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 9 United States of America

10 UNITED STATES DISTRICT COURT  
 11 SOUTHERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,	)	Criminal Case No. 06CR2252-W
	)	
13 Plaintiff,	)	<b>GOVERNMENT'S TRIAL MEMORANDUM</b>
	)	
14 v.	)	<b>DATE:</b> January 21, 2009
	)	<b>TIME:</b> 9:00 a.m.
15	)	<b>CTRM:</b> 7 (3rd Floor)
16 ROLAND C. COLTON,	)	<b>JUDGE:</b> Honorable Thomas J. Whelan
	)	
17 Defendant.	)	

18 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,  
 19 Karen P. Hewitt, United States Attorney, and Eric J. Beste and Valerie H. Chu, Assistant U.S.  
 20 Attorneys, and hereby files its Trial Memorandum.

21 **I**  
 22 **STATUS OF THE CASE**

23 **A. INDICTMENT**

24 On October 17, 2006, a Federal Grand Jury in the Southern District of California returned a  
 25 seven-count indictment against defendant Roland C. Colton (“Colton”) charging him with bankruptcy  
 26 fraud, in violation of various provisions of 18 U.S.C. § 152. Count 1 alleges that Colton falsely stated  
 27 under penalty of perjury in his bankruptcy petition and accompanying schedules that he had no interest  
 28 in real property and personal property, although he in fact did have interests in real property located in

1 France and Laguna Niguel, California, and in over \$1.5 million in personal property such as bank and  
2 brokerage accounts, in violation of 18 U.S.C. § 152(3). Counts 2, 3 and 4 allege that Colton gave false  
3 testimony under oath in examinations taken pursuant to Fed. R. Bank. P. 2004 ("Rule 2004  
4 examination"), in violation of 18 U.S.C. § 152(2). Count 2 concerns Colton's false claim in his January  
5 15, 2002 examination that his schedules were correct and that they accurately identified all of his assets  
6 and liabilities. Count 3 concerns Colton's false claim that he maintained no other bank accounts. Count  
7 4 concerns Colton's false assertion that he had not contributed anything towards the purchase of his  
8 Laguna Niguel estate. Count 5 alleges that Colton gave false testimony under oath in his Rule 2004  
9 examination on August 14, 2002, when he testified that he paid \$85.86 in foreign taxes in 2000. Count  
10 6 alleges that Colton knowingly and fraudulently concealed real and personal property in France  
11 belonging to the debtor's estate from creditors and the bankruptcy trustee, in violation of 18 U.S.C.  
12 § 152(1). Count 7 alleges that Colton knowingly and fraudulently concealed ownership, control and  
13 possession of numerous financial accounts belonging to the debtor's estate from creditors and the  
14 bankruptcy trustee, in violation of 18 U.S.C. § 152(1).

15 B. JURY TRIAL

16 This case is presently set for trial on January 21, 2009. No jury waiver has been filed.

17 C. STATUS OF COUNSEL

18 Colton is proceeding pro se. At the last status hearing on December 11, 2008, Defendant moved  
19 to represent himself. The parties appeared that day before Magistrate Judge Bencivengo, and after  
20 conducting a *Faretta* hearing, Judge Bencivengo relieved retained counsel Jeremy Warren and granted  
21 Colton's motion to represent himself. Colton appeared before this Court later that day, and confirmed  
22 his awareness of the trial date. No standby counsel has been appointed.

23 D. CUSTODIAL STATUS

24 Colton is out of custody on a \$50,000 personal appearance bond.

25 E. INTERPRETER

26 The government may need a French-English interpreter for several witnesses during its case-in-  
27 chief or in rebuttal.

28

1 F. LENGTH OF TRIAL

2 At the status hearing on August 18, 2008, parties jointly estimated that the trial would occupy  
3 approximately 2 weeks. Since then, Colton has released his counsel and decided to proceed pro se. At  
4 the status hearing on December 11, 2008, Colton indicated that he intended to file motions that he  
5 expected would reduce the length of trial. At this time, the government believes this trial will be  
6 completed in 2 weeks.

7 G. COURTROOM COMPUTER SYSTEM

8 The government will be using a computer-based evidence presentation system including  
9 individual monitors located at the bench, the witness stand, and at counsel tables for the government and  
10 the defense.

11 H. DISCOVERY

12 The United States has complied with its discovery obligations, including again making  
13 documents available for Colton's inspection which his previous counsel had already seen. Colton has  
14 not produced any reciprocal discovery, and the government will object to the introduction of any  
15 documents by Colton which have not been produced in discovery at this time.

16 I. PRE-TRIAL MOTIONS

17 On January 6, 2009, the government filed motions in limine to: (1) preclude allegations of  
18 government misconduct; (2) preclude pro se defendant from presenting evidence in his role as attorney;  
19 (3) admit the expert testimony of trial counsel for the U.S. Bankruptcy Trustee; (4) preclude self-serving  
20 hearsay; (5) admit defendant's statements to his bankruptcy attorney made for the purpose of filing his  
21 bankruptcy petition; (6) admit evidence of Nahid Birjandi's 1994 bankruptcy filing; (7) admit evidence  
22 of Colton's prior tax conviction pursuant to Fed. R. Evid. 609 should he testify; (8) preclude defense  
23 exhibits not produced in reciprocal discovery; (9) use trial exhibits in opening statement; (10) exclude  
24 witnesses other than the case agents; and (11) order reciprocal discovery.

