

1 JAMES L. LOPES (No. 63678)
JEFFREY L. SCHAFFER (No. 91404)
2 AMY E. MARGOLIN (No. 168192)
CEIDE ZAPPARONI (No. 200708)
3 HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
4 A Professional Corporation
Three Embarcadero Center, 7th Floor
5 San Francisco, California 94111-4065
Telephone: 415/434-1600
6 Facsimile: 415/217-5910
7 Attorneys for Appellant, Cross-Appellee, Debtor and
Debtor in Possession PACIFIC GAS AND ELECTRIC
8 COMPANY

9 – and –

10 Attorneys for Appellant and Cross-Appellee PG&E
CORPORATION
11 *listed on attached Counsel Page*

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15
HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 In re
17 PACIFIC GAS AND ELECTRIC COMPANY,
18 Appellant, Cross-
19 Appellee, Debtor and
Debtor in Possession
20
21 Federal I.D. No. 94-0742640

No. C 02-01550 VRW
(Bankruptcy Case No. 01-30923 DM)
Chapter 11 Case
Date: June 13, 2002
Time: 2:00 p.m.
Courtroom: No. 6

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24 APPELLANTS' OPPOSITION TO MOTION TO DISMISS APPEAL
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Additional Counsel Page

PROFESSOR LAURENCE H. TRIBE
Pro Hac Vice
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4621

Co-Counsel to PG&E CORPORATION for
Constitutional Law Matters

MICHAEL P. KESSLER
OSCAR R. CANTU
Pro Hac Vice
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000

Attorneys for PG&E CORPORATION

ALAN S. GOVER
Pro Hac Vice
DEWEY BALLANTINE LLP
Two Houston Center
909 Fannin Street, Suite 1100
Houston, Texas 77010
Telephone: (713) 576-1500

Attorneys for PG&E CORPORATION

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN

A Professional Corporation

1 **INTRODUCTION**

2 Appellees’ technical procedural “gotcha,” and doomsday predictions about the dangers that
3 will befall the courts and the parties to this reorganization if this appeal is permitted to proceed, have
4 no basis in law or fact.

5 To begin with, their position that the separate judgment requirement of Rule 58 has not been
6 complied with is wrong. For even if the Bankruptcy Court’s Order did not fully satisfy Rule 58 (and
7 it does), Supreme Court precedent and its Ninth Circuit progeny—which Appellees ignore—teach
8 that a technical failure to comply with Rule 58 cannot defeat appellate jurisdiction where there is no
9 prejudice to anyone. And here, there is none. Appellees’ hyper-technical argument elevates form
10 over substance and could only result in a waste of judicial resources and improper delay.

11 The remainder of their arguments simply fail to come to grips with Ninth Circuit precedent
12 indicating that appellate jurisdiction properly lies pursuant to 28 U.S.C. Section 158(a)(1). The
13 purely legal express preemption claim under Section 1123(a)(5) of the Bankruptcy Code at issue in
14 this appeal was *the* central legal avenue to obtain confirmation, over Appellees’ objection, of the
15 plan of reorganization jointly propounded by Pacific Gas and Electric Company and its parent,
16 PG&E Corporation (collectively “Proponents”), which now is headed for confirmation hearings
17 sometime this fall in tandem with Appellees’ competing plan of reorganization. A timely, final
18 adjudication of Proponents’ Section 1123(a)(5) claim by the appellate courts, if in Proponents’
19 favor, could well eliminate the need to press ahead with the time-consuming, expensive and
20 complex issues of implied preemption as defined by the Bankruptcy Court below (including through
21 post-confirmation appeals). And that, far from creating a risk of inefficiency and wasted effort,
22 would be of tremendous benefit to the parties and the courts, not to mention the many constituencies
23 affected by this reorganization. Simply put, the sooner the appellate courts begin to grapple with the
24 disaggregation contemplated by Proponents’ plan, the better for everyone. Moreover, the appellate
25 courts will never have to revisit the same ground if this appeal is permitted to go forward. For under
26 the standard announced by the Bankruptcy Court, the alternate claim remaining below, implied
27 preemption, is a very different animal than the purely legal express preemption claim now pressed
28 on appeal. When the Bankruptcy Court certified its ruling under Rule 54(b) for immediate appeal, it

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1 recognized all of this. Thus, the substantive underpinnings of the motion to dismiss this appeal is
2 quite flawed, and in more than one respect.

3 *First*, in challenging the Bankruptcy Court’s decision to enter final judgment under Rule 54(b)
4 on its express preemption ruling to permit an immediate appeal, Appellees overlook that, in the
5 Ninth Circuit at least, “[t]he present trend is toward greater deference to . . . a decision to certify
6 under Rule 54(b).” *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 564 n.1 (9th Cir.
7 1994) (per curiam). In recognition of the fact that courts have been unable to settle upon any precise
8 standard for Rule 54(b) certifications (and the Supreme Court has, on multiple occasions, *refrained*
9 from doing so), the Ninth Circuit takes a “pragmatic approach” to Rule 54(b), which focuses
10 principally on “severability and efficient judicial administration.” *Texaco, Inc. v. Ponsoldt*, 939
11 F.2d 794, 798 (9th Cir. 1991). *That* is the driving consideration, not adherence to rigid, mechanical
12 formulae that are incapable of ready application. And, indeed, that approach is particularly
13 appropriate in bankruptcy appeals, where the Ninth Circuit has taken a pragmatic approach to
14 questions respecting appellate jurisdiction more generally, in recognition of the unique nature of
15 bankruptcy cases.

16 Here, the Bankruptcy Court clearly resolved a “separate claim” within the meaning of Rule
17 54(b) as applied to contested matters when it rejected as a matter of law Appellants’ claim that
18 Section 1123(a)(5) authorizes the restructuring transactions contemplated by Appellants’ plan
19 “notwithstanding” any state or local laws to the contrary, and instead required Appellants to
20 demonstrate that the plan could proceed under principles of implied preemption, which it viewed as
21 imposing a more exacting legal and factual burden. And there can be no doubt that it resolved that
22 claim *finally*, when it made quite clear that it would not revisit the question, and that it was law of
23 the case. Nor is there any merit to Appellees’ suggestion that the Bankruptcy Court abused its
24 discretion when it found “no just reason to delay” entry of judgment on its ruling; the Bankruptcy
25 Court made a number of detailed factual findings about the severability of the express preemption
26 question from other questions remaining before it, and the harms to the estate, creditors and others
27 that prompt appellate review might well avoid (which findings are a far cry from how Appellees
28 characterize them). The Bankruptcy Court’s conclusions are amply justified, and entitled to

1 substantial deference.

