 regard to which Mr. Colello is *not* named as a defendant.
13
14

15 By incorporating the CFS factoring fraud into the money laundering conspiracy
16 charge in Count 26, the indictment makes it amply clear that the “specified unlawful
17 activity” at issue is none other than the CFS factoring fraud itself. Therefore, Count 26
18 charges Mr. Colello with conspiring to promote the CFS factoring fraud and conspiring to
19

20
21 ¹(...continued)

22 activity” is expressly referenced in sections 1956(a)(2)(A) and 1956(a)(2)(B)(i), and
23 it is defined in section 1956(a)(7).

24 ² Indictment at Count 26, paragraph 36, page 22, at lines 16-17 (“promote” theory), and
25 line 27 (“conceal / disguise” theory).

26 ³ Indictment at Count 26, paragraph 35, page 22. Although Count One does not allege
27 wire fraud under 18 U.S.C. 1343 as an object of the conspiracy, it would appear from
28 the government’s pretrial discovery that wire fraud is indeed an object of Count 1. In
fairness to the government, the defense assumes this to be the case for purposes of
making this motion to strike surplusage.

1 conceal / disguise the proceeds of the CFS factoring fraud.

2
3
4 **3. The Mendenhall Letter Of Credit Pertains Solely To The “Promote” Theory Of**

5 **Money Laundering**

6 From a facial reading of Count 26, it is clear that the funds of Doris Ann
7 Mendenhall that were paid to acquire the Mendenhall letter of credit did not come from
8 the proceeds of the CFS factoring fraud. Rather, as the indictment alleges, Mendenhall
9 paid the funds directly to the Siemens, Inc. bank account, from where it was transferred
10 overseas.⁴ Mendenhall ultimately received a \$1 million letter of credit, which is expressly
11 referenced in Count 26.⁵

12
13 Because the funds from Mendenhall do not constitute proceeds of the CFS
14 factoring fraud, it follows that the allegations in Count 26 do not pertain to the “conceal /
15 disguise” theory which, by statutory mandate, is limited to laundering involving the illegal
16 proceeds of the specified unlawful activity.⁶

17
18 Thus, the indictment appears on its face to reference the Mendenhall letter of credit
19 in the context of the “promote” theory of money laundering. However, as discussed below,
20
21

22
23 ⁴ Indictment at Count 26, pars. 48-49 at page 26; paragraph 63, at Overt Act #6, 7, and
24 8, at pages 29-30.

25 ⁵ Par. 39, at page 24, line 9.

26 ⁶ 18 U.S.C. 1956(a)(2)(B) provides in pertinent part that the transfer at issue “is
27 designed in whole or in part –
28 “(i) to conceal or disguise the nature, the location, the source, the ownership, or
the control

1 the Mendenhall letter of credit has not been properly pleaded in regard to promoting the
2 CFS factoring fraud.

3
4
5 4. The Mendenhall Letter Of Credit Is Not Alleged To Promote The CFS
6 Factoring Fraud And Thus Constitutes Surplusage Which Should Be Stricken

7 As discussed above, the Mendenhall letter of credit can only apply, at best, to the
8 “promote” theory, since the funds used to acquire the Mendenhall letter of credit are not
9 proceeds of the specified unlawful activity, to wit, the CFS factoring fraud.
10

11 But once we turn our attention to the “promote” theory, it becomes apparent from
12 a facial reading of the indictment that the government has not pleaded – and it most likely
13 is not the government’s theory – that the transfers of funds overseas to acquire the
14 Mendenhall letter of credit were designed to promote the CFS factoring fraud.
15

16 In fact, there is not even a single factual allegation in Count 26 to suggest that the
17 transfers to acquire the Mendenhall letter of credit were in any way connected to the
18 promotion of the CFS factoring fraud.
19

20 Therefore, the allegations pertaining to the Mendenhall letter of credit stand alone
21 in Count 26 without any pleading that connects that letter of credit to either the
22 “promote” or the “conceal / disguise” theory. For this reason, these allegations constitute
23 surplusage which should be stricken from Count 26.
24
25
26
27
28

1 **C. The Government Cannot Correct The Defect By Claiming That The Financial**
2 **Transfers For The Mendenhall Letter Of Credit Were Designed To Promote Another**
3 **Specified Unlawful Activity, Namely The Letter Of Credit Fraud Scheme**
4

