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6 Attorney For Defendant,  
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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

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Plaintiff,

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v.

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MICHAEL COLELLO,

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Defendant

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) CR 99-904(A) – CBM  
)  
) MOTION IN LIMINE BY  
) DEFENDANT MICHAEL COLELLO  
) FOR ORDER  
) (1) PRECLUDING TESTIMONY BY  
) GOVERNMENT EXPERT VINCENT  
) MAULELLO RE: LETTER OF  
) CREDIT FRAUD;  
) (2) SETTING *DAUBERT / KUMHO*  
) HEARING; MEMORANDUM OF  
) POINTS AND AUTHORITIES  
)  
)  
) DATE: May 28, 2001  
) TIME: 1:30 p.m.  
) CTRM: HON. Consuelo B. Marshall  
)  
)

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

28

PLEASE TAKE NOTICE that on May 28, 2001, at 1:30 p.m., before the

1 **Honorable Consuelo B. Marshall, Judge of the United States District Court, defendant**  
2 **Michael Colello will move the Court in limine for an order**

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5 **1. Precluding government expert Vincent Maulello from testifying about**

6 **(a) the profile characteristics of letter of credit fraud (see Exhibit “A”);<sup>1</sup>**

7 **(b) the application of those characteristics to the letters of credit in this case;**

8 **(c) terminology such as “worthless,” “unenforceable,” or “flawed” in regard**  
9 **to the letters of credit in this case;**

10  
11  
12 **alternatively,**

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14  
15 **2. Setting a hearing under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S.**  
16 **579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), to determine**  
17 **the admissibility of any of the above-listed testimony.**

18  
19 **The motion is based on Federal Rules of Evidence 403, 702 and 704(b), as well as**  
20 **the case authorities cited in the accompanying memorandum of points and authorities.**

21 **The motion is brought pursuant to this notice of motion, the accompanying**  
22 **memorandum of points and authorities, the declaration of counsel, all papers contained in**  
23 **the district court file, and any additional evidence the court permits counsel to introduce**

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25 \_\_\_\_\_  
26 <sup>1</sup> **Exhibit “A” is a document previously filed by the government and is thus part of the**  
27 **court file. As such, the defense requests that the court take judicial notice of this**  
28 **document.**

1 at the hearing on the motion.

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4 **DATED: May 02, 2001**

**Respectfully Submitted,**

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**GREGORY NICOLAYSEN**

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**Counsel for Defendant,**

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**Michael Colello**

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

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6 A. The Charges Against Defendant Michael Colello

7 Defendant Colello is charged in the Superseding Indictment in the following  
8 counts:

- 9
- 10 1. Counts Twenty Six through Thirty Three (money laundering);
  - 11 2. Counts Thirty Five through Forty-One (obstruction of justice);
  - 12 3. Counts Forty Two (forfeiture).
- 13

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

22 This motion focuses on expert testimony that the government intends to present at  
23 the trial concerning letters of credit. Specifically, the motion seeks two forms of relief:

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- 25 1. An order precluding government expert Vincent Maulello from testifying about  
26 (a) the profile characteristics of letter of credit fraud (see Exhibit “A”);
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(b) the application of those characteristics to the letters of credit in this case;  
(c) terminology such as “worthless,” “unenforceable,” or “flawed” in regard to the letters of credit in this case.

alternatively,

2. Setting a hearing under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), to determine the admissibility of any of the above-listed testimony.

Each form of relief stands independent of the other; thus, if the preclusion order as to witness Maulello is granted, the defense still requests the *Daubert / Kumho* hearing because it addresses a separate area of expert testimony.

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II.

**THE COURT SHOULD PRECLUDE GOVERNMENT  
WITNESS VINCENT MAULELLO FROM TESTIFYING  
ABOUT THE PROFILE “SIGNS” OF LETTER OF CREDIT  
FRAUD SCHEMES AND RENDERING ANY OPINIONS  
BASED ON SUCH “SIGNS”**

**A. Introduction**

In early February 2001, the government filed its “Summary Of Expected Testimony of Government Expert Witness Vincent Maulello” (“Maulello Summary”) in connection with the March 5 trial of co-defendants Owen Fox and Douglas Cross. For the Court’s convenience, a copy of the Maulello Summary is attached to the accompanying declaration of counsel as Exhibit “A.”