2 *Second*, and in any event, jurisdiction also is proper under the “practical finality” doctrine of
3 *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964), an exception to the final judgment
4 rule pursuant to which the Ninth Circuit has permitted appeals on fundamental, important issues
5 necessary to the efficient conduct of bankruptcy proceedings. *See Salmeyer v. Karbach Enters. (In*
6 *re Exennium, Inc.)*, 715 F.2d 1401, 1402, 1403 n.1 (9th Cir. 1983); *Fireman’s Fund Ins. Cos. v.*
7 *Grover (In re Woodson Co.)*, 813 F.2d 266, 268-69 (9th Cir. 1987).

8 For all of these reasons, this Court unquestionably has jurisdiction over this appeal, the motion
9 should be denied, and the appeal should be permitted to proceed without any further delay.

10 **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

11 A complete discussion of the pertinent facts and procedural history of this appeal is set forth in
12 Proponents’ pending “[Protective] Motion of Pacific Gas and Electric Company And PG&E
13 Corporation For Leave to File Interlocutory Appeal” (filed on March 22, 2002), which discussion
14 (and evidence in support thereof) is incorporated herein.¹

15 **ARGUMENT**

16 Pursuant to 28 U.S.C. Section 158(a), this Court has jurisdiction to hear appeals “from final
17 judgments, orders, and decrees” of the Bankruptcy Court, as well as, *inter alia*, “with leave of the
18 court, from other interlocutory orders and decrees.” 28 U.S.C. §158(a)(1), (3). Proponents’
19 protective request for leave to appeal under Section 158(a)(3) is presently pending before this Court.
20 In this brief, we explain why this Court also has jurisdiction over this appeal under Section
21 158(a)(1).

22 **A. The Judgment Fully Complies With Rule 58, And Any Defect Would Not In Any** 23 **Event Defeat Appellate Jurisdiction.**

24 Appellees contend the Order does not comply with the requirement of Rule 58 of the Federal

25 ¹As used herein, the term “Mem. Dec.” refers to the February 7, 2002 “Memorandum
26 Decision Regarding Preemption and Sovereign Immunity” (attached as Exhibit B to the Request For
27 Judicial Notice that Appellees have filed in support of their motion; and also appearing at 863-911
28 of Appellants’ Excerpts of Record (“ER”). The term “Order” refers to the March 18, 2002 “Order
and Judgment Disapproving Disclosure Statement; Rule 54(b) Certification” (attached as Exhibit A
to Appellees’ Request For Judicial Notice, and also appearing at ER 924-33).

1 Rules of Civil Procedure that a judgment be set forth in a separate document, and also that it has not
2 yet been entered by the bankruptcy court clerk as required by Rule 79(a).² If that argument were
3 accepted, the parties would simply return to the Bankruptcy Court for the entry of another order,
4 and, after several weeks of added delay, return to this Court in precisely the same posture as they
5 stand now. The law does not require the performance of such pointless acts.

6 First, Appellees are simply wrong when they say that the Order was never entered in the
7 Bankruptcy Court's docket. It was—on March 22, 2002, as indicated by the notation “[EOD
8 3/22/02].” See Appellees’ RJN, Ex. F at unnumbered pp. 7-8. It also appears on the online docket,
9 under entry number 5424 for March 18, 2002.³ (And even if it had not been properly entered, any
10 such defect *could be cured*.⁴)

11 The “separate document” requirement also been fully satisfied. The Order is a separate
12 document from the February 7 Memorandum Decision, and states:

13 For the reasons stated in the court’s Memorandum Decision Regarding Preemption and
14 Sovereign Immunity filed on February 7, 2002 (“Memorandum Decision”), the Plan (as
15 defined in the Memorandum Decision) could not be confirmed as a matter of law.
Therefore the Disclosure Statement (also as defined in the Memorandum Decision) is
disapproved.

16 With respect to the entry of final judgment, it also provides:

17 This Order is based upon rejection of Proponents’ express preemption theory, as
18 explained in the Memorandum Decision [I]t is appropriate to enter the Order as a
final judgment and to make the necessary determinations under Rule 54(b).

19
20 ²Bankruptcy Rule 9021 makes Rule 58 of the Federal Rules of Civil Procedure applicable in
21 bankruptcy proceedings. In pertinent part, Rule 58 provides: “Every judgment shall be set forth on
a separate document. A judgment is effective only when so set forth and when entered as provided
in Rule 79(a).”

22 ³To view the relevant page of the docket online which contains a link to the order, see
23 http://www.pge.com/006_news/current_issues/reorganization/court_docs/court_docs53.shtml. To
24 view the order itself, see [http://www.pge.com/006_news/current_issues/reorganization/
court_docs/pdf/00005424.pdf](http://www.pge.com/006_news/current_issues/reorganization/court_docs/pdf/00005424.pdf). The first page of the order bears the notation “5424,” meaning that it
was entered on the docket as item 5424. It also appears in the appellate record as such. ER 924.

25 ⁴See Fed. R. Bankr. P. 8002(a) (“[a] notice of appeal filed after the announcement of a
26 decision or order but before entry of the judgment, order, or decree shall be treated as filed after
such entry and on the day thereof”). Thus, Appellee’s citation to *Griggs v. Provident Consumer*
27 *Discount Co.*, 459 U.S. 56, 60 (1982) is entirely off point, which held that appellate jurisdiction was
28 lacking over a prematurely filed notice of appeal governed by former Federal Rule of Appellate
Procedure 4(a)(4), which provided (and no longer does) that: “A notice of appeal filed before the
disposition of [a post-judgment motion] *shall have no effect*.”

1 And the last sentence states, “[t]he clerk of the court is *directed* to enter this Order as a final
2 judgment pursuant to Rule 54(b)” (and, as noted, the clerk did so on March 22, 2002). While the
3 February 7 Memorandum Decision contains extensive discussion and citations regarding
4 Proponents’ express preemption claim, the Order contains none. The only legal issues *it* addresses
5 pertain to the entry of the Order and Judgment itself and certification under Rule 54(b). It does not
6 revisit the issue of express preemption. And the fact that it addresses *other* legal issues related to
7 certification under Rule 54(b) does not negate its explicit direction to enter final judgment on the
8 express preemption claim. It contains a final judgment, and it is a separate document from the
9 February 7 Memorandum Decision that explains the reasoning on which the judgment is based.
10 Thus, the separate document requirement of Rule 58 is fully satisfied.