25 Colton has not filed any motions in limine.

26 Consistent with the Court's chambers rules, motions in limine are scheduled to be heard on the  
27 morning of trial, January 21, 2009.

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1 J. EXHIBITS

2 By January 15, 2009, the government will make available to Colton a preliminary exhibit list  
3 and a set of pre-marked exhibits. The government will provide an updated list to the Court and to  
4 defense counsel on the morning of trial. The government's exhibit list will be updated during trial to  
5 reflect additional exhibits that the government finds it necessary to introduce.

6 K. JURY INSTRUCTIONS

7 The government's proposed jury instructions will be submitted under separate cover.

8 **II**

9 **STATEMENT OF FACTS**

10 **A. THE DEFENDANT**

11 Colton, a seasoned trial attorney, graduated from the University of Utah with a degree in  
12 accounting, and obtained his law degree from the University of San Diego. Before his admission to the  
13 California bar in 1978, Colton was a practicing accountant. At all times material to the indictment,  
14 Colton was a partner in the Del Mar law firm of Colton & Roesser.

15 Since 1998, Colton has resided in a \$2.375 million estate in Laguna Niguel, California, with his  
16 current wife, Nahid Birjandi, a podiatrist. Colton vacations regularly in France, where he typically  
17 spends 2-3 months every summer. For example case, during the pendency of this case Colton's bond  
18 was modified to permit him to travel to France for vacation. While in France Colton stays at his  
19 vacation home, known as Chateau de la Briche.

20 **B. COLTON'S BANKRUPTCY CASE**

21 **1. Colton's Filings**

22 On October 11, 2001, defendant electronically filed a voluntary Chapter 7 bankruptcy liquidation  
23 petition ("Petition") and attached schedules with the United States Bankruptcy Court for the Southern  
24 District of California, seeking a discharge of some \$2.7 million in debts, and attached schedules. These  
25 schedules included: (1) a summary of assets and liabilities; (2) specific lists of assets and liabilities; (3)  
26 schedules of income and expenses; (4) schedules of exempt assets; and (5) a statement of financial  
27 affairs ("Schedules"). Colton electronically signed, and later manually signed, a certification attesting  
28

1 to the truth, completeness and accuracy of the statements contained in the Petition and Schedules.  
2 Colton signed both of these certifications under penalty of perjury.

3 In the Petition and Schedules, Colton falsely claimed only \$15,650 in assets, consisting of \$100  
4 in cash, a Washington Mutual checking account worth \$200, a television, a computer, a grand piano and  
5 his interest in his law partnership, Colton & Roesser, which he valued at \$10,000. He claimed that he  
6 no “any legal, equitable, or future interest” in any real property, “including [any] property owned as a  
7 co-tenant, community property, or in which the debtor has a life estate.” Defendant also denied that  
8 there was any real property in which he held rights and powers exercisable for his own benefit. Colton  
9 claimed he had no interest in any other personal property, including any automobiles, other businesses,  
10 investment accounts, retirement plans, or insurance policies.

11 Colton also claimed that during the prior year he had not made any payments to creditors who  
12 were insiders, had not given gifts, had not incurred gambling losses, had not executed any property  
13 transfers, and had not closed any financial accounts. He claimed his monthly income was \$6,533, and  
14 that he and his family had monthly expenses of \$7,119 (including \$2,500 in “rent or home mortgage  
15 payment”). Defendant’s claimed liabilities consisted of large California Franchise Tax Board  
16 assessments, court judgments, and credit card debts.

17 On October 11, 2001, the United States Bankruptcy Court for the Southern District of California  
18 appointed Richard Kipperman (“Trustee Kipperman”) as a private Chapter 7 bankruptcy trustee.  
19 Trustee Kipperman was obligated to identify, and then recover and distribute, assets that were to be for  
20 the benefit of the debtor’s estate. Trustee Kipperman retained bankruptcy counsel, Peter Duncan and  
21 Susan Stevenson, to assist in this task.

22 2. Colton’s Statements Under Oath

23 On January 21, 2002, Duncan conducted a Rule 2004 examination, under oath, of Colton.  
24 During that examination, Duncan asked Colton the following questions:

25  
26 Q: Are there any changes to the [bankruptcy] schedules of which you are presently aware?  
27 A: I think the one my attorney referred to we need to make.  
28 Q: Any other changes?  
A: Not that I can think of.

1 Q: So other than amending the schedules to add the Chevron royalty interest, the schedules  
2 are true and correct to your knowledge?

3 A: I think so.

4 Q: And they accurately identify all of your assets and liabilities other than the Chevron  
5 royalty?

6 A: Yes.

7 At the same session, Duncan asked Defendant about the check register, copies of bank  
8 statements, and copies of checks for the single Washington Mutual account listed on his Petition.

9 Specifically, Duncan asked:

10 Q: All right. Sir, we are looking at Exhibit 4, which is your register and statements and  
11 checks, and the question pending was are there any other statements or checks of which  
12 you are aware that are not in Exhibit 4 for the period?

13 A: Not to my knowledge.

14 Q: Okay. Is this the only bank account you maintained personally during the period that is  
15 reflected in Exhibit 4?