The Maulello Summary outlines the testimony the government expects to elicit from Mr. Maulello as an expert witness at trial and is in several parts:

1. The history of letters of credit;<sup>2</sup>
2. An overview of letter of credit transactions in general, including key terms and

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<sup>2</sup> Maulello Summary, section A, page 4, lines 10-22.

1 the basic transactional concepts;<sup>3</sup>

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3. The fraudulent use of letters of credit, including the “eleven signs of fraud”;<sup>4</sup>

4. An analysis of the letters of credit in this case in relation to the eleven signs of fraud, which includes opinions, the bases for those opinions, and publication-references.<sup>5</sup>

By this motion, Mr. Colello objects to the *third and fourth categories* of testimony.

No objection is made to the first two categories, since they deal solely with fundamental concepts regarding letters of credit in general.

Mr. Colello urges this Court to issue a preclusion order as to the third and fourth categories based on any of the following three arguments, each of which is discussed below:

1. Such testimony violates the standards in Fed.R.Evid. 702 and 704(b);

2. Such testimony is tantamount to inadmissible drug courier profile evidence;

3. Under Fed.R.Evid. 403, the prejudicial effect outweighs the probative value of such testimony.

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<sup>3</sup> Maulello Summary, sections B, C and D, page 4, line 23, to page 9, line 16.

<sup>4</sup> Maulello Summary, section E, pages 9, line 17, to page 10, line 9.

<sup>5</sup> Maulello Summary, section F, page 10, line 10, to page 16, line 26.

1 **B. Applicable Legal Standards**

2 **Federal Rule of Evidence 702 states:**

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4 **If scientific, technical, or other specialized knowledge will**  
5 **assist the trier of fact to understand the evidence or to**  
6 **determine a fact in issue, a witness qualified as an expert by**  
7 **knowledge, skill, experience, training, or education, may**  
8 **testify thereto in the form of an opinion or otherwise.**

9  
10 **In criminal cases where the government seeks to have an expert at trial depart from**  
11 **general testimony and render opinions about criminal conduct, the admissibility of such**  
12 **expert testimony raises the serious issue as to whether the opinions verge on conclusions**  
13 **about the defendant's guilt. In this regard, Rule 702 must be construed in conjunction**  
14 **with Rule 704, which provides that "testimony in the form of an opinion or inference**  
15 **otherwise admissible is not objectionable because it embraces an ultimate issue to be**  
16 **decided by the trier of fact."**

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19 **Despite the express wording in Rule 704, the commentary to the rule states that**  
20 **Rule 702 (and Rule 403) may still be used to exclude "opinions which would merely tell the**  
21 **jury what result to reach." Fed.R.Evd. 704, Note of Advisory Committee on 1972**  
22 **Proposed Rules. Moreover, Rule 704(b) bars an expert from testifying that the defendant**  
23 **had "the mental state or condition constituting an element of the crime charged(.)"**  
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26 **In view of these standards, courts must closely guard the fine line between**  
27 **permissible expert testimony in criminal cases and impermissible opinions regarding**  
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1 criminal conduct at issue. Accordingly, the Ninth Circuit has consistently held that an  
2 expert may not give a direct opinion on the defendant's guilt or innocence, as such an  
3 opinion necessarily incorporates a conclusion that the defendant had the requisite mental  
4 state to meet all elements of the offense, in violation of Rule 704(b). United States v.  
5 Lockett, 919 F.2d 585, 590 (9th Cir. 1990); United States v. Bosch, 914 F.2d 1239, 1243  
6 (9th Cir. 1990); United States v. Kinsey, 843 F.2d 383, 388 (9th Cir.), cert. denied, 488  
7 U.S. 836 (1988); United States v. Fleishman, 684 F.2d 1329, 1335-36 (9th Cir.), cert.  
8 denied, 459 U.S. 1044 (1982).

