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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Gene Douglas Balas and Carlos A. Morales, Debtors.	Case No.: 2:11-bk-17831-TD Chapter 13 **DEBTORS' RESPONSE TO THE UNITED STATES TRUSTEE'S MOTION TO DISMISS BANKRUPTCY APPEAL PURSUANT TO FRBP 8001(c)**

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RESPONSE

As the Court is well aware, the House Bipartisan Legal Advisory Group ("BLAG") has declined every invitation to appear in this bankruptcy case and defend the indefensible – application of section 3 of the federal Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sep. 21, 1996), *codified in pertinent part at* 1 U.S.C. § 7 ("DOMA"), to require the dismissal of joint bankruptcy petitions filed by lawfully married same-sex spouses. *See, e.g.*, *Debtors' Reply Brief* [Docket No. 46], filed June 7, 2011 (detailing the ample notice and opportunity to be heard afforded to BLAG in this particular case, and noting that BLAG has declined to intervene in any other bankruptcy cases around the country). Indeed, this Court's path-marking *Memorandum of Decision* [Docket No. 47], filed June 13, 2011, specifically noted that BLAG requested and received a last-minute continuance, yet still failed to appear and make any argument in support of DOMA's constitutionality. News reports following the Court's ruling finally offered an explanation for BLAG's non-engagement in this and other bankruptcy cases:

> A spokesman for [Speaker of the House John] Boehner, Brendan Buck, said the ruling would not be appealed.
>
> "Bankruptcy cases are unlikely to provide the path to the Supreme Court, where we imagine the question of constitutionality will ultimately be decided," Mr. Buck said. "Obviously, we believe the statute is constitutional in all its applications, including bankruptcy, but effectively defending it does not require the House to intervene in every case, especially when doing so would be prohibitively expensive."

John Schwartz, *A California Bankruptcy Court Rejects U.S. Law Barring Same-Sex Marriage*, N.Y. TIMES (June 15, 2011) at A18.[1]

Notwithstanding BLAG's professed disinterest in bankruptcy cases, the Department of Justice continued to offer BLAG the opportunity to defend DOMA by, among other things, taking an appeal in this case. *See Notice of Appeal* [Docket No. 50], filed June 27, 2011; *see also Motion for Leave to Appeal* [Docket No. 53], filed June 27, 2011 (explaining

[1] *But see* KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT (LexisNexis 2009) (examining hundreds of bankruptcy decisions issued by the U.S. Supreme Court from 1898 to 2008).

that "Justice is interested in providing Congress a full and fair opportunity to participate in this and other cases in which a challenge to the constitutionality of [DOMA] may be presented," so "although Congress elected not to participate in the proceedings before the Bankruptcy Court, the United States Trustee has timely filed a Notice of Appeal so that the Bankruptcy Court's ruling that an act of Congress is unconstitutional may be reviewed in this Court.").

The Debtors agreed that a definitive ruling on the constitutionality of applying DOMA in the bankruptcy context was necessary, and therefore elected not to oppose the United States Trustee's motion for leave to appeal, *see Notice of Non-Opposition* [Docket No. 59], filed June 30, 2011, and further asked this Court to certify the United States Trustee's appeal directly to the Ninth Circuit, *see Debtors' Request for Certification of Direct Appeal to the U.S. Court of Appeals for the Ninth Circuit* [Docket No. 56], filed June 30, 2011. The Debtors therefore supported appellate review of this Court's ruling (notwithstanding the possibility that appeal could lead to reversal) because judges, trustees, practitioners, debtors, creditors, and other interested parties need clear guidance – one way or the other – on the critically important question of whether legally married same-sex couples are entitled to the same rights and obligations under section 302(a) of the Bankruptcy Code as legally married opposite-sex couples. *Cf. In re Cooper Commons LLC*, 512 F.3d 533, 534 (9th Cir. 2008) (noting that "[b]ankruptcy is an intensely practical affair," such that clear, settled rules "animate and guide the law within the statutory framework set by the Bankruptcy Code").

The United States Trustee now seeks dismissal of the appeal, *see Motion to Dismiss* [Docket No. 61], filed July 6, 2011, stating that the decision to abandon appellate review of this Court's ruling came about when BLAG notified the Department of Justice "that it does not intend to appear to present arguments in support of Section 3 of DOMA," and that as a result, "the United States Trustee has determined that it is not a necessary or appropriate expenditure of the resources of this Court and the parties to continue to litigate the appeal." The motion to dismiss correctly states that the Debtors were asked to stipulate to the

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dismissal of the appeal, but declined. As the Debtors explained to the United States Trustee in declining to so stipulate, absent indication that dismissal of the appeal in this particular bankruptcy case was part of a larger shift in policy by which no further challenges would be brought under DOMA to joint bankruptcy cases filed by legally married same-sex couples, the Debtors believed that the appeal should proceed so that definitive appellate guidance could be provided.

