

1 PETER C. ANDERSON
UNITED STATES TRUSTEE
2 JILL M. STURTEVANT (State Bar No. 089395)
ASSISTANT UNITED STATES TRUSTEE
3 HATTY YIP (State Bar No. 246487)
TRIAL ATTORNEY
4 OFFICE OF THE UNITED STATES TRUSTEE
725 S. Figueroa Street, Suite 2600
5 Los Angeles, CA 90017
Phone (213) 894-1507
6 Fax (213) 894-2603
Email: hatty.yip@usdoj.gov
7
8

9 **UNITED STATES BANKRUPTCY COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **LOS ANGELES DIVISION**

12 In re:) Case No. 2:11-bk-17831-TD
13)
14 **GENE DOUGLAS BALAS and CARLOS**) Chapter 13
A. MORALES,) **MOTION FOR LEAVE TO APPEAL**
15)
16)
17 Debtor(s).)
18)
19)
20)
21

22 **I. INTRODUCTION**

23 The United States Trustee seeks to appeal the United States Bankruptcy Court’s
24 Memorandum of Decision and Order denying the United States Trustee’s Motion to Dismiss
25 pursuant to 11 U.S.C. § 1307(c) or for Related Relief (“Memorandum of Decision”), and the Order
26 overruling the United States Trustee’s objection to confirmation of plan (“Order Overruling
27 Objection”). The appeal presents the issue of the constitutionality of Section 3 of the Defense of
28 Marriage Act (“DOMA”), 1 U.S.C. § 7. Although the Attorney General and the President have

1 concluded that Section 3 of DOMA, as applied to legally married, same-sex couples, is subject to
2 heightened constitutional scrutiny and is unconstitutional under that standard, the President has
3 instructed that Executive departments and agencies continue to comply with Section 3 unless and
4 until it is repealed by Congress or there is a definitive ruling by the Judicial Branch that Section 3
5 is unconstitutional. The United States Trustee moved to dismiss the debtors' petition and notified
6 the Bipartisan Legal Advisory Committee ("BLAG") of the pendency of the litigation in the event
7 that Congress chose to participate. Justice is interested in providing Congress a full and fair
8 opportunity to participate in this and other cases in which a challenge to the constitutionality of
9 Section 3 may be presented. Accordingly, although Congress elected not to participate in the
10 proceedings before the Bankruptcy Court, the United States Trustee has timely filed a Notice of
11 Appeal so that the Bankruptcy Court's ruling that an act of Congress is unconstitutional may be
12 reviewed in this Court.

13 The Court may and should find that the orders on appeal are final and appealable under 28
14 U.S.C. § 158(a)(1) under a pragmatic approach to finality that applies in bankruptcy. Alternatively,
15 if the Court determines that the Memorandum of Decision and Order Overruling Objection are
16 interlocutory, the United States Trustee respectfully requests leave to appeal pursuant to FRBP 8001,
17 FRBP 8003, and 28 U.S.C. § 158(a)(3).

18 **II. STATEMENT OF FACTS**

19 1. On April 15, 2011, the United States Trustee filed a Motion to Dismiss pursuant to
20 11 U.S.C. § 1307(c) or for Related Relief (hereinafter "Motion to Dismiss"), alleging that Debtors
21 are not eligible to file a joint petition.

22 2. On April 27, 2011, Debtors Gene Douglas Balas and Carlos A. Morales ("Debtors")
23 filed an Opposition to the Motion to Dismiss, arguing that DOMA is unconstitutional.

24 3. A hearing was held on the Motion to Dismiss on May 17, 2011.

25 4. On June 7, 2011, Debtors filed a Reply Brief.

26 5. A continued hearing was held on the Motion to Dismiss on June 13, 2011.

27 6. On June 13, 2011, the Court issued a Memorandum of Decision, finding DOMA to
28

1 be unconstitutional and denying the Motion to Dismiss.

2 7. On June 20, 2011, the Court issued an Order overruling the United States Trustee's
3 objection to confirmation of plan.