11 This prohibition is well illustrated by the Second Circuit's ruling in United States  
12 v. Scop, 846 F.2d 135, modified on other grounds, 856 F.2d 5 (2d Cir. 1988), which  
13 reversed appellant's conviction for securities fraud on the grounds that an expert witness  
14 had stated "highly prejudicial" legal conclusions in expressing his opinion about the  
15 defendant's conduct. The expert's testimony had improperly used specific statutory and  
16 regulatory language such as "manipulation" and "scheme to defraud" to describe the  
17 defendants' actions. 846 F.2d at 139-140. While Scop has not been cited by the Ninth  
18 Circuit, at least one district court has cited its holding with approval. Playboy Enters. v.  
19 Terri Welles, Inc., 78 F.Supp.2d 1066, 1081 (S.D.Ca. 1999).

23 Based on Rule 704 and the cases cited above, the proffered testimony of  
24 government expert Vincent Maulello regarding the characteristics of letter of credit fraud  
25 scams and the application of those characteristics to this case amounts to improper  
26 testimony about a legal conclusion, i.e., that Mr. Colello's conduct was fraudulent. As  
27

1 such, the testimony is also tantamount to rendering an improper opinion about Mr.  
2 Colello's state of mind in regard to his role in facilitating the issuance of the allegedly  
3 fraudulent letters of credit. This is discussed more fully in the following section of this  
4 memorandum.  
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8 **C. Application Of Facts To Legal Standards Under Rules 702 and 704(b)**

9           The Maulello Summary sets forth "eleven signs of fraud", which purport to  
10 comprise the profile characteristics of letter of credit fraud scams. The section of the  
11 Maulello Summary entitled, "Rise Of The Fraudulent Use Of Letters Of Credit," states in  
12 part as follows:  
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14                       Since the 1980's, international and national trade associations,  
15                       law enforcement agencies, and LC periodicals and newsletters  
16                       have reported an increase in the fraudulent uses of LCs,  
17                       especially standby LCs. While not intended to be an all-  
18                       inclusive list, the fraudulent use of LCs sometimes feature one  
19                       or more of these *eleven signs of fraud*, as expounded upon in  
20                       more detail in Exhibit B attached hereto:<sup>6</sup> (italics added)  
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26           <sup>6</sup>       Maulello Summary, Section E, at page 9, lines 17-24. Exhibit B to the Maulello  
27           Summary is an excerpt from a trade publication entitled, "Eleven Signs Of Fraud," on  
28           which the profile list and discussion in the Summary is based.



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suspect.<sup>11</sup>

Statements of this type demonstrate that the government’s intention in using Maulello is to go far beyond the general, explanatory role of an expert who teaches a jury about the fundamentals of letters of credit so that the jury understands their transaction purpose and the terminology applicable to such transactions. Such explanatory testimony would fall squarely within the ambit of Rule 702, which contemplates the admission of expert testimony where it assists the jury without usurping the jury’s role. But here, the government seeks to go much further by having Maulello characterize the letters of credit as fraudulent and thereby render an opinion directly on Mr. Colello’s guilt in terms of his involvement in a letter of credit fraud scam. This is precisely what Rules 702 and 704 prohibit. “Such opinions are of no assistance to the jury because the jury is as competent as the witness to determine the issue of guilt.” Dubria v. Smith, 197 F.3d 390, 400 (9<sup>th</sup> Cir. 1999).

The proffered testimony of Maulello does not fall within the recognized exception under Rule 704, whereby experts, and in particular law enforcement officers, may testify that “the defendant’s activities indicated that he acted in accordance with usual criminal modus operandi.” United States v. Espinosa, 827 F.2d 604, 612 (9<sup>th</sup> Cir. 1987). The Espinosa case is illustrative of the specific and limited context in which the “modus operandi” exception has been held to apply. In that case, the Circuit upheld the testimony of a detective in a drug prosecution that the defendant used an apartment as a

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<sup>11</sup> Maulello Summary, Section F, at page 13, line 23, to page 14, line 5.