16 A: I believe so.

17 Q: Okay. Any record that would refresh your recollection to the contrary?

18 A: I can't think of anything.

19 Duncan also questioned Defendant closely regarding a residence located in Laguna Niguel,  
20 California. Colton's wife (Nahid Birjandi) was listed on the title as the owner of the property, but  
21 Duncan wanted to know if Colton helped pay any of the \$2.375 million purchase price, thereby resulting  
22 in Colton (and his bankruptcy estate) having at least an equitable interest in the property. Duncan asked:

23 Q: Did you contribute anything towards the down payment of the property?

24 A: No.

25 Counsel for Trustee Kipperman conducted further investigation into these and other facts in  
26 order to determine whether assets of the estate were available to satisfy creditor claims. This  
27 investigation led Trustee Kipperman to file separate adversary proceedings against: (1) Colton, his law  
28 partner Roesser, and their partnership to recover the debtor's interest in additional income from the  
29 partnership; and (2) Colton's wife (Dr. Nahid Birjandi) to recover the debtor's community property  
30 interest in their multi-million dollar home.

31 Colton's Rule 2004 examination did not conclude on January 15, 2002, but continued on two  
32 other occasions. In the follow-up session held on August 14, 2002, Duncan's law partner Susan  
33 Stevenson asked Colton about a deduction he claimed in his 2000 federal income tax return for \$8,685  
34 paid in foreign taxes. By this time, Trustee Kipperman had learned that Colton may have had an interest  
35 in real estate known as Chateau de la Briche located in Hommes, France. Colton had claimed attorney-

1 client privilege in response to questions by Stevenson as to whether Colton had visited Chateau de la  
2 Briche, and in what town Chateau de la Briche was located. Coming at it from another direction,  
3 Stevenson attempted to clarify the reason Colton paid \$8,586 in foreign taxes, as claimed on his tax  
4 return:

- 5 Q: Do you know if you paid any foreign taxes in 2001?  
6 A: I don't believe so.  
7 Q: Because I see in 2000 you paid – I don't know, it seems to me like a lot of foreign taxes  
8 – about \$8500, \$8600. Do you know what government or country they were paid to?  
9 A: I think that's inaccurate.  
10 Q: Is your tax return inaccurate or is my characterization of Exhibit A to the tax return  
11 [which includes the line-item for foreign taxes]  
12 A: I believe the amount paid was not accurate as indicated on the tax return.  
13 Q: So you're saying if I look at the tax return I'm going to find a statement that eighty-five,  
14 eighty-six in foreign taxes is inaccurate?  
15 A: Well, this came up during the previous 2004 examination. And when I looked at the  
16 information that I transmitted to [Colton's tax preparer] Mr. Hatch, I think it was \$85.86  
17 or whatever the number is. \* \* \*  
18 Q: Okay. Here we have Exhibit A, itemized deductions to your 2000 return with the  
19 eighty-five, eight-six amount. Is that what you're saying is inaccurate, it should be  
20 \$85.86?  
21 A: That's correct.

22 Trustee Kipperman eventually obtained proof that Colton was in fact the owner of the Chateau  
23 in France, as well as of several brokerage and bank accounts, some of which he held in the names of  
24 shell companies (e.g., Sports Gaming, Inc., Southwest Drilling, etc.). Based on the evidence indicating  
25 that Colton had other assets available for the bankruptcy estate, and that he might dissipate those assets  
26 outside of the normal bankruptcy process, Trustee Kipperman obtained an *ex parte* order from the  
27 bankruptcy court restraining Colton's bank accounts and preventing him from selling or encumbering  
28 the Chateau and his Laguna Niguel home.

29 C. COLTON'S ACTUAL FINANCIAL CONDITION

30 In contrast to the modest \$15,650 in total assets Colton disclosed on his Petition, Colton actually  
31 had interests in millions of dollars worth of real and personal property in the U.S. and France, and had  
32 control over several accounts in the U.S. and in France through which hundreds of thousands of dollars  
33 flowed at his behest.

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1                   1.       Laguna Niguel Residence

2                   In late 1998, Nahid Birjandi, then Colton’s fiancé, was looking for a new home for herself and  
3 her new husband. The couple settled on a newly-built custom home overlooking the Pacific Ocean,  
4 located on 59 Asilomar Road in Laguna Niguel, California. The seller agreed with Colton (who  
5 negotiated the transaction) to a purchase price of \$2,375,000. Birjandi’s claimed income of  
6 approximately \$10,000 per year was nowhere near enough to make the monthly mortgage payments or  
7 cover the necessary expenses of the property. Thus, through a variety of complicated financial  
8 transactions and behind-the-scenes moves, Colton provided almost all the money Birjandi used to  
9 purchase the property and make the monthly mortgage payments.

10                  First, Colton obtained a \$1,400,000 mortgage loan in Birjandi’s name from Hawthorne Savings  
11 Bank. While Birjandi’s name would be the only one on the note, Colton personally promised the bank  
12 that he would help make the payments. Colton told the loan officer that he did not want his name on  
13 the mortgage papers because he was going through a messy divorce, and did not want to be formally  
14 obligated on the loan. But Colton’s assistance was necessary to obtain the loan, as Birjandi clearly  
15 could not qualify for the \$1.4 million loan on her minimal income.