11 Ultimately, Appellees object to the Bankruptcy Court’s election to combine its final judgment
12 on Proponents’ express preemption claim with its legal analysis of the certification factors under
13 Rule 54(b). But “extraneous material” included a final judgment does not affect its validity. 10
14 Lawrence P. King, *Collier On Bankruptcy* ¶7054.02, at 7054-3 (15th ed. rev. 2001). “Such
15 inclusion would not make the judgment ineffective, but merely improper in form, and if it is
16 otherwise proper, the judgment would stand.” *Id.* (citing 10 James Wm. Moore, *Moore’s Federal*
17 *Practice* ¶54.03, at 54-29 to 54-30 (3d ed. 2001)). Thus, notwithstanding any defect in form, the
18 Order is valid and effective as a final judgment under Rule 58.

19 But even if the Order did not comply with Rule 58, that would not defeat appellate
20 jurisdiction. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386-87 (1978); accord *United States v.*
21 *Lummi Indian Tribe*, 235 F.3d 443, 448 (9th Cir. 2000) (citing *Bankers Trust*). In *Bankers Trust*, the
22 leading United States Supreme Court case on point, the Court held that the Second Circuit correctly
23 exercised appellate jurisdiction despite the absence of a separate judgment as required by Rule 58,
24 and made plain that the sole purpose of the separate document requirement is to clarify when the
25 time for appeal begins to run. *Bankers Trust*, 435 U.S. at 385.⁵ Appellees do not cite *Bankers Trust*.

26
27 ⁵Although the parties in *Bankers Trust* were deemed to have “waived” the separate judgment
28 requirement under the circumstances (*id.* at 388), the Ninth Circuit and other courts have extended
Bankers Trust to uphold appellate jurisdiction even over the objection of an appellee, as we have
(continued . . .)

1 Indeed, they cite *no* case dismissing for lack of jurisdiction for an alleged Rule 58 defect.

2 Moreover, the Bankruptcy Court’s intention that its Order be deemed a final rejection of
3 Proponents’ express preemption claim could hardly be clearer. *See* Order at 3. “[I]f no question
4 exists as to the finality of the district court’s decision, the absence of a Rule 58 judgment will not
5 prohibit appellate review.” *Spurlock v. FBI*, 69 F.3d 1010 (9th Cir. 1995) (citing *Bankers Trust*, 435
6 U.S. at 382-88). Because the Bankruptcy Court’s intention is not in question, and Appellees claim
7 no prejudice, this Court has jurisdiction. “It is too late in the day and entirely contrary to the spirit
8 of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such
9 mere technicalities.” *Bankers Trust*, 435 U.S. at 387.

10 **B. Appellees’ Overgeneralizations About Express Preemption and Implied**
11 **Preemption Obscure The Question At Stake In This Appeal.**

12 Apart from raising a Rule 58 issue where really there is none, Appellees’ motion to dismiss
13 this appeal (“Mot.”) is premised on the notion that express and implied preemption are just
14 “different sides of the same coin” (Mot. at 5) and that there is no meaningful difference between
15 their elements. But Appellees’ assertion that “express and implied preemption are alternative
16 theories that seek the same relief based on the same facts” (Mot. at 14) is a gross over-
17 simplification, and wrong in the circumstances of this case.

18 While any type of preemption requires an examination of congressional intent (*cf.* Mot. at 5),
19 and thus there may be some overlap in any given case between various forms of preemption, the
20 Supreme Court has mapped out three basic paths for undertaking that inquiry (albeit said not to be

21

(. . . continued)

22 here. *Harris v. McCarthy*, 790 F.2d 753, 756-57 (9th Cir. 1986) (where appellee was not prejudiced
23 by lack of separate judgment, appellate jurisdiction properly assumed over appellee’s objection);
24 *Noli v. Commissioner*, 860 F.2d 1521, 1524-25 (9th Cir. 1988) (where appellees claimed no
25 prejudice from Bankruptcy Court’s failure to enter written judgment, jurisdiction existed); *Miller v.*
26 *Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998) (where neither party claims judgment was
27 not intended to be final and appellee claims no prejudice from lack of separate judgment, appellate
28 jurisdiction exists); *Pack v. Burns Int’l Sec. Serv.*, 130 F.3d 1071, 1073 (D.C. Cir. 1997) (where
dismissal for lack of separate judgment would serve no purpose other than delay, *Bankers Trust*
requires exercise of appellate jurisdiction). Here, Appellees do not claim to have been misled or
prejudiced by the Order. Rather, they simply stress the need for certainty in determining when the
time for appeal begins to run. But the timeliness of this appeal is not in dispute (nor of their cross-
appeal). In fact, their position would only lead to precisely the type of unnecessary delay decried in
Bankers Trust: “Wheels would spin for no practical purpose.” 435 U.S. at 385.

1 “rigidly distinct”):

2 [S]tate law is pre-empted under the Supremacy Clause [U.S. Const. art. VI, cl. 2] in
3 three circumstances. First, Congress can define explicitly the extent to which its
4 enactments pre-empt state law. . . . Second, in the absence of explicit statutory
5 language, state law is pre-empted where it regulates conduct in a field that Congress
6 intended the Federal Government to occupy exclusively. . . . Finally, state law is pre-
7 empted to the extent that it actually conflicts with federal law. (*English v. General Elec.*
8 *Co.*, 496 U.S. 72, 78-79 (1990))

9 As to the latter form (commonly referred to as conflict preemption), state law conflicts with federal
10 law where state law “stands as an obstacle to the accomplishment and execution of the full purposes
11 and objectives of Congress.” *Id.* at 79.