1 “stash pad” for money and narcotics, and that “pay and owe” sheets found in the  
2 apartment contained the names of defendant’s cocaine buyers. In so holding, the Court  
3 commented that “[I]aw enforcement officers with sufficient qualifications may testify  
4 concerning the methods and techniques employed in an area of criminal activity.” Id.  
5 The opinion cites to several earlier Ninth Circuit rulings that upheld similar testimony by  
6 experts in drug cases regarding the methods used by traffickers:  
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9 In Fleishman, we upheld admission of an officer's testimony  
10 that the defendant's actions showed that he was acting as a  
11 lookout in a drug trafficking conspiracy case. Fleishman, 684  
12 F.2d at 1335-36. In United States v. Maher, 645 F.2d 780 (9th  
13 Cir. 1981) (per curiam), we upheld admission of an agent's  
14 testimony that the defendant's activities were similar to the  
15 modus operandi of persons conducting counter-surveillance  
16 while transporting drugs. Id. at 783-84. And in United States  
17 v. Stewart, 770 F.2d 825 (9th Cir. 1985), cert. denied, 474 U.S.  
18 1103, 106 S. Ct. 888, 88 L. Ed. 2d 922 (1986), we upheld  
19 admission of a DEA agent's opinion testimony that (1) the  
20 defendant's driving behavior indicated that he was attempting  
21 to avoid surveillance and (2) that he probably was delivering  
22 drugs to customers on another occasion. Id. at 831. We also  
23 cited with approval United States v. Carson, 702 F.2d 351 (2d  
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1                   Cir.), cert. denied, 462 U.S. 1108, 103 S. Ct. 2456, 77 L. Ed. 2d  
2                   1335 (1983), in which the Second Circuit upheld admission of  
3                   expert testimony that a transaction on a street corner  
4                   appeared to be a drug sale. Stewart, 770 F.2d at 831; see also  
5                   United States v. Masson, 582 F.2d 961, 964 (5th Cir. 1978)  
6                   (admission of expert testimony to determine if tape-recorded  
7                   conversations contained evidence of bookmaking operations).  
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10                  827 F.2d at 612. The “modus operandi” exception continues to be recognized in the Ninth  
11                  Circuit, most specifically in the area of drug prosecutions. *See, United States v. Vallejo*,  
12                  2001 U.S. App. Lexis 7367 (9<sup>th</sup> Cir., January 16, 2001) (agent permitted to testify as expert  
13                  about the structure of drug trafficking organizations), and cases cited therein.  
14

15                  The key factor that unifies the “modus operandi” cases by a common analytical  
16                  thread is that the expert is merely testifying about behavioral practices of participants in  
17                  an area that is clearly recognized as being criminal in nature. Thus, the “modus  
18                  operandi” rule is repeatedly applied in the context of drug prosecutions, where the  
19                  underlying conduct that is the subject of the prosecution, namely drug dealing, is  
20                  unquestionably illegal; in such cases, the expert’s role is limited to describing certain  
21                  behavioral practices of the defendants to help the jury recognize that the defendants are  
22                  engaged in drug dealing, which is undisputably illegal.  
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25                  Using the analogy to simple logical reasoning, the “modus operandi” expert’s role is  
26                  to testify as to the Minor Premise in the logical syllogism, as follows:  
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1	Major Premise:	Drug Dealing = Criminal	[established by law]
2	Minor Premise	Defendant's Conduct = Drug Dealing	[expert testimony]
3	Conclusion	Defendant's Conduct = Criminal	[Government's Argument]

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As this diagram makes clear, the Major Premise reflects an undisputed standard that the underlying conduct charged in the indictment, namely drug dealing, is criminal. The role of the “modus operandi” expert is therefore limited to the Minor Premise, i.e., applying the facts to the standard in showing that the defendant’s conduct constitutes drug dealing.

In sharp contrast, the Maulello Summary makes clear that the government is intending an entirely different use of expert testimony, which is to have Maulello render an opinion that the underlying conduct at issue in this case, namely the letter of credit transactions, are fraudulent. Unlike drug dealing, which is per se illegal, letter of credit transactions are only illegal to the extent the government can connect those transactions to a crime, such as mail /wire fraud.

To make that connection, the government would have Maulello testify to the “eleven signs of fraud,” which are profile characteristics whose only purpose is to provide fraud analysts with *investigative tools* by which to identify possible scams. These eleven signs are merely a compilation of factors contrived by people in the fraud detection business to assist them in their work. These profile characteristics are not the law; they have not been codified in any criminal statute. Yet the government would have these profile characteristics presented to the jury as gospel by having Maulello testify to these