16                  Second, Colton secured a portion of Birjandi’s down payment by obtaining a \$553,500 loan for  
17 her from a second bank, Pioneer Citizens Bank of Nevada. Again, the note was in Birjandi’s name, but  
18 it was collateralized by a Certificate of Deposit (CD) in the amount of \$553,000 posted by a company  
19 owned and controlled by Colton. Colton provided thousands of dollars over the course of the next year  
20 to Birjandi for her to make the interest payments on this loan, and when the note was due Colton simply  
21 directed that the CD be liquidated and the funds used to pay off Birjandi’s note.

22                  Third, Colton negotiated a second mortgage “take back” from the seller of the property in the  
23 amount of \$329,000. Colton provided funds used by Birjandi to make the payments on this note, and  
24 even wire-transferred \$189,718.84 from a brokerage account he controlled directly to the lender.

25                  After arranging for the purchase of 59 Asilomar Road, Colton continued provided the funds for  
26 Birjandi to make the monthly mortgage payments on the couple’s estate. Between March 1999 and  
27 March 2000, Colton directed Charles Schwab to transfer thousands of dollars out of a brokerage account  
28 he controlled – the account was in the name of “Sports Gaming,” a Nevada corporation of which he was



1 the President, Secretary, Treasurer, and Director – into a bank account owned by Birjandi. Colton  
2 regularly transferred in excess of the \$12,000 per month needed by Birjandi to make the required  
3 mortgage payment.

4 Colton was living at 59 Asilomar when he filed for bankruptcy in October 2001. But the  
5 property was identified nowhere on his Petition and Schedules. Instead, Colton listed his address on  
6 the Petition as his office in Del Mar where his law firm was located. When asked in his Rule 2004  
7 examinations about his interest in the property, Colton contended that he only paid his wife \$2,500 per  
8 month in rent to live there.

9 2. Chateau de la Briche

10 In or about July 1999, Colton purchased Chateau de la Briche, a French castle located a few  
11 hours outside Paris, for over 7 million francs (over \$1 million at the time). Built in 1870, the castle has  
12 5 stories and dozens of rooms, including an entrance hall, library, billiards room, sitting room, drawing  
13 room, dining room, back staircase, kitchen, and eating area (and all that just on the first floor). The  
14 property also includes multiple outbuildings (e.g., horse tables, tack room, garage, barns, greenhouses,  
15 kennels, gardener’s building and living quarters, etc.), a swimming pool, vineyards, water tower,  
16 orangery, pleasure gardens, a vegetable garden, woods, meadows and footpaths.

17 To finance the purchase, Colton applied for a loan from CaixaBank in Poitiers, France. In his  
18 application and in various letters to bank officials, he presented a far different picture of his financial  
19 condition than that depicted in his Petition. In response to a bank officer’s inquiries, Colton authored  
20 a letter with additional information about “my most significant investments,” including:

- 21 - a bank account at Home Savings of America, valued at \$4,596.74;
- 22 - a Charles Schwab brokerage account, valued at \$1,087,714.44;
- 23 - a \$30,000 loan from a colleague;
- 24 - his “residence: 59 Asilomar,” with a purchase price of \$2,375,000, a current value of  
25 \$2,800,000, an outstanding loan amount of \$1,100,000, and furnishings worth over \$737,000;
- 26 - a Young-Chang piano valued at \$15,000, and a “Steinway (Concert Grand)” piano valued at  
27 \$75,000; and
- 28 - two cars: a Mercedes Benz valued at \$20,000, and a Jaguar XJ 220 valued at \$400,000.

1 On the CaixaBank formal loan application Colton listed himself as the only borrower, and listed  
2 his residence as 59 Asilomar Road. He stated that his annual salary was between 3,000,000 to 6,000,000  
3 francs (approximately \$475,000 and \$950,000), and claimed that he owed approximately 900,000 Francs  
4 on a mortgage. Colton claimed to own many assets in his application, including his residence at 59  
5 Asilomar (valued at 17,000,000 Francs), his law firm (valued at 3,000,000 francs), and miscellaneous  
6 personal property, such as securities and vintage cars (valued at over 15,000,000 francs). Colton  
7 requested a long term loan in the amount of 4,200,000 francs to purchase “Chateau de la Briche,” which  
8 he described as a single family house to be used as his vacation home.

9 Colton made clear to the bank that he was purchasing the Chateau as his own separate property,  
10 and not jointly with his wife, or for any other party. He wrote in a letter contained in his loan file:

11 I hereby certify that all of the funds which will be used to purchase the Chateau de la  
12 Briche come from funds that I had prior to marriage and which I have maintained  
13 separate since marriage. I further certify that all the funds which will be used to make  
14 payments on the chateau will also come from the same separate funds. **Accordingly,  
15 ownership of the chateau will be in my name alone, as my separate property.**

16 The sales contract lists the buyer of the property as “Mr. Roland Clark COLTON, Attorney.” The  
17 contract lists the financing as a 4,200,000 Fr loan from CaixaBank, to be paid in 144 monthly payments  
18 of 37,231.05 Fr (5,674.84 Euros), and a 3,650,000 Fr down payment from Colton. The total purchase  
19 price of the Chateau was 7,850,000 Fr.

20 French property records show that Colton paid property taxes, lodging taxes, and sanitation taxes  
21 for Chateau de la Briche from 2000 up until at least 2006. In the year 2000, his payment of French  
22 property and lodging taxes on the Chateau alone exceeded \$6,000.