12 Below, Proponents argued that the state laws preempted under the First Amended Disclosure
13 Statement were both expressly preempted by Section 1123(a)(5), and alternatively, impliedly
14 preempted under the foregoing standard. *See* ER 808. But the Bankruptcy Court rejected as a
15 matter of law the claim that Section 1123(a)(5) expressly preempts any of those laws. Mem. Dec. at
16 3. As to implied preemption, it ruled that Proponents must file a new disclosure statement and
17 specifically demonstrate “*what ultimate facts will be proven*” to lead the court to find that the
18 application of those laws to the facts of PG&E’s proposed reorganization are economic in nature
19 rather than directed at protecting public safety or other noneconomic concerns, and that those
20 particular laws stand as an obstacle to the accomplishment and execution of the purposes and
21 objectives of Congress and the Bankruptcy Code.” Mem. Dec. at 3, 16, 40-41, 47 (emphasis added).

22 There is thus a striking difference between express and implied preemption in the context of
23 this case. When the Bankruptcy Court rejected Proponents’ express preemption argument, it denied
24 them the relief they sought (approval of the First Amended Disclosure Statement) and required them
25 to modify their Disclosure Statement and their Plan, to proceed on a theory of implied preemption,
26 which the Bankruptcy Court clearly regarded as “rais[ing] the evidentiary burden [Proponents] must
27 sustain to obtain plan confirmation.” Order at 6. The particularized showing that Proponents intend
28 to make on the question of implied preemption under the Bankruptcy Court’s announced standard is
detailed at pages 151-73 of their Second Amended Disclosure Statement. *See* Exhibit 16 to

1 “Request For Judicial Notice” filed on March 22, 2002.⁶

2 Contrary to Appellees’ position, express and implied preemption are not in any sense based
3 upon the same set of operative facts under the standard set by the Bankruptcy Court. Indeed, if they
4 were, it would have made no sense for the Bankruptcy Court to reject Proponents’ express
5 preemption claim under Section 1123(a)(5) and to disapprove the First Amended Disclosure
6 Statement but at the same time grant them leave to amend with further factual specifics on the
7 question of implied preemption.⁷ The express and implied preemption claims are governed by
8 different legal standards and involve different facts in this case as matters now stand, and the
9 differences between them, far from being mere abstractions of legal form, in fact have immense
10 practical implications for the future progress of this case (including the progress of any appeals
11 resulting from the confirmation order). Moreover, while Proponents’ claims of express preemption
12 and implied preemption both are directed at the very same laws and regulations, only through
13 express preemption under Section 1123(a)(5) could Proponents *necessarily* establish preemption of
14 all such state laws (e.g., through the application of the literal, plain meaning of “any otherwise
15 applicable nonbankruptcy law”). *See* 11 U.S.C. §1123. Implied preemption, on the other hand, will
16 require a searching and individualized inquiry into every state law at issue in the Bankruptcy Court’s
17 view, and thus carries with it the possibility that the Bankruptcy Court will conclude that only some
18 of them, but not all, are preempted.

19 As we explain below, these differences figure significantly in the reasons why this Court has
20 jurisdiction over the Bankruptcy Court’s unequivocal, and final, rejection of Proponents’ express
21 preemption claim.

22 ⁶Because the Bankruptcy Court made clear that its February 7, 2002 ruling on implied
23 preemption remains subject to further litigation (Order at 2:8-17), Proponents retain the right to seek
24 to persuade the Bankruptcy Court that implied preemption is subject to a less onerous standard.
25 Nonetheless, as matters now stand, the Bankruptcy Court has subscribed to a view of implied
preemption that, in the Bankruptcy Court’s words, “raises the evidentiary burden [Proponents] must
sustain to obtain plan confirmation premised upon implied preemption.” Order at 6.

26 ⁷Again and again, the CPUC itself acknowledged below the dichotomy between express and
27 implied preemption. For example, it argued that “Section 1123(a) . . . does not directly speak to
28 whether a bankruptcy court may confirm a plan calling for actions inconsistent with applicable
nonbankruptcy law; rather, that problem is left to traditional *case-by-case adjudication under
principles of implied preemption.*” ER 703 (emphasis added); *see also id.* at 689-90, 694 (similar).

1 **C. Jurisdiction Under 28 U.S.C. Section 158(a)(1) Is Proper Because The Bankruptcy**
2 **Court Properly Certified The Order For Immediate Appeal Under Federal Rule Of**
3 **Civil Procedure 54(b).**

4 Rule 54(b) provides for the entry of judgment “as to one or more but fewer than all of the
5 claims” in a proceeding, upon “an express determination that there is no just reason for delay.” Fed.
6 R. Civ. P. 54(b). Entry of judgment under Rule 54(b) requires two separate findings: *first*, a court
7 must expressly direct the entry of final judgment as to one or more but fewer than all “claims” (or
8 parties); and *second*, it must expressly determine that there is “no just reason” to delay appellate
9 review. *See Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1524-25 (9th
10 Cir. 1987). The first step is satisfied where a decision finally disposes of one or more, but fewer
11 than all, “claims”; the second, where the need for immediate appeal outweighs the rule against
12 “piecemeal” litigation. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-8 (1980). “In
13 reality, issuance of a Rule 54(b) order is a fairly routine act that is reversed only in the rarest
14 instances.” *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1068 n.6 (9th Cir. 2002).

15 The Ninth Circuit takes a flexible, pragmatic approach to the interpretation of jurisdictional
16 statutes designed for bankruptcy cases (*see, e.g., Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975,
17 980 (9th Cir. 2001); *Mason v. Integrity Ins. Co. (In re Mason)*, 709 F.2d 1313, 1318 (9th Cir.
18 1983)), and has made clear that jurisdictional statutes are interpreted differently than those
19 governing ordinary civil actions. *See Cannon v. Hawaii Corp. (In re Hawaii Corp.)*, 796 F.2d 1139,
20 1142 n.1 (9th Cir. 1986) (“congressional grants of appellate jurisdiction over bankruptcy matters”
21 should be construed “in accord with the Code purposes”). As cases in that context instruct, the
22 policy of judicial economy is said to “strongly” outweigh the need to avoid piecemeal appeals *when*
23 *resolution of a central legal issue would obviate the need for further proceedings by a bankruptcy*
24 *court. Bonner Mall P’ship v. U.S. Bancorp Mortgage Co. (In re Bonner Mall P’ship)*, 2 F.3d 899,
25 903-05 (9th Cir. 1993) (exercising jurisdiction over whether legal premise of debtor’s proposed plan
26 (“new value exception” to absolute priority rule) renders it unconfirmable as a matter of law, where
27 district court had reversed bankruptcy court ruling finding plan unconfirmable and remanded for
28 further proceedings; “[i]f we hold that the new value exception no longer exists, no further factual
 proceedings will be necessary”); *see also, e.g., In re Scovis*, 249 F.3d at 981; *Lundell v. Anchor*

1 *Constr. Specialists, Inc.*, 223 F.3d 1035, 1038-1039 (9th Cir. 2000). Similar considerations are
2 present here. Indeed, a flexible application of Rule 54(b) is important in Chapter 11 cases generally,
3 in which the goals of efficiency and judicial economy are paramount.⁸

4 As we show below, the Bankruptcy Court correctly entered judgment under Rule 54(b) on its
5 express preemption ruling under Section 1123(a)(5). Thus, this Court has jurisdiction over this
6 appeal under 28 U.S.C. Section 158(a)(1). *See, e.g., Ritter Ranch Dev., L.L.C. v. City of Palmdale*
7 (*In re Ritter Ranch Dev., L.L.C.*), 255 B.R. 760, 763 (B.A.P. 9th Cir. 2000).