1 eleven signs of fraud; in so doing, Maulello would essentially *establish the standards for the*  
2 *crime of letter of credit fraud*. He then proceeds to apply the facts of this case, rendering  
3 various opinions that the letters of credit in this case correspond to these eleven signs of  
4 fraud and thus constitute a fraud. The inescapable conclusion offered by Maulello is that  
5 defendant Colello was engaged in fraudulent practices, pursuant to a standard of  
6 misconduct that the witness himself defined.  
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9 Using the analogy to simple logical reasoning, Maulello's role is not confined to the  
10 Minor Premise in the logical syllogism, as the "modus operandi" expert's role is. This is  
11 because, unlike drug dealing, letters of credit are not per se illegal. According to Maulello,  
12 letters of credit are unlawful (that is, fraudulent) when the eleven signs of fraud apply.  
13 This is not a legal standard but a standard that Maulello offers based on seminars and  
14 publications listed at the end of the Maulello Summary.<sup>12</sup> His testimony is charted as  
15 follows:  
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17	Major Premise: LOC W/Signs Of Fraud = Fraudulent Documents	[Maulello, based on trade 18 publications, seminars]
19	Minor Premise: LOC in this case = LOC W/Signs Of Fraud	[Maulello]
20	Conclusion LOC in this case = Fraudulent Documents	[Government's Argument]

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22 Thus, unlike the "modus operandi" expert, Maulello testifies as to *both* the Major  
23 Premise and Minor Premise, which arrogates to him the power to establish the standard of  
24 evaluation, which is far beyond the role upheld by the Ninth Circuit for a "modus  
25 operandi" expert. Moreover, the standard of evaluation is based not on any law or even  
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27 <sup>12</sup> Maulello Summary, Section IV, at page 15, line 20, to page 16, line 26.  
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1 on any established authority, but rather on various trade publications and seminar  
2 materials. This means the government wants Maulello to define for the jury where the  
3 line is drawn between legitimate and fraudulent uses of letters of credit (the Major  
4 Premise above), and to do so based on highly subjective views of various people in the  
5 banking industry. This is absurd.  
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9 **D. Drug Courier Profile Evidence**

10 For the government to use Maulello to define the standard of evaluation for what  
11 constitutes a fraudulent letter of credit, and to have him do so by testifying about the  
12 eleven signs of fraud, smacks of offering profile evidence at trial to determine guilt. While  
13 profile evidence is recognized as a useful tool to guide investigations, and thus can be used  
14 to satisfy probable cause requirements for the issuance of search warrants or to meet  
15 Fourth Amendment requirements for investigative detentions and searches, such evidence  
16 is merely an investigative tool that has no place in a courtroom as substantive evidence of  
17 guilt.  
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19  
20 The classic analogy that applies is drug courier profiling. The Ninth Circuit, like  
21 many other circuits, has denounced the use of a drug courier profile as substantive  
22 evidence of a defendant's innocence or guilt at trial. In so holding, the Circuit has  
23 recognized that drug courier profile testimony is inherently prejudicial to the defendant  
24 by suggesting that innocuous events indicate criminal activity. United States v. Lui, 941  
25 F.2d 844, 848 (9th Cir. 1991) (profile included carrying hard-sided suitcase, traveling for  
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1 stated purpose of visiting a relative, itinerary with multiple stops for short periods of time  
2 via a non-source country, and using pagers). In Lui, the Court defined a drug courier  
3 profile as follows:  
4

5 a somewhat informal compilation of characteristics believed to  
6 be typical of persons unlawfully carrying narcotics. . . . These  
7 profiles are commonly used by agents as a basis for reasonable  
8 suspicion to stop and question a suspect or to form probable  
9 cause.  
10

11 941 F.2d at 847. The Lui court proceeded to state that, "every defendant has a right to be  
12 tried based on the evidence against him or her, not on the techniques utilized by law  
13 enforcement official in investigating criminal activity." Id., quoting United States v.  
14 Beltran-Rios, 878 F.2d 1208, 1210 (9th Cir. 1989).  
15