### 23 3. French Financial Accounts

24 Colton opened an account at CaixaBank on or about July 20, 1999, around the time he purchased  
25 the Chateau. Throughout 2001 this CaixaBank account remained open and active. Colton identified  
26 himself as the sole account holder and his listed his address as 59 Asilomar, although he later he gave  
27 his wife power of attorney on the account. During the years 1999, 2000 and 2001, Colton periodically  
28 transferred thousands of dollars into this account from a Charles Schwab account in the name of “Sports  
Gaming, Inc.” Records from the CaixaBank account show monthly withdrawals in the amount of the  
mortgage Colton owed on the Chateau (37,231,05 Francs).

1 Throughout 2001, Colton also wrote checks on his CaixaBank account and deposited them into  
2 another account, held in his own name, at the French bank Credit Agricole. Colton opened the Credit  
3 Agricole account as a joint account with his wife, and listed his address on the application as “Chateau  
4 De La Brich.” This Credit Agricole account was active in October 2001, when Colton filed for  
5 bankruptcy.

6 Colton failed to disclose the existence of any of these foreign accounts in his Petition or  
7 Schedules, or the many transfers into and out of these accounts – some of which took place just a few  
8 days before he filed for bankruptcy.

#### 9 4. Domestic Financial Accounts

10 Unlike his foreign accounts, which were in his own name, Colton created layers between himself  
11 and his domestic accounts. He controlled the Charles Schwab brokerage account described earlier  
12 (which he listed as one of his most significant assets in his letter to the French bank), although the name  
13 on the account was a company called Sports Gaming, Inc. Colton opened this account for Sports  
14 Gaming on February 12, 1999. Colton frequently transferred money out of this account by sending wire  
15 transfer instructions specifying the following:

16 I am the sole authorized signer for the above-referenced account. Please accept this  
17 document as wire instructions for transferring funds to the account indicated below. I  
18 realize that the funds are going to an account that is not in my name. Accordingly,  
Sports Gaming, Inc. is giving up legal ownership to the funds that are being wired.

19 Colton also controlled an account at Washington Mutual Bank in the name of “Southwest  
20 Drilling, Inc.,” another company he incorporated. Expenditures on this bank account include debit-card  
21 payments for restaurants, hotels, and travel, including travel expenses incurred in France. Colton also  
22 concealed this account in his bankruptcy.

23 Colton maintained another account in his own name at California Bank and Trust that he failed  
24 to disclose on his Petition and Schedules. Although the address on the account was Colton’s business  
25 address, the transfers of funds out of the account show that it was used for Colton’s personal expenses.  
26 For example, between October 2000 and April 2002, Colton transferred approximately \$198,980 from  
27 this account to his CaixaBank account, and another \$198,000 from this account to an E\*Trade brokerage  
28 account in his name (which was also omitted from his Petition). In April 2002, only after being

1 questioned in detail about his finances during his Rule 2004 examination, did Colton change the name  
2 on this account from his own name to something called “JMK Family Trust.”

3 4. Other Assets Concealed by Colton

4 Colon concealed from the bankruptcy court several other substantial assets that he owned and  
5 used for his benefit. He purchased a Peugeot automobile in France for over \$20,000 in June 2000, and  
6 registered the car in his own name. In his 1999 loan application for the Chateau, he claimed to be the  
7 sole owner of a Jaguar XJ220 sports car valued at approximately \$400,000. When he was in California,  
8 Colton sometimes drove a BMW with the vanity licence plate “Briche.” Yet on his Petition and  
9 schedule, Colton asserted that he owned no cars.

10 **III**

11 **LEGAL PRINCIPLES**

12 A. ELEMENTS OF THE OFFENSES

13 1. False Declaration, Certificate, Verification or Statement Under Penalty of  
14 Perjury (18 U.S.C. § 152(3))

15 Colton is charged in Count 1 with making a false declaration, verification, or statement on  
16 his Petition and Schedules. To prove a violation of this statute, the government must show that:

- 17 1. On or about the date alleged in the indictment, the proceeding in  
bankruptcy was in existence;
- 18 2. Defendant knowingly and fraudulently made, and caused to be made, a  
19 false declaration, certification, verification or statement in that  
bankruptcy proceeding or in relation to that bankruptcy proceeding;
- 20 3. The false declaration, certificate, verification, or statement was made  
21 under penalty of perjury, and
- 22 4. The statement was as to a material fact.

23 2 Devitt, Blackmar & O’Malley, Federal Jury Practice and Instructions, § 24.07 (4th ed. 1990); *United*  
24 *States v. Gaudin*, 515 U.S. 506, 522 (1995).

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2. False Oaths or Accounts (18 U.S.C. § 152(2))

Counts 2 - 5 of the indictment charge Colton with making false statements under oath during his Rule 2004 examinations on January 15, 2002 and August 14, 2002. The elements of these offenses are:

- 1. On or about the date alleged in the indictment, the proceeding in bankruptcy was in existence,
- 2. Defendant knowingly and fraudulently made, or caused to be made, a false oral statement in that bankruptcy proceeding or in relation to that bankruptcy proceeding,
- 3. The false oral statement was made under oath, and
- 4. The false statement was as to a material fact.

2 Devitt, Blackmar & O'Malley, Federal Jury Practice and Instructions, § 24.07 (4<sup>th</sup> ed. 1990); *United States v. Gaudin*, 515 U.S. 506, 522 (1995).