It is now clear that the Department of Justice has, in fact, changed its policy with respect to joint bankruptcy cases filed by legally married same-sex couples:

> Following consultation with the House Bipartisan Legal Advisory Group (BLAG), the U.S. Trustee asked to withdraw its appeal in its challenge to the attempted joint bankruptcy petition filed by Gene Douglas Balas and Carlos Morales, a married gay couple who live in California – a move a Department of Justice spokeswoman says represents the DOJ's new policy on all such bankruptcy filings.
>
> DOJ spokeswoman Tracy Schmaler wrote to *Metro Weekly* that the July 6 filing in the Balas and Morales case represents a new policy, writing, "The Department of Justice has informed bankruptcy courts that it will no longer seek dismissal of bankruptcy petitions filed jointly by same-sex debtors who are married under state law."
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> * * *
>
> About the department-wide policy, Schmaler wrote to *Metro Weekly* that the decision was made after consulting with the BLAG [and] went on to note, "This decision is consistent with and follows the Administration's notification to Congress in February of this year that it would no longer defend the constitutionality of Section 3 of DOMA as applied to legally married same-sex couples but would seek to provide Congress an opportunity to enter litigation to argue in favor of DOMA's constitutionality. This decision to stop filing motions to dismiss bankruptcy petitions avoids generating costly and time-consuming constitutional litigation that neither the BLAG nor the Department plans to defend."

Chris Geidner, *U.S. Trustee Withdraws Appeal of Gay Couple's Bankruptcy Court DOMA Victory*, METRO WEEKLY (July 7, 2011). The Department of Justice's change in policy is further confirmed by filings made in the last several days in other joint bankruptcy cases filed by same-sex couples in this Court and around the country. *See, e.g.*, *Notice of Voluntary Dismissal/Withdrawal by United States Trustee of Motion to Dismiss* [Docket No. 19], *In re Fox & Kiddoo*, Case No. 8:11-bk-11684-MW (Bankr. C.D. Cal., July 1, 2011); *Stipulation for Voluntary Dismissal of Appeal*, *In re Somers & Caggiano*, Case No. 7:11-cv-04257 (S.D.N.Y., July 8, 2011).

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In view of the Department of Justice's decision to no longer seek dismissal of joint bankruptcy cases filed by lawfully married same-sex couples anywhere in the country (a decision apparently prompted by BLAG's repeated refusal to appear and defend DOMA in the bankruptcy context), this Court's landmark June 13, 2011 opinion will now be given nationwide effect. Accordingly, the Debtors are pleased to report that they have no objection to the dismissal of the United States Trustee's appeal.

Dated: July 8, 2011

KLEE, TUCHIN, BOGDANOFF & STERN LLP

/s/ Robert J. Pfister

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In re: Gene Douglas Balas and Carlos A. Morales Debtor(s).	CHAPTER 13 CASE NUMBER 2:11-bk-17831-TD

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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
1999 Avenue of the Stars, Thirty-Ninth Floor
Los Angeles, CA 90067

A true and correct copy of the foregoing document described as DEBTORS' RESPONSE TO THE UNITED STATES TRUSTEE'S MOTION TO DISMISS BANKRUPTCY APPEAL PURSUANT TO FRBP 8001(c) will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d), and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On July 8, 2011 I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the e-mail address indicated below:

SEE ATTACHED SERVICE LIST

☒ Service Information continued on attached page.

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served): On _____ I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follow. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

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III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P.5 and/or controlling LBR, on July 8, 2011 I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method) by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Via Personal Delivery
The Honorable Thomas B. Donovan
U.S. Bankruptcy Court
Roybal Federal Building
255 E. Temple Street, Suite 1352
Los Angeles, CA 90012-3332

Via Personal Delivery
Office of the United States Trustee
Attn: Peter C. Anderson
725 S. Figueroa Street, Suite 2600
Los Angeles, CA 90017

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

July 8, 2011	Robert J. Pfister	/s/ Robert J. Pfister
Date	*Type Name*	*Signature*

In re: Gene Douglas Balas and Carlos A. Morales Debtor(s).	CHAPTER 13 CASE NUMBER 2:11-bk-17831-TD

ADDITIONAL SERVICE INFORMATION (if needed):

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