16  
17 In rejecting drug courier profiling as substantive evidence of guilt, the Ninth  
18 Circuit in Beltran-Rios quoted the Eleventh Circuit's reasoning in United States v.  
19 Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir. 1983), an opinion which also criticized  
20 the use of criminal profiles as evidence of guilt in criminal trials:  
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23 drug courier profiles are inherently prejudicial because of the  
24 potential they have for including innocent citizens as profiled  
25 drug couriers. . . . Every defendant has a right to be tried  
26 based on the evidence against him or her, not on the  
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1 techniques utilized by law enforcement officials in  
2 investigating criminal activity. Drug courier profile evidence  
3 is nothing more than the opinion of those officers conducting  
4 an investigation. . . . We denounce the use of this type of  
5 evidence as substantive evidence of the defendant's innocence  
6 or guilt.  
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9 878 F.2d at 1210 - 1211. The Ninth Circuit has also acknowledged the Eighth Circuit's  
10 rejection of drug courier profile testimony as substantive evidence of guilt at a trial.  
11 United States v. Gomez-Norena, 908 F.2d 497, 501 (9<sup>th</sup> Cir. 1990), citing United States v.  
12 Carter, 901 F.2d 683, 684 (8th Cir. 1990) ("Drug courier profiles are investigative tools,  
13 not evidence of guilt. . . . [They] are not to be admitted as substantive evidence of guilt.")  
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17 Consequently, based on the authorities cited above, Maulello's proffered testimony  
18 violates Rules 702 and 704(b) and amounts to inadmissible evidence of profiling. The  
19 Court should therefore preclude Maulello from testifying about

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21 (a) the "eleven signs of fraud" pertaining to letters of credit fraud; and

22 (b) the application of those signs to the letters of credit in this case.

23  
24 (c) any opinion testimony the government may seek to elicit from Maulello  
25 regarding the "worthless," "unenforceable," or "flawed" letters of credit at issue.<sup>13</sup>

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27 <sup>13</sup> The following references are to the Maulello Summary:

(continued...)

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**E. Alternative Basis To Grant Motion: Rule 403**

In addition to considering Rules 702 and 704, the district court should bear in mind that in deciding whether to permit the expert testimony in question, "Rule 403 considerations of the prejudicial effect of the testimony, its probative value, confusion of the jury, and waste of time must still be taken into account." 4 Weinstein's Federal Evidence § 702.05[3]. Here, the court finds that the proffered testimony of Maulello should also be precluded under Rule 403 in that his proffered testimony in regard to the profile characteristics of letter of credit fraud scams, and the application of those characteristics to the letters of credit in this case, is substantially more prejudicial than probative and would likely lead to jury confusion and waste of time.

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<sup>13</sup>(...continued)  
(1) "worthless": page 11, line 23; page 13, lines 2, 21; page 14, line 12; page 15, line 3.  
(2) "unenforceable": page 11, line 23; page 13, lines 2, 23; page 14, line 12; page 15, line 3.  
(3) "flawed documentation": page 10, line 22; page 11, lines 13-23; page 12, lines 2-3; page 12, line 17-page 13, lines 2, 10-11, 25-26; page 14, lines 15-16.

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III.

AT THE VERY LEAST, THIS COURT SHOULD CONDUCT

A HEARING UNDER DAUBERT / KUMHO TIRE

TO DETERMINE THE ADMISSIBILITY OF THE

EXPERT TESTIMONY AT ISSUE

A. Introduction

If the Court denies the request for a preclusion order as requested in the preceding section, a pretrial hearing should be conducted pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1992) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) to determine admissibility of witness Maulello’s proffered testimony regarding the “eleven signs of fraud” and opinions based on the application of the facts of this case to those signs of fraud.

Moreover, such a hearing is necessary to establish the admissibility of any opinion testimony the government may seek to elicit from Maulello regarding the “worthless,” “unenforceable,” or “flawed” letters of credit at issue. As with the eleven signs of fraud, the government must satisfy the Daubert / Kumho Tire standards for such opinion testimony prior to its presentation to a jury.

The case authorities discussing the Daubert / Kumho Tire standards are set forth in detail below.

1 **B. Applicable Legal Standards**

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3 Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to  
4 ensure that scientific testimony is not only relevant, but reliable. To accomplish this goal,  
5 the Supreme Court, in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579,  
6 (1993), set forth standards on which a court may rely in determining whether an expert  
7 may give testimony at trial. In its hallmark decision on the issue, the Supreme Court  
8 recommended consideration of five non-exclusive factors: (1) the objective testability of  
9 the expert's technique or theory, (2) whether the technique or theory had been subjected  
10 to peer review and publication, (3) the error rate for the technique or theory, (4) the  
11 existence and maintenance of standards and controls, and (5) the degree to which the  
12 technique or theory has been accepted in the community. 509 U.S. at 592-594.

