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12
13 **UNITED STATES BANKRUPTCY COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**
15 **LOS ANGELES DIVISION**
16

17 In re:
18 Gene Douglas Balas and Carlos A. Morales,
19 Debtors.

Case No.: 2:11-bk-17831-AA
Chapter 13

20 **DEBTORS' REPLY BRIEF**

21 Date: June 13, 2011
22 Time: 2:00 p.m.
23 Place: Courtroom 1345
Roybal Federal Building
255 East Temple Street
24 Los Angeles, California 90012

REPLY

1
2 There is a doctrine in civil procedure to the effect that a party’s deliberate failure to
3 respond “is equated with an admission that the [non-responding] party has no meritorious
4 claim” *Karlsson v. Ford Motor Co.*, 45 Cal. Rptr. 3d 265, 278-79 (Cal. App. 2006); *see*
5 *also Kahn v. Kahn*, 137 Cal. Rptr. 332, 337 (Cal. App. 1977) (“a persistent refusal to comply
6 with an order for the production of evidence is tantamount to an admission that the
7 disobedient party really has no meritorious claim or defense to the action”). While that rule
8 operates in a different context (discovery) in a different judicial forum (the California state
9 court system), the general principle is instructive here, where the House Bipartisan Legal
10 Advisory Group (“BLAG”) has had more than ample opportunity to be heard in this Court
11 on the constitutionality of DOMA,¹ yet has failed to appear and defend this indefensible law:

- 12 • On May 17, 2011, at a duly-noticed hearing on a motion filed more than a month
13 before, BLAG asked the United States Trustee via e-mail an hour before the
14 hearing “to come here today to request a brief continuance, so that it can
15 determine whether to intervene in this case, in order [to present] its arguments on
16 the constitutional issues the Debtors have raised.” Transcript [Docket No. 45]
17 (“Tr.”) at 3:17-22.
- 18 • As the United States Trustee noted in making this unprecedented entreaty by a
19 non-party, BLAG’s last-minute request to continue did not comply with this
20 Court’s rules, which “call for a written motion to continu[e] filed at least three
21 days before the hearing.” Tr. at 4:3-5; *see* LBR 9013-1(m) (further providing that
22 any motion for a continuance “must set forth in detail the reasons for the
23 continuance . . . and be supported by the declaration of a competent witness
24 attesting to the necessity for the continuance”).
- 25 • Moreover, as the Debtors noted at the hearing in response to the Court’s inquiry,
26

27 ¹ Capitalized terms not otherwise defined have the meanings ascribed in the Debtors’ Opposition
28 and Response [Docket No. 35], filed April 27, 2011. For ease of reference, the attachments to
this Reply (Tab F and Tab G) continue sequentially from the Opposition and Response.

1 BLAG indisputably knew of the DOMA issue in this Bankruptcy Case since at
2 least May 4. *See* Tr. 9:5-11 (describing the declaration submitted by the General
3 Counsel of the House of Representatives in *Golinski*, another DOMA matter,
4 which identified this Bankruptcy Case by name as one in which “the statute will
5 be undefended unless the Bipartisan Legal Advisory Group intervenes.”).²

- 6 • Notwithstanding the procedural irregularity of BLAG’s request, the Debtors
7 consented to a brief continuance, and the Court entered its *Order Continuing*
8 *Hearing on the United States Trustee’s Motion to Dismiss and Setting Deadline*
9 *for Any Pleadings or Other Filings* [Docket No. 43], which provided: “Any
10 agency or instrumentality of the United States Government that wishes to be heard
11 on the merits of the Motion to Dismiss or the Opposition must file its merits brief
12 on or before May 31, 2011.” Notably, this deadline was *twice as long* as the one-
13 week continuance BLAG requested. *Cf.* Tr. at 13:10-12 (giving BLAG until May
14 31 to respond means that “then there can be no excuses” for further delay).
- 15 • On May 31, 2011, BLAG filed nothing: no merits brief, no motion for extension
16 of time, and not even an explanation for why BLAG inconvenienced the Court, the
17 parties and a courtroom full of observers³ with a nearly one-month delay, for no
18 apparent purpose.

19 Tellingly, BLAG has taken a similar tack in two other pending bankruptcy cases that
20 implicate DOMA, both of which are chapter 7 proceedings.⁴ In both, the courts denied
21 motions to dismiss the joint petitions pursuant to DOMA, but declined to reach the
22

23 ² Specifically, the Debtors were referring to the *Declaration of Kerry W. Kircher in Support of*
24 *Defendant’s Motion to Enlarge Time to Respond to Plaintiff’s Second Amended Complaint*,
Docket No. 119 in *Golinski v. U.S. Office of Pers. Mgmt.*, No. 10-257 (N.D. Cal., May 4, 2011).

25 ³ As the Court noted on the record, “[t]here are a lot of people in the courtroom.” Tr. at 10:20-21.

26 ⁴ As set out in the Kircher Declaration, *see supra* note 2, BLAG has identified ten active cases in
27 which DOMA is at issue: five general civil matters (taxation, government benefits and the like),
28 two immigration proceedings, and three bankruptcy matters (including this Bankruptcy Case).
As of the date of this Reply, BLAG has filed motions to intervene in all of the civil and
immigration cases, but not any of the bankruptcy cases. The Debtors are unaware of any reason
for BLAG’s failure to engage in the bankruptcy cases.