8 **1. The Court's Rejection of Express Preemption Under Section 1123 Resolved A**
9 **Claim Within The Meaning Of Rules 54 and 9014.⁹**

10 Rule 54(b) is made applicable to contested matters in bankruptcy, which are governed by Rule
11 9014 of the Federal Rules of Bankruptcy Procedure. *See* Fed. R. Bankr. P. 9014; Fed. R. Bankr. P.
12 7054(a). While Rule 9014 does not define the term “contested matter,” the Advisory Committee
13 Notes offer the following guidance:

14 Whenever there is *an actual dispute*, other than an adversary proceeding, before
15 the bankruptcy court, *the litigation to resolve that dispute is a contested matter*. For
16 example, the filing of an objection to a proof of claim, to a claim of exemption, *or to a*
17 *disclosure statement* creates a dispute which is a contested matter. Even when an
18 objection is not formally required, there may be a dispute. If a party in interest opposes

19 ⁸*See, e.g., Katchen v. Landy*, 382 U.S. 323, 328 (1966) (“a chief purpose of the bankruptcy
20 laws is to secure a prompt and effectual administration and settlement of the estate of all bankrupts
21 within a limited period”); *Public Serv. Co. of New Hampshire v. New Hampshire (In re Public Serv.*
22 *Co. of New Hampshire)*, 108 B.R. 854, 891 (Bankr. D.N.H. 1989) (explaining importance of prompt
23 resolution of corporate reorganizations); *National Fuel Gas Distrib. Corp. v. TGX Corp.*, 950 F.2d
24 829, 834 (2d Cir. 1991) (entry of judgment under Rule 54(b) appropriate where defendant was in
25 Chapter 11 and legal issue certified was “threshold question” in an “already protracted” litigation).

26 ⁹In arguing that the Bankruptcy Court erred in finding a cognizable “claim,” Appellees also
27 argue that any claim is not, in any event, “distinctly” separate. *See* Mot. at 11-15. But the latter
28 question generally is regarded as a matter within a lower court’s discretion in deciding whether there
is any “just reason to delay” entry of judgment (and so Appellees are wrong that it is a question
subject to independent review), and not an additional element as to whether a “claim” exists in the
first place, and so we address it in Section C(3), *infra*. *See, e.g., Cold Metal Process Co. v. United*
Eng’g & Foundry Co., 351 U.S. 445, 452 (1956) (“the relationship of the adjudicated claims to the
unadjudicated claims is one of the factors which the District Court can consider in the exercise of its
discretion”); *Gregorian v. Izvestia*, 871 F.2d 1515, 1520 (9th Cir. 1989) (recognizing that
separability of claims is subject to *de novo* review, yet concluding that “the district court *could*
properly conclude that the factual and legal issues involved . . . were ‘substantially different’”);
accord 10 *Moore’s Federal Practice, supra*, ¶54.22[2][b], at 54-58 (“the factual interdependence of
the adjudicated and unadjudicated claims is the primary consideration” in the exercise of district
court’s discretion to certify judgment).

1 the amount of compensation sought by a professional, there is a dispute which is a
2 contested matter. (Fed. R. Bankr. P. 9014 advisory committee’s note (emphasis added))

3 Thus, a contested matter consists of nothing more than litigation to resolve “an actual dispute” that
4 is not an adversary proceeding, including, as we have here, a disclosure statement objection. *Id.*¹⁰

5 Contrary to Appellees’ arguments, the relevant claim for purposes here is not “the main
6 bankruptcy proceeding.” Mot. at 12. Nor is it “the ongoing claim by which PG&E seeks approval,
7 confirmation, and implementation of its proposed plan” (Mot. at 13), nor even “the preemption
8 dispute as a whole.” Mot. at 17. *Cf. Continental Airlines*, 819 F.2d at 1525 (“A claim, it is true, is
9 less than the central object of a lawsuit . . .”) (emphasis added). Indeed, an objection to a disclosure
10 statement is itself a contested matter, separate and distinct from an objection to the confirmation of a
11 plan. *See* Fed. R. Bankr. P. 3020(b); Fed. R. Bankr. P. 9014 advisory committee’s note. Rather, the
12 relevant claim is Proponents’ discrete legal claim that Section 1123(a)(5) of the Bankruptcy Code
13 entitles PG&E to reorganize its business without interference from state or local laws that otherwise
14 would impair or prohibit the restructuring transactions contemplated by its Plan—or any other—
15 which is a question that the Bankruptcy Court answered squarely, and definitively, in the negative.
16 That is an “actual dispute” that has been fully and finally “litigated” within the meaning of Rule
17 9014, which Appellees’ sweeping statements overlook. *See* Fed. R. Bankr. P. 9014 advisory
18 committee’s note.¹¹ And as we next show, nothing in Appellees’ authorities or arguments is to the
19 contrary.

20 **a. The Case Law Applying Rule 54 To Contested Matters.**

21 While Appellees contend that “Courts apply rule 54(b) . . . in contested matters in the same
22 manner as the rule is applied in adversary proceedings and in nonbankruptcy civil actions and
23 proceedings” (Mot. at 10 n.6), the truth is, there are very few reported decisions construing Rule 54

24 ¹⁰Adversary proceedings are those specific proceedings enumerated in Rule 7001 of the
25 Federal Rules of Bankruptcy Procedure, and are governed by specific rules, some but not all of
26 which also apply to contested matters. *See* Fed. R. Bank. P. 7001 *et seq.*

27 ¹¹One gets to the very same result even viewing *all* objections to Proponents’ disclosure
28 statement as the relevant “contested matter,” rather than discrete ones; for by making Rule 54(b)
applicable to disclosure statement objections, the drafters clearly contemplated situations in which it
is appropriate to enter immediate judgment on resolution of *portions* of such objections.