15 The Court further defined the district court's "gatekeeping" duty, as well as the  
16 level of deference to be accorded the trial court, in Kumho Tire Co. v. Carmichael, 526  
17 U.S. 137 (1999). There, the *Daubert* factors were extended to include not only scientific  
18 expert testimony, but also testimony based on technical and other "specialized  
19 knowledge." *Id.* at 149. The Court observed that in determining the admissibility of an  
20 expert's testimony a federal trial judge may properly consider one or more of the specific  
21 *Daubert* factors, where "such testimony's factual basis, data, principles, methods, or their  
22 application are called sufficiently into question." *Id.*

25 With this as a guide, the Court noted that, as it stated in *Daubert*, the test of  
26 reliability is "flexible," and *Daubert's* list of specific factors neither necessarily nor  
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1 exclusively applies to all experts or in every case. “[W]e can neither rule out, nor rule in,  
2 for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can  
3 we now do so for subsets of cases categorized by category of expert or by kind of evidence.  
4 Too much depends upon the particular circumstances of the particular case at issue.” *Id.*  
5 at 150. Rather, the law grants a district court “leeway in deciding in a particular case how  
6 to go about determining whether particular expert testimony is reliable.” *Id.* at 152. To  
7 this end, “a trial court should consider the specific factors identified in *Daubert* where they  
8 are reasonable measures of the reliability of expert testimony.” *Id.*

11 Although the standard is one of flexibility, the Supreme Court has also made clear  
12 that an expert’s testimony must be based on more than mere speculation. In General  
13 Electric Co. v. Joiner, 522 U.S. 136 (1997), the Court drew from *Daubert* in making the  
14 following observations:

16 nothing in either *Daubert* or the Federal Rules of  
17 Evidence requires a district court to admit opinion  
18 evidence that is connected to existing data only by  
19 the *ipse dixit* of the expert. A court may conclude  
20 that there is simply too great an analytical gap between  
21 the data and the opinion proffered.

25 *Id.* at 146.

27 Hence, expert testimony that ultimately does not withstand the test for reliability



1 misstatements in securities fraud actions. It does not take  
2 any special competence, for example, to read pertinent public  
3 documents... to determine whether certain risks were  
4 conveyed to the public.”

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6 66 F.Supp.2d at 1188. *See, Haines v. Honolulu Shipyard, Inc.*, 125 F. Supp. 2d 1020 (D.  
7 Haw. 2000) (summary judgment granted where expert testimony, consisting primarily of  
8 letters and declarations which speculated on the cause of Plaintiff’s blackout, failed to  
9 demonstrate that the expert’s conclusions were reliable as to causation).

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11 It is important to note that while a request for an in limine hearing where the issues  
12 concern non-scientific expert testimony is not mandated by *Daubert* and its progeny, it  
13 should be granted where it “will assist the trier of fact to understand or determine a fact in  
14 issue.” *Daubert*, 509 U.S. at 592-593. Thus, in cases where it is unclear whether expert  
15 testimony will be helpful or prejudicial “[t]rial courts should be mindful of the difficulties  
16 posed when counsel must explore an expert's qualifications and the basis for the expert's  
17 opinion in the presence of the jury and, depending on the circumstances of the case,  
18 should give due consideration to requests that questioning occur unconstrained by that  
19 presence.” *United States v. Alatorre*, 222 F.3d 1098, 1105 (9<sup>th</sup> Cir. 2000).

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24 **B. Application Of Facts To Legal Standards**

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26 In the case at bar, a *Daubert / Kumho Tire* is necessary to determine the  
27 admissibility of expert witness Maulello’s testimony regarding:

- 1           1. The “eleven signs of fraud”;
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- 3           2. The applicability of the letters of credit in this case to those eleven signs;
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- 5           3. Characterizations of the letters of credit in this case as “worthless,”
- 6 “unenforceable,” and having “flawed documentation.”