A statement in bankruptcy is materially false if it has a natural tendency to influence or be capable of influencing the bankruptcy trustee, any creditors, or the bankruptcy court. *Kungys v. United States*, 485 U.S. 759, 770 (1988); Ninth Circuit Criminal Model Jury Instructions § 8.66 (2003).

3. Concealment of Property (18 U.S.C. § 152(1))

Counts 6 and 7 charge Colton with concealing from the trustee real property and personal property belonging to the estate. To prevail on these counts the government must prove:

- 1. On or about the date alleged in the indictment, the proceeding in bankruptcy was in existence,
- 2. Defendant knowingly and fraudulently concealed property from a custodian, trustee, marshal, creditor or United States trustee, and
- 3. The property belonged to the estate of the debtor.

2 Devitt, Blackmar & O'Malley, Federal Jury Practice and Instructions, § 24.03 (4<sup>th</sup> ed. 1990).

The estate of the debtor includes both legal and equitable interests. *United States v. Weinstein*, 834 F.2d 1454, 1461 n.2 (9th Cir. 1987). Withholding information about an asset constitutes concealment under § 152. *Id.* at 1462.

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1           B.       USE OF SUMMARY EVIDENCE

2                   1.       Summary Witness (Financial Analyst Aaron Rich)

3           The government intends to call Federal Bureau of Investigation (“FBI”) financial analyst Aaron  
4 Rich to testify as to the preparation of schedules and charts summarizing Colton’s voluminous financial  
5 documents. Rich, who is a certified public accountant and has received training in commercial  
6 accounting and forensic accounting, will help the jury understand Colton’s bank records and financial  
7 statements, and describe to the jury the flow of funds into and out of bank accounts controlled by  
8 Colton. His testimony will be predicated entirely upon documents that are admissible in evidence, and  
9 which have been made available to the defense for review and inspection.

10           The use of summary witnesses has long been approved by the courts. *See United States v.*  
11 *Johnson*, 319 U.S. 503, 519-20 (1943) (reversing where court failed to allow summary witness  
12 testimony in a tax evasion prosecution); *United States v. Baker*, 10 F.3d 1374, 1411 (9th Cir. 1993)  
13 (noting “this circuit has often allowed the use of summary charts and summary witness testimony based  
14 on testimonial evidence (most commonly in tax cases)”), *overruled on other grounds by United States*  
15 *v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). As the Ninth Circuit has recognized, summary evidence “can  
16 help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in  
17 the testimony of the multitude of witnesses.” *United States v. Shipley*, 884 F.2d 1130, 1133 (9th Cir.  
18 1989) (citation omitted). Because Financial Analyst Rich will not be offering “expert opinions” – but  
19 merely adding and subtracting amounts found on Colton’s various financial records – his testimony does  
20 not fall within Fed. R. Evid. 702 and need not be disclosed pre-trial pursuant to Fed. R. Crim. P. 16.

21                   2.       Summary Charts or Schedules of Voluminous Evidence

22           In addition to the testimony of a summary witness, the government intends to offer through the  
23 witness several summary schedules of voluminous evidence. These summaries are admissible under  
24 Federal Rule of Evidence 1006, which provides:

25           The contents of voluminous writings, recordings, or photographs which cannot  
26 conveniently be examined in court may be presented in the form of a chart, summary,  
27 or calculation. The originals, or duplicates, shall be made available for examination or  
28 copying, or both, by other parties at reasonable time and place. The court may order that  
they be produced in court.

1 Fed. R. Evid. 1006. “The purpose of Rule 1006 is to allow the use of summaries when the volume of  
2 documents being summarized is so large as to make their use impractical or impossible; summaries may  
3 also prove more meaningful to the judge and jury.” *United States v. Johnson*, 594 F.2d 1253, 1255 (9th  
4 Cir. 1979) (citation omitted). The proponent of a summary under Rule 1006 must establish the  
5 admissibility of the underlying documents in order to introduce the summary. *See United States v.*  
6 *Meyers*, 847 F.2d 1408, 1411-12 (9th Cir. 1988) (allowing government to admit a summary chart of  
7 telephone calls and surveillance logs which helped clarify “confusing” events).

8 Financial Analyst Rich’s testimony will be based upon his review of several years’ worth of  
9 account statements from several different domestic and foreign financial accounts associated with  
10 Colton. These statements were made available to Colton for his review, and are admissible as business  
11 records. Rule 1006 summaries are particularly appropriate where summaries organize information  
12 derived from a large number of documents into an understandable format. *See e.g., Keith v. Volpe*, 858  
13 F.2d 467, 480 (9th Cir. 1988) (summaries necessary to clearly present government agency files).

#### 14 C. USE OF BUSINESS RECORDS

##### 15 1. Domestic Records of Regularly Conducted Activity

16 The government intends to offer into evidence many documents that qualify as “business  
17 records,” and thus are free from the prohibition on hearsay. *See Fed. R. Evid.* 803(6), 902(11). The  
18 government has notified Colton in writing of its intention to use Rule 902(11) certifications, and has  
19 invited Colton to review the certifications and the underlying documents.

##### 20 2. Foreign Records of Regularly Conducted Activity

21 The government will also seek to admit business records from France concerning Colton’s  
22 purchase of the Chateau, his purchase of a Peugeot automobile, and his CaixaBank and Credit Agricole  
23 accounts – none of which he disclosed in his bankruptcy Petition. These records are admissible over  
24 any authenticity or hearsay objection because they comply with the requirements of 18 U.S.C. § 3505.