1 in contested matters. *See Spears v. United States Trustee*, 26 F.3d 1023, 1025 (10th Cir. 1994);
2 *Hatcher v. Wade (In re Hatcher)*, 208 B.R. 959, 967 (B.A.P. 10th Cir. 1997), *aff'd*, 133 F.3d 932
3 (10th Cir. 1998); *In re Wallace*, 191 B.R. 929, 935 (Bankr. M.D. Fla. 1996); *cf. In re Molten Metal*
4 *Tech., Inc.*, 244 B.R. 515, 529 (Bankr. D. Mass. 2000).¹² Rigidly applying the concept of a “claim”
5 developed for civil actions under the Federal Rules of Civil Procedure to “contested matters” would
6 fail to recognize that contested matters do not fit the paradigm of ordinary civil actions (unlike
7 adversary proceedings in bankruptcy).¹³ Indeed, Appellees’ invitation to apply Rule 54(b) here “in
8 the same manner as is applied in nonbankruptcy civil actions and proceedings” (Mot. at 10 n.6)
9 would rob Rule 9014 of virtually all meaning because, as we have seen, a “contested matter” is
10 litigation regarding “an actual dispute” before the bankruptcy court, such as a specific objection to a
11 disclosure statement.

12 What little law there is under Rule 54(b) in the contested matter context provides some
13 valuable insights. In *In re Wallace*, 191 B.R. 929 (Bankr. M.D. Fla. 1996), for example, the trustee
14 objected to the debtor’s assertion that various items of property were exempt from the bankruptcy
15 estate (procedurally, through objections to the debtor’s Schedule C). The bankruptcy court
16 sustained the objection as to some items (personal property and automobiles), but found the record
17 insufficient to decide whether another item (a residence) was property of the estate. *Id.* at 934-35. It
18 then entered judgment under Rule 54(b) on its ruling as to those items that it found to be property of
19 the estate, reasoning in part as follows:

20 F.R.B.P. 9014 and 7054(a) apply F.R.Civ.P. 54(b) to this contested matter. Although the
21 decision of the court that this order represents does not determine the issues as to the
22 debtor’s *claim* of homestead exemption, it does fully determine all issues as to the
debtor’s *claim* of personal property and automobile exemptions [¶] The court

23 ¹²To be sure, some cases recite that Rule 54(b) applies to contested matters just as it does in
24 ordinary civil cases. *See, e.g., IRS v. Hildebrand (In re Brown)*, 248 F.3d 484, 488-89 (6th Cir.
25 2001). But such statements should not be taken out of context, for they do not concern what Rule
54(b) means in a contested matter, but merely the impact of failing to secure a Rule 54(b) judgment
in a contested matter.

26 ¹³Adversary proceedings can only be initiated by means of a complaint and summons, and
27 have virtually all the attributes of a civil lawsuit. Contested matters, by contrast, are initiated by
28 motion and are frequently resolved on a summary basis. *Compare* Fed. R. Bankr. P. 7001 *et seq.*
(adversary proceedings) *with* Fed. R. Bankr. P. 9014 (contested matters). *See also Gschwend v.*
Markus (In re Markus), 268 B.R. 556, 560 (B.A.P. 9th Cir. 2001) (noting distinctions).

1 expressly directs the entry of judgment as to those *claims*. (*Id.* at 935 (emphases added))
2 Notably, the court characterized the specific exemption dispute as a “claim,” even though it had not
3 yet fully determined the sum total of what property comprised the entire estate. *Cf.* 11 U.S.C. §541.
4 Following Appellees’ view of Rule 54 as applied to contested matters might have led the court to
5 view the “claim” more broadly; but instead it adhered to a far more narrow view, and carved the
6 specific question out for immediate appellate review. That approach sensibly comports with the
7 definition in the Advisory Committee Notes of a contested matter as “litigation” on an “actual
8 dispute.” *See* Fed. R. Bankr. P. 9014 advisory committee’s note (identifying, *inter alia*, an objection
9 to a claim of exemption as a contested matter). And here, we plainly have an “actual dispute” about
10 whether Section 1123(a)(5) permits the substantive provisions of a plan of reorganization to preempt
11 state law, triggered through the filing of objections to Proponents’ disclosure statement.¹⁴

12 By contrast, in arguing that we have no “claim” here, Appellees principally rely on *Spears v.*
13 *United States Trustee*, 26 F.3d 1023 (10th Cir. 1994). But they misstate its holding. *Spears* was an
14 appeal from an order by the bankruptcy court granting the trustee’s request for appointment of
15 counsel on a going-forward basis, but denying the trustee’s request for compensation for past
16 services. *See id.* at 1024. As the Tenth Circuit characterized the problem, “counsel’s employment is
17 ongoing and the dispute ultimately comes down to the temporally restricted but as yet undetermined
18 amount of his compensation.” *Id.* Thus, it held that it had no appellate jurisdiction because it was
19 confronted with an interlocutory order. *See id.* at 1024-25. It then went on to note that the appeal
20 could not be saved by resort to Rule 54(b):

21 While certification is available in bankruptcy proceedings by virtue of Rule 54(b)’s
22 incorporation in Bankr. R. 7054(a), the procedure may only be used to permit appeal
23 from orders that finally resolve at least the discrete claim for which review is sought.
24 Here, the bankruptcy court determined only the effective date of counsel’s appointment,
25 leaving the fee for counsel’s (continuing) services for future determination. *We therefore*
lack a final order even as to the particular matter appealed. Under the circumstances,
26 Rule 54(b) certification is simply not an available option. (*Id.* at 1025 (emphasis added)
27 (citations omitted))
28

26 ¹⁴*Cf. In re Molten Metal Tech., Inc.*, 244 B.R. 515, 529 (Bankr. D. Mass. 2000) (inviting
27 parties to move under Rule 54(b) for entry of a separate final order where court adjudicated some,
28 but not all, questions presented by joint motion filed by eleven employees for immediate payment of
administrative claims, through separate summary judgment motions).

1 In short, then, *Spears* dealt not with the issue of what constitutes a “claim” within the meaning of
2 Rule 54, but with the question of *finality*, a separate Rule 54(b) element that we address in Section
3 C(2) below. Thus, Appellees are wrong that in *Spears*, “the Tenth Circuit . . . adhered to the
4 traditional legal definition of a ‘claim for relief,’ which . . . requires a ‘distinctly separate’ claim for
5 relief.” Mot. at 13. *Spears* said nothing about that question.¹⁵

6 **b. Case Law Outside The Contested Matter Context.**

7 Additional guidance from outside the contested matter context makes plain that the
8 Bankruptcy Court resolved a “claim” when it ruled that Section 1123(a)(5) does not authorize the
9 substantive restructuring transactions of Proponents’ plan, notwithstanding contrary state law.

10 Contrary to the unspoken premise of Appellees’ papers, there is no consensus about what
11 constitutes a “claim” under Rule 54(b). As the Ninth Circuit has aptly observed:

12 Distinguishing ‘claims’ from theories of recovery for purposes of Rule 54(b) has
13 occasioned a good deal of subtle jurisprudence. A claim, it is true, is less than the
14 central object of a lawsuit and surely more than merely one element of proof offered in
15 support of a complaint seeking money damages. But the essence eludes the grasp like
quicksilver. (*Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519,
1525 (9th Cir. 1987))¹⁶

16
17 ¹⁵Even under Appellees’ misreading of *Spears*, the case still would be distinguishable had the
18 Tenth Circuit in fact held that the order was not a “claim” under Rule 54(b). In that event, it would
19 fully comport with the view that Rule 54(b) cannot be used as a vehicle to appeal an order
20 determining liability, when damages remain adjudicated. *See, e.g., Liberty Mutual Ins. Co. v.*
21 *Wetzel*, 424 U.S. 737, 743-44 (1976); *Kaszuk v. Bakery & Confectionery Union & Indus. Int’l*
22 *Pension Fund*, 791 F.2d 548, 553 (7th Cir. 1986); *see also Sidag Aktiengesellschaft v. Smoked*
23 *Foods Prods. Co.*, 813 F.2d 81, 84 (5th Cir. 1987) (order determining liability for attorneys’ fees but
not total amount could not be certified under Rule 54(b)). All that the order had accomplished, as
the Tenth Circuit recognized, was a determination that counsel should be appointed, while leaving
open the “as yet undetermined amount of his compensation.” 26 F.3d at 1024. Here, we have no
similar problem, not even remotely. The Bankruptcy Court did not *partially* adjudicate Proponents’
claim under Section 1123(a)(5) that the state laws at issue could be expressly preempted (for
example, it did not hold that some, but not all of them, could be expressly preempted)—it fully
adjudicated that question as to each and every law.

24 ¹⁶*See also, e.g., Samaad v. City of Dallas*, 940 F.2d 925, 930-31 (5th Cir. 1991) (“[A] great
25 deal of uncertainty nonetheless remains The most that can be said confidently about this
26 question is that various courts focus upon different things but are reluctant to articulate hard-and-fast
27 tests”); 10 Charles Alan Wright et al., *Federal Practice and Procedure* §2657, at 68, 70 (3d ed.
28 1998) (“There is no generally accepted test that is used to determine whether more than one claim
for relief is before the court” but observing that “decisions repudiate the notion that a separate claim
. . . must be entirely distinct from all the other claims in the action and arise from a difference
occurrence or transaction”).

1 And though Appellees’ opening papers do not acknowledge it, the Ninth Circuit follows a
2 “pragmatic approach” to Rule 54(b) certification, which focuses on “severability and efficient
3 judicial administration,” and eschews early Ninth Circuit case law that suggested a stricter standard.
4 *See Continental Airlines*, 819 F.2d at 1525; *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797-98 (9th Cir.
5 1991) (criticizing *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981)). Pursuant to
6 that approach, Rule 54(b) certification is said to be proper if “it will aid ‘expeditious decision’ of the
7 case.” *Texaco, Inc.*, 939 F.2d at 797.

8 No one disputes that claims based on the *same facts* but different legal theories are not
9 “separate claims,” and thus Appellees’ cases are inapposite. *See, e.g., CMAX, Inc. v. Drewry*
10 *Photocolor Corp.*, 295 F.2d 695, 697 (9th Cir. 1961) (causes of action containing identical
11 allegations that differed only in bases for liability were not “separate claims”); *Hasbrouck v. Sheet*
12 *Metal Workers Local 232*, 586 F.2d 691, 694 (9th Cir. 1978) (defamation and disparagement claims
13 not separate claims from federal labor law claims “to the extent” that they rest on same conduct).
14 Similarly, the pursuit of different remedies does not transmute what would otherwise be a single
15 claim into separate ones, as their cases show (*Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 743
16 (1976)), even if the remedy itself requires proof of additional facts. *See Arizona State Carpenters*
17 *Pension Trust Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991) (counts for compensatory and
18 punitive damages under ERISA held one “claim” for purposes of Rule 54(b)). But that is not what
19 we have here. For while Appellees contend that express and implied preemption claims both rest
20 “on the same facts” (Mot. at 14), they are wrong, as explained above.

21 Whatever may be the approach of other circuits (*see* Mot. at 12 n.7 (citing cases)), in the Ninth
22 Circuit, and indeed according to the Supreme Court, mere factual overlap between claims does not
23 defeat Rule 54 certification.¹⁷ Respected jurists from outside this Circuit share the same view. *See,*

24
25 ¹⁷*See, e.g., Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436-37 & n.9 (1956) (finding “no
26 doubt” that dismissed antitrust claim was a “claim for relief” within the meaning of Rule 54 despite
27 that it “does rest in part on some of the facts” involved in two remaining claims for inducing breach
28 of contract and unfair competition); *Continental Airlines*, 819 F.2d at 1524 (in action arising out of
airplane crash, affirming Rule 54(b) certification of partial summary judgment on airline’s
negligence and strict liability claims against airplane and parts manufacturer even though fraud,
warranty and passenger indemnification claims remained pending; “we confidently hold that
(continued . . .)

1 e.g., *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1367-68 (7th Cir. 1990)
2 (Posner, J.) (“some of our previous cases place too much weight on the existence and extent of
3 factual overlap between the two claims. What is true is that if the overlap is complete the claims are
4 the same [but]. . . . [i]f the claims are legally distinct and involve at least some separate facts, the
5 district court has the power to enter a Rule 54(b) judgment . . .”). Indeed, that is consistent with the
6 1948 amendment of Rule 54(b), which deleted the words “transaction or occurrence” so that the rule
7 now refers only to “claim for relief.” *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 433-36
8 (1956).