7           From a facial reading of the Maulello Summary, it simply cannot be ascertained

8 whether the admissibility requirements have been met or even *can* be met. Two key

9 considerations necessitate a pretrial hearing:

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- 11           1. First, the “eleven signs of fraud” referenced in the Maulello Summary *do not*
- 12 *constitute an objectively-defined, authoritative standard or principle* on which to base expert
- 13 testimony. For example, these eleven signs of fraud are not codified in any law, nor are
- 14 they contained in any published industry guidelines or policies.<sup>14</sup>

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16           Instead, the Maulello Summary appears to concede that this checklist is taken

17 directly from articles in trade publications and seminar materials. The Summary even

18 attaches a copy of an article entitled, “Eleven Signs Of Fraud,” printed in the

19 September 1994 of “Corporate Cashflow,” a trade journal.<sup>15</sup> The article lists the same

20 eleven signs that are addressed in the Maulello Summary and cites no authority

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24           <sup>14</sup> By comparison, there are industry guidelines and policies that govern letters of credit

25 transactions in general. These are published in the ICC Uniform Customs and Practice

26 for Documentary Credits (“UCP 500”) issued by the International Chamber of

27           <sup>15</sup> See Exhibit B to the Maulello Summary.

1 whatsoever for the checklist, stating only in the opening paragraph that “[t]hese features  
2 are common to fraudulent international bank instrument scams.” This is hardly an  
3 authoritative standard on which to base expert opinions at trial, and the article is not even  
4 specific to letters of credit but, rather, is meant as a *generic reference guide* pertaining to  
5 fraud scams across the board in the banking industry.  
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8 The same lack of any objectively-defined, authoritative standards or principles  
9 applies to the references in the Maulello Summary to “worthless,” “uncollectible” and  
10 “flawed documentation” in reference to the letters of credit in this case.  
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12 2. Second, the Maulello Summary fails to identify any threshold standard under  
13 the “eleven signs of fraud” by which to identify when a letter of credit is deemed  
14 fraudulent, worthless, uncollectible or flawed. Does a letter of credit have to meet a  
15 certain number of the eleven signs in order to support a conclusion? If so, what is the  
16 basis for defining this threshold; is there an authoritative standard? For example, in the  
17 field of fingerprint analysis, the process of making an identification is based on the  
18 number of points of comparison; accordingly, the industry recognizes as its standard that  
19 a threshold number of points of comparison must be found by the analyst before a  
20 reliable opinion can be reached as to a fingerprint match.  
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23 In short, there is simply no authoritative framework within which to admit expert  
24 testimony on the subjects that are at issue in this motion. It is instructive to note that  
25 Judge Weinstein has observed:  
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27 When the proffered expert testimony relates to *a topic that has*  
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1 *through tradition won judicial recognition as a proper subject*  
2 *for expert testimony, the court need only consider whether the*  
3 *testimony will aid the jury in deciding the particular issues in*  
4 *the case. When, however, a court is faced with an offer of a*  
5 *new form of expertise that has not yet received judicial*  
6 *sanction, it must, as a threshold matter, determine whether*  
7 *the new technique or principle is sufficiently reliable to aid the*  
8 *jury in reaching accurate results. (Italics added)*

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11 4 Weinstein's Federal Evidence § 702.05[1] (1997)

12 As Judge Weinstein observes, the expert needs to base his opinion on generally  
13 recognized principles and methodologies. Here, the proffered testimony of Maulello  
14 presents serious questions of sufficiency under *Daubert / Kumho Tire* so as to warrant a  
15 pretrial hearing to determine if this witness can provide reliable evidence to assist the jury  
16 in reaching a fair verdict.  
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19 IV.

20 CONCLUSION

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22 Based on the foregoing analysis, the defense respectfully requests that the Court  
23 issue the following relief:

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25 1. An order precluding government expert Vincent Maulello from testifying about  
26 (a) the profile characteristics of letter of credit fraud;

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(b) the application of those characteristics to the letters of credit in this case;  
(c) terminology such as “worthless,” “unenforceable,” or “flawed” in regard to the letters of credit in this case.

alternatively,

2. Setting a hearing under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), to determine the admissibility of any of the above-listed testimony.

DATED: May 02, 2001

Respectfully Submitted,

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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 May 03, 2001, I served the foregoing document described as Notice of Motion and Motion by Defendant Michael Colello for Order Precluding Expert Testimony and Setting Daubert / Kumho Tire Hearing; Memorandum of Points and Authorities, by delivering a true copy to:**

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**Executed on May 03, 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.**

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**BRENDA R. DABNEY**