5 It is likely that the government will try to salvage the pleading defect in Count 26
6 by contending that the financial transfers overseas of Doris Mendenhall's funds, which
7 were used to acquire the Mendenhall letter of credit, were designed to promote not the
8 CFS factoring fraud, but rather an entirely different specified unlawful activity, namely
9 the letter of credit fraud scheme. If the government were to make such an argument, it
10 would be specious because the indictment fails to properly plead the letter of credit fraud
11 scheme as a specified unlawful activity, as required under 18 U.S.C. 1956(a)(7).
12

13 The concept of a letter of credit fraud scheme as to Mendenhall is suggested,
14 although not clearly pleaded, in paragraphs 40 and 48 of Count 26, which are both quoted
15 in full below.
16

17 **Paragraph 40 alleges:**

18 These letters of credit were fraudulent and worthless in that
19 they contained terms and conditions that the purported
20 beneficiaries could not satisfy, and were never intended by
21 defendant Colello and his associated to be paid.
22

23 **Paragraph 48 alleges:**

24 On or about September 9, 1993, defendants Siemens and
25 Colello, through materially false and misleading
26
27

1 representations and the concealment of material facts, caused
2 Doris Anne Mendenhall to transfer \$790,000 from her account
3 at First Interstate Bank in Sherman Oaks, California to the
4 Siemens, Inc. account at Bank One.
5

6 These allegations merely hint at a letter of credit fraud scheme but fall far short of
7 pleading the elements necessary to establish a specified unlawful activity under the
8 statutory requirements of 18 U.S.C. 1956(a)(7).
9

10 By comparison, the CFS factoring fraud is pleaded in Count 1 of the indictment as
11 mail fraud under 18 U.S.C. 1341, and all of the statutory elements are alleged in factual
12 detail. Thus, by incorporating Count 1 into Count 26, the government is establishing a
13 properly pleaded mail fraud conspiracy as a specified unlawful activity for purposes of the
14 money laundering charge.⁷ Thus, the CFS factoring fraud is properly pleaded as a
15 specified unlawful activity in regard to both the “promote” and “conceal / disguise”
16 theories in Count 26.
17

18 In sharp contrast, the so-called letter of credit fraud scheme is merely a suggestion
19 and hardly a properly pleaded specified unlawful activity. The elements of mail or wire
20 fraud are not fully pleaded. The mere references in paragraph 48 to “false and misleading
21 representations and the concealment of material facts” fall far short of pleading the
22 elements of a mail or wire fraud. Nor are any other statutory offenses pleaded which fall
23
24

25 ⁷ The government appears to take the position that mail fraud is a proper basis for a
26 specified unlawful activity, pursuant to 18 U.S.C. 1956(a)(7)(A), which cross-references
27 to 18 U.S.C. 1961(1) which, in turn, includes the mail fraud statute, 18 U.S.C. 1341, in
28 its list of statutory references.

1 within the statutory rubric of 18 U.S.C. 1956(a)(7) for establishing the letter of credit
2 fraud scheme as a specified unlawful activity.

3
4 Thus, the government cannot salvage the defects in Count 26 by taking the position
5 that the financial transfers to acquire the Mendenhall letter of credit were designed to
6 promote a specified unlawful activity, to wit, the letter of credit fraud scheme against
7 Mendenhall.

8
9 Therefore, the allegations in Count 26 regarding Mendenhall are surplusage and
10 should be stricken.

11
12 **III.**

13 **CONCLUSION**

14
15 Based on the foregoing analysis, the defense respectfully requests that the Court
16 issue an order striking all references in Count 26 to the Mendenhall letter of credit, which
17 can be found in paragraphs 39, 48-49, 63 (Overts Act #1, 5, 6, 7, 8, 12).

18
19
20 **DATED: May 5, 2001**

Respectfully Submitted,

21
22
23 _____
24 **GREGORY NICOLAYSEN**
25 **Counsel for Defendant,**
26 **Michael Colello**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 7, 2001, I served the foregoing document described as “Notice of Motion and Motion by Defendant Michael Colello for Order Striking Surplusage From Count 26 of Indictment; 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
Ass't U.S. Attorney
11th Floor
312 No. Spring St.
Los Angeles, CA 90012**

Executed on May 7, 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