1 constitutional of the statute given the lack of briefing by BLAG. *See Memorandum*
2 *Decision Denying Motion to Dismiss*, Docket No. 31 in *In re Somers & Caggiano*, No. 10-
3 38296 (Bankr. S.D.N.Y., May 4, 2011) (Morris, J.) (attached hereto as **Tab F**) (“The Court
4 will not conduct its own constitutional analysis of [DOMA] since the issue . . . has not been
5 briefed by the parties.”); *Civil Minutes*, Docket No. 44 in *In re Ziviello-Howell*, No. 11-
6 22706 (Bankr. E.D. Cal., May 31, 2011) (McManus, J.) (attached hereto as **Tab G**)
7 (adopting essentially the same reasoning, “[w]ithout reaching DOMA’s constitutionality”).
8 Yet notwithstanding the indisputable procedural default by BLAG, the U.S. Trustee filed a
9 notice of appeal in *Somers & Caggiano*, and apparently will do the same in *Ziviello-Howell*.⁵

10 Whatever the reason for BLAG’s default in *Somers & Caggiano* and *Ziviello-Howell*,
11 there can be no question that BLAG has had more than ample opportunity to appear and be
12 heard in this Bankruptcy Case, yet chose (perhaps strategically) to remain silent. Like the
13 proverbial “dog that didn’t bark,” BLAG’s silence is significant: it betrays the lack of any
14 compelling argument that DOMA is constitutional.⁶ The Debtors respectfully submit that

15 _____
16 ⁵ The United States Trustee’s *Designation of Record on Appeal* [Docket No. 37 in *Somers &*
17 *Caggiano*] specifically states that, “at the request of [BLAG], Appellant has included the
18 constitutionality of [DOMA] and the bankruptcy court’s refusal to dismiss the petition on the
19 basis of [DOMA] as issues on appeal.”

20 ⁶ Indeed, last week in *Golinski* (a civil DOMA case before Judge White in San Francisco), BLAG
21 filed its first merits brief attempting to defend the constitutionality of DOMA since the Attorney
22 General’s announcement that the United States will no longer defend the law. *See Motion to*
23 *Dismiss Plaintiff’s Second Amended Complaint*, Docket No. 119 in *Golinski v. U.S. Office of*
24 *Pers. Mgmt.*, No. 10-257 (N.D. Cal., June 3, 2011).

25 Without endeavoring a point-by-point refutation of a brief filed in another case, suffice it to say
26 that BLAG’s argument that DOMA is constitutional (that is, the argument BLAG refuses to
27 bring before this Court) is premised on a *non sequitur*: starting from the proposition that
28 marriage equality is not a right protected by the federal constitution, BLAG skips to the
conclusion that the federal government may therefore deny recognition of otherwise valid same-
sex marriages with impunity. But that conclusion does not follow from its premise. There may
be, for example, no fundamental federal constitutional right to get married on a Tuesday – but
that does not mean that the federal government could unjustifiably refuse to recognize any
otherwise valid marriage on the ground that it was entered into on a particular day of the week.
One of DOMA’s constitutional infirmities (in addition to many others) is that it treats differently
couples who are similarly circumstanced in all pertinent respects (those lawfully married under
state law), with no *constitutionally legitimate* justification for the distinction drawn. And even
beyond this fundamental flaw, BLAG’s defense of DOMA is rife with other errors, including

1 BLAG's deliberate silence should not dissuade this Court from squarely addressing the
2 constitutional issue that has been fully briefed in this case.

3
4 Dated: June 7, 2011

KLEE, TUCHIN, BOGDANOFF & STERN LLP

5
6 /s/ Robert J. Pfister

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24 that it (i) relegates discussion of the plaintiff's sex discrimination claim to a conclusory footnote
25 that fails to engage the Supreme Court's well-settled gender discrimination case law;
26 (ii) incorrectly asserts that the proper level of scrutiny for classifications based on sexual
27 orientation is settled law in the Ninth Circuit; and (iii) dismisses all due process challenges to
28 DOMA in an inapposite footnote, without addressing contrary controlling decisions of the Ninth
Circuit.

In short, the attempt by very skilled lawyers (including a former Solicitor General of the United States) to defend DOMA in *Golinski* only confirms that the statute is, indeed, indefensible – as the President and the Attorney General concluded in February.

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

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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:

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A true and correct copy of the foregoing document described as DEBTORS' REPLY BRIEF 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 June 7, 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:

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II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):

On June 7, 2011 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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The Honorable Thomas B. Donovan
U.S. Bankruptcy Court
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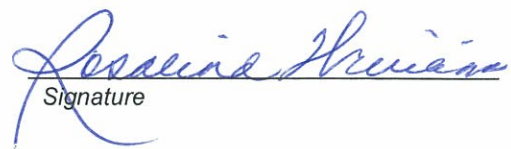
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Service Information continued on attached page.

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

June 7, 2011
Date

Rosalind Williams
Type Name


Signature

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