25 “Pursuant to § 3505, ‘[i]n a criminal proceeding in a court of the United States, a foreign record  
26 of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the  
27 hearsay rule if a foreign certification attests . . .’ to the requirements specified in the statute.” *United*  
28 *States v. Hagage*, 437 F.3d 943, 956 (9th Cir. 2006) (quoting § 3505). A foreign certification under

1 § 3505 must state that “(A) such record was made, at or near the time of the occurrence of the matters  
2 set forth, by (or from information transmitted by) a person with knowledge of those matters; (B) such  
3 record was kept in the course of a regularly conducted business activity; (C) the business activity made  
4 such a record as a regular practice; and (D) if such record is not the original, such record is a duplicate  
5 of the original; unless the source of information or the method or circumstances of preparation indicate  
6 lack of trustworthiness.” 18 U.S.C. § 3505(a)(1). If a foreign certification meets these requirements,  
7 then the proponent of the evidence need not call a live witness to establish its authenticity, and the  
8 foreign record may not be excluded as hearsay. *Hagege*, 437 F.3d at 957. The Ninth Circuit has  
9 specifically held that foreign business records admitted pursuant to § 3505 are not subject to the  
10 Confrontation Clause requirements of *Crawford v. Washington*, 541 U.S. 36 (2004), and are sufficiently  
11 reliable and part of a “firmly rooted” hearsay exception to satisfy *Ohio v. Roberts*, 448 U.S. 56 (1980).  
12 *Hagege*, 437 F.3d at 958.

13 The records at issue here – records of Colton’s accounts at CaixaBank and Credit Agricole, his  
14 purchase of a Peugeot, and his purchase of the Chateau – are each accompanied by a certification from  
15 a qualified custodian. These certifications will be offered into evidence at the time the underlying  
16 documents are moved into evidence. Colton was notified in writing in November 2007 of the  
17 government’s intention to rely on § 3505 certifications to admit these records.

18 D. USE OF FOREIGN PUBLIC RECORDS AND ACKNOWLEDGED DOCUMENTS

19 The government may seek to introduce records from public agencies in France concerning  
20 Colton’s ownership of the Chateau, his payment of fees and taxes on the Chateau, and his ownership  
21 of a Peugeot automobile. Such records, if offered, will be admissible over any authentication or hearsay  
22 objections by Colton.

23 Foreign public documents are deemed authentic if under Fed. R. Evid. 902(3) if “executed or  
24 attested in an official capacity by a person authorized by the laws of a foreign country to make the  
25 execution or attestation, and accompanied by a final certification as to the genuineness of the signature  
26 and official position (A) of the executing or attesting person, or (B) of any foreign official whose  
27 certificate of genuineness of signature and official position relates to the execution or attestation in a  
28 chain of certificates of genuineness of signature and official position relating to the execution or



1 attestation.” Fed. R. Evid. 902(3). Even if a final certification is not available, a court may still treat  
2 such documents as presumptively authentic if good cause has been shown, and a “reasonable  
3 opportunity had been given to all parties to investigate the authenticity and accuracy of official  
4 documents.” See *United States v. Chung Kong Yin*, 935 F.2d 990, 994-95 (9th Cir. 1991).

5 Documents that are acknowledged by a notary public “or other officer authorized by law to take  
6 acknowledgments” are self-authenticating. Fed. R. Evid. 902(8); *United States v. M’Biye*, 655 F.2d  
7 1240, 1242 (D.C. Cir. 1981) (notarized affidavit); *United States v. Estate of Oxarango*, 2008 WL  
8 5411719, \*4 (D. Idaho Dec. 24, 2008) (recorded mortgages and promissory notes). Many of the  
9 documents provided by French authorities are notarized or acknowledged by French judicial officers  
10 authorized by law to take such acknowledgments.

11 Public records are not hearsay so long as they are “[r]ecords, reports, statements, or data  
12 compilations, in any form, of public offices or agencies, setting forth . . .the activities of the office or  
13 agency . . . .” Fed. R. Evid. 803(8). Each of the public records to be offered into evidence contain  
14 records and data compilations concerning the activities of the appropriate public office – e.g., the  
15 Ministry of the Economy, Finances and Industry has provided records of taxes owed by Colton on the  
16 Chateau, and the Office of the Mayor of Hommes has provided records demonstrating Colton’s  
17 ownership of the Chateau. Therefore, each of these public records fit within an exception to the rule  
18 against hearsay.<sup>1/</sup>

19 E. USE OF RESIDUAL HEARSAY EXCEPTION

20 The previous owners of the Chateau (as listed on the sales contract with Colton) were Joseph  
21 Jacques Bouchard and his wife Marie Marcelle Carole Maranda. The couple authored a French  
22 language book about their lives at the Chateau, with photographs of many interior rooms and unique  
23 features of the castle. The government may seek to introduce this self-authenticating book and its  
24 contents under the residual hearsay exception, Fed. R. Evid. 807. The government has notified Colton  
25

26 \_\_\_\_\_  
27 <sup>1/</sup> Records from France concerning the Chateau may be admissible under several theories. For  
28 example, the purchase contract signed by Colton is admissible under Fed. R. Evid. 801(d)(2) because  
it was signed and adopted by Colton, and under Fed. R. Evid. 803(14) because it is a record of a  
document affecting an interest in property.