9 Particularly instructive here is *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d
10 287 (7th Cir. 1992). There, the plaintiffs challenged the practice of insurance “redlining” under the
11 Fair Housing Act (Title VIII of the Civil Rights Act of 1968) and other provisions of state and
12 federal law. The district court entered judgment under Rule 54(b) on, *inter alia*, its dismissal of the
13 Title VIII claim under Rule 54(b) and allowed the remaining claims to go forward. The Seventh
14 Circuit upheld the certification, despite substantial factual overlap with the remaining claims,
15 because Title VIII imposed a different, less burdensome standard of proof than the remaining
16 claims. As Judge Easterbrook explained:

17 “[T]he dismissed Fair Housing Act claim, would, if it were viable, be subject to proof
18 under a disparate impact formula, rather than under the ‘intentional racial
19 discrimination’ test applicable to all the counts remaining in the district court.” . . . We
20 therefore assume that plaintiffs’ burden under Title VIII is lighter than their burden
21 under the other legal theories. *Different burdens may imply different “claims”* even for
purposes of preclusion. Resolving the Title VIII issue in plaintiffs’ favor implies that
the other legal theories will fall away. If they prevail under Title VIII, they obtain all
the relief they seek; if they lose at trial under Title VIII, they necessarily lose on all

22 (. . . continued)

23 multiple claims existed”); *Gregorian v. Izvestia*, 871 F.2d 1515, 1520 (9th Cir. 1989) (no error to
24 certify dismissal of libel claim under Rule 54(b) despite pending emotional distress claim alleging
25 that by means of the alleged libel, defendants acted intentionally to inflict emotional distress; “[t]he
26 district court could properly conclude that the factual and legal issues involved in the claim for
27 intentional infliction of emotional distress were ‘substantially different’ from those raised by the
28 libel claim”); *McIntyre v. United States*, 789 F.2d 1408, 1410 (9th Cir. 1986) (holding quiet title
and trespass claims “separate claims” because trespass “would require proof of different facts”);
Purdy Mobile Homes, Inc. v. Champion Home Builders Co., 594 F.2d 1313, 1316 (9th Cir. 1979)
(upholding Rule 54(b) certification of dismissal of federal anti-trust claims, despite pending state
law claims premised on same alleged breach of exclusive sales licensing agreement; “[Plaintiff]
cannot successfully attack the court’s finding of multiple claims merely by showing that some facts
are common to all of its ‘theories of recovery’”).

1 other theories; either way, there will not be duplicative appellate review. . . . [T]his is
2 enough, if barely, to justify treating a legal theory as a ‘claim’ for purposes of Rule
54(b). (*NAACP*, 978 F.2d at 292-93) (citations omitted) (emphasis added))¹⁸

3 Here, the Bankruptcy Court’s announcement of a significant difference in the standards of
4 proof between express and implied preemption is one of the reasons that prompted it to certify its
5 decision under Rule 54(b). *See* Order at 6. Under that standard, the facts necessary to establish
6 express preemption “would be insufficient by themselves” to prove implied preemption. *Purdy*
7 *Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1316 (9th Cir. 1979); *see also*
8 *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 923-24 (9th Cir. 1986) (holding claims based
9 on largely same facts “separate claims” because “distinct issues were raised” by the different
10 claims). Moreover, as in *NAACP*, there will not be duplicative appellate review—because if
11 Proponents finally prevail on express preemption then it is possible they would not need to pursue a
12 claim of implied preemption, including up through the appellate courts. Hence, that suffices to
13 constitute a “claim” for purposes of Rule 54(b).

14 Appellees nevertheless maintain that *Spiegel v. Trustees of Tufts College*, 843 F.2d 38 (1st Cir.
15 1988), demonstrates why the Bankruptcy Court erred, but that case is wide off the mark. *See* Mot. at
16 13, 15-16. In that case, a multi-count action arising from a tenure dispute, the First Circuit did not
17 examine what constitutes a “claim,” *but assumed that the element had been satisfied*. *See* 843 F.2d
18 at 44 (“We assume without deciding that the first three counts . . . state one or more ‘claims’
19 separate and distinct from the fourth count, and that the dismissal therefore possessed the necessary
20 finality to permit the district court to consider allowing an early appeal”). The question that it
21 considered was whether the district court had erred in entering judgment under Rule 54(b) on the
22 ground that there was “no just reason for delay” (*see id.* at 42)—which is a question we address in
23 Section C(2), *infra*. *See also* note 22 *infra* (addressing *Spiegel*).

24 When the Bankruptcy Court in this case certified its ruling on Section 1123(a)(5) for
25

26 ¹⁸While the Court also observed that “[i]deally the facts and theories separated for immediate
27 appeal should not overlap with those retained” it also aptly recognized that “[i]n disdaining bright
28 lines and asking how much duplication is too much, we enter the zone of shadings traditionally
committed to a district judge’s discretion.” 978 F.2d at 292.

1 immediate review, it quite correctly observed the following:

2 The fact that there are apparently no reported cases dealing with the particular type of
3 contested matter presented on an objection to approval of a disclosure statement, and
4 whether there can be a discrete and separate ‘claim’ in that context, does not justify
5 denying the Request. . . Here . . . is an attempt to reorganize PG&E under Chapter 11 of
6 the Bankruptcy Code premised upon a business proposition, disaggregation. An
7 essential, if not indispensable feature of that strategy, is the overriding of numerous state
8 laws and regulations by one powerful device, 11 U.S.C. §1123(a). This theory—now
9 rejected by the court — *is as much a claim for relief in the context of a proposed
10 Chapter 11 reorganization plan as any other ‘cause of action’ in traditional litigation
11 seeking relief. . . . The court has no doubt that the Order is a decision on a cognizable
12 ‘claim’ asserted by Proponents that the Plan, dependent upon express preemption, is
13 confirmable.* (Order at 2-3 (emphasis added))

14 **2. The Bankruptcy Court’s Ruling Finally Resolved The Express Preemption
15 Claim, And Thus It Was A “Final” Adjudication For Purposes Of Rule 54(b).**

16 The Bankruptcy Court