4 **III. STATEMENT OF QUESTIONS PRESENTED AND RELIEF SOUGHT**

5 The United States raises the following issues on appeal:

- 6 a. Did the Bankruptcy Court err in denying the United States Trustee's Motion to
7 Dismiss the Case or in overruling the United States Trustee's Objection to
8 Confirmation of Plan?
- 9 b. Did the Bankruptcy Court err in concluding that Section 3 of the Defense of Marriage
10 Act, 1 U.S.C. § 7, did not require the dismissal under 11 U.S.C. § 1307(c) of
11 Debtors' joint bankruptcy petition?
- 12 c. Did the Bankruptcy Court err in concluding that Section 3 of the Defense of Marriage
13 Act, 1 U.S.C. § 7, is unconstitutional under the equal protection component of the
14 Fifth Amendment's Due Process Clause?

15 The United States Trustee also requests that the Memorandum of Decision and denial of the
16 Motion to Dismiss be reversed.

17 **IV. STATEMENT OF REASONS WHY AN APPEAL SHOULD BE GRANTED**

18 Federal district courts are vested with jurisdiction to hear appeals from bankruptcy court
19 decisions by 28 U.S.C. § 158(a).

20 **A. The Memorandum of Decision and Order Overruling Objection are Final
21 Orders Appealable by Right.**

22 A final order may be appealed as a matter of right under 28 U.S.C. § 158(a)(1). The Ninth
23 Circuit has developed a 'pragmatic approach' to deciding whether orders in bankruptcy cases are
24 final.¹ The following four factors are considered: "(1) the need to avoid piecemeal litigation; (2)

25 _____
26 ¹See *United States Dep't of Labor v. Grayson (In re Grayson)*, 125 F. Appx. 784, 786, 2005
27 WL 434462, *1 (9th Cir. 2005); *Lundell v. Anchor Constr. Specialists, Inc.*, 223 F.3d 1035, 1038
28 (9th Cir. 2000). *But see Dunkley v. Rega Props., Ltd. (In re Rega Props., Ltd.)*, 894 F.2d 1136,

1 judicial efficiency; (3) systemic interest in preserving the bankruptcy court's role as the finder of
2 fact; and (4) whether delaying review would cause either party irreparable harm."² Taking these
3 factors into consideration, review of the Memorandum of Decision and Order Overruling Objection
4 avoids delay and piecemeal litigation, preserves the bankruptcy court's role as finder of fact as
5 constitutional legal issues were raised, and is most practical at the present time. Therefore, the Court
6 should determine that the Memorandum of Decision and Order Overruling Objection are final,
7 appealable orders.

8 **B. Alternatively, the Memorandum of Decision and Order Overruling Objection**
9 **are Appealable Interlocutory Orders.**

10 Even if the Court determines that the Memorandum of Decision and Order Overruling
11 Objection are not final orders, interlocutory orders are appealable with leave of court pursuant to 28
12 U.S.C. § 158(a)(3). Rule 8003(a) governs the procedure for leave to appeal. "Granting leave is
13 appropriate if the order involves a controlling question of law where there is substantial ground for
14 difference of opinion and when the appeal is in the interest of judicial economy because an
15 immediate appeal may materially advance the ultimate termination of the litigation."³ Because the
16 Memorandum of Decision and Order Overruling Objection involve controlling questions of law, the
17 Court should exercise its discretion to grant leave to appeal and accept jurisdiction in this case.

18 **V. CONCLUSION**

19 For the reasons stated herein, in the event that the Court determines that the Memorandum
20 of Decision and Order Overruling Objection are interlocutory orders, the United States Trustee
21 respectfully requests that leave to appeal be granted. Accordingly, the United States Trustee should
22 be afforded an appeal of the Memorandum of Decision and Order Overruling Objection as
23

24 1138-39 (9th Cir. 1990) ("an order denying a motion to dismiss a debtor's petition is not final");
25 *Allen v. Old Nat'l Bank of Wash. (In re Allen)*, 896 F.2d 416, 418 (9th Cir. 1990).

26 ²*Lundell v. Anchor Constr. Specialists, Inc.*, 223 F.3d at 1038.

27 ³*See In re Kashani*, 190 B.R. 875, 883 (9th B.A.P. 1995).

1 appealable final orders or as appealable interlocutory orders.

2 DATED: June 27, 2011

Respectfully submitted,

3 PETER C. ANDERSON
4 UNITED STATES TRUSTEE

5 
6 By: JILL M. STURTEVANT
Assistant United States Trustee

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28