1 of this book (which it only recently acquired), and advised him in writing that it may seek to rely on  
2 Rule 807 to overcome any hearsay objection.

3 F. TRANSLATIONS

4 Many of the documents relating to Colton's French assets (including documents written and  
5 signed by Colton) are written in the French language. The government has provided Colton with  
6 certified translations of these documents. However, to date, Colton has refused to stipulate to the  
7 accuracy of these translations. Accordingly, the government may be required to call the French  
8 language specialist (Christian Degueudre) who translated the documents to establish their authenticity  
9 and accuracy for the jury. Mr. Degueudre's substantial qualifications have been provided to Colton.

10 G. EXPERT TESTIMONY

11 The government may call Mary Testerman DuVoisin, a Trial Attorney with the United States  
12 Trustee's Office, as an expert witness to provide background in the area of bankruptcy. Ms. Testerman  
13 DuVoisin's qualifications and anticipated testimony has been provided to Colton, as required by Fed.  
14 R. Crim. P. 16.

15 Other witnesses will necessarily testify about the bankruptcy process in order to explain what  
16 they did and why they did it. For example, as counsel for Trustee Kipperman, Peter Duncan was  
17 engaged to determine if assets were available to satisfy Colton's estate. In order to do so, Duncan had  
18 to analyze Colton's possible equitable and marital property interests in 59 Asilomar Road, in addition  
19 to other assets. While Duncan will not offer "expert opinions" as to whether Colton in fact owned or  
20 did not own certain assets, he will be asked why he inquired into certain areas during his Rule 2004  
21 examination of Colton. This testimony will be relevant to prove the materiality of Colton's falsehoods,  
22 and their potential impact on his bankruptcy. While the government does not believe such testimony  
23 falls under Fed. R. Evid. 702, out of an abundance of caution, it has provided Colton with written notice  
24 of Duncan and Stevenson's qualifications and anticipated testimony.

25 V

26 WITNESSES

27 The government may call the following individuals as witnesses in its case-in-chief at trial, but  
28 reserves the right to call additional witnesses during its case-in-chief or in rebuttal:

- 1 1. Paulette Ancharoff
- 2 2. Roy Carlson
- 3 3. Jessica Colton
- 4 4. Christopher Colton
- 5 5. Glen Dean
- 6 6. Christian Degueldre
- 7 7. Jacques Dessoles
- 8 8. Peter Duncan
- 9 9. Mary Testerman DuVoisin
- 10 10. Pierre Gravel
- 11 11. Teresa Hardke
- 12 12. Phillip Hatch
- 13 13. John Hause
- 14 14. Jean-Francois Lefay
- 15 15. Robert Love
- 16 16. Kathleen Love
- 17 17. David Oleksow
- 18 18. Michael Peters
- 19 19. Donald Pelgrim
- 20 20. Aaron Rich
- 21 21. Susan Stevenson
- 22 22. Armand Vallette
- 23 23. Philippe Vidoni
- 24 24. Jeannette Leon Vittorio
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**VI**

**EXHIBITS**

Under separate cover, the government is providing Colton with a draft exhibit list and copies of its anticipated exhibits. On the morning of trial, the government will provide Colton and the Court with a final exhibit list, and will provide the Court with copies of its anticipated exhibits.

**VII**

**VOIR DIRE**

In addition to the Court’s standard questions to the venire, the government requests that the Court consider inquiring of the panel in the following areas:

1. Has anyone been involved in the bankruptcy process, either as a debtor, a creditor, or in some other capacity?
2. Has anyone had any experiences with agents from the Federal Bureau of Investigation that would make it difficult for you to sit as an impartial juror in this case?
3. Has anyone had experiences with the United States Trustee’s Office that would make it difficult for you to sit as an impartial juror in this case?
4. Does anyone have any training or experience in the law, and particularly in the area of bankruptcy law?
5. Some of the evidence you may see in this case comes from France. Does anyone speak or read French? Would you be able to put aside what you know about the French language, and accept what the court-certified French translator says is the English translation of any testimony or evidence in the French language?
6. Has anyone had any particularly positive or negative experiences with the Internal Revenue Service or the California Franchise Tax Board?
7. Does anyone have any training or experience in the area of estate planning, such as wills and trusts?

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1           The government respectfully requests permission from the Court to personally address the venire  
2 and ask follow-up questions.

3           DATE: January 14, 2009

Respectfully submitted,

4           KAREN P. HEWITT  
5           United States Attorney

6           /s/ Eric J. Beste  
7           ERIC J. BESTE  
8           Assistant U.S. Attorney

9           /s/ Valerie H. Chu  
10           VALERIE H. CHU  
11           Assistant U.S. Attorney

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Criminal Case No. 06CR2252-W
	)	
Plaintiff,	)	
v.	)	CERTIFICATE OF SERVICE
	)	
ROLAND C. COLTON,	)	
	)	
Defendant.	)	
	)	
_____	)	

IT IS HEREBY CERTIFIED THAT:

I, Eric J. Beste, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the GOVERNMENT’S TRIAL MEMORANDUM on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

Roland C. Colton, rcc7@msn.com

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 14, 2009

s/ Eric J. Beste  
ERIC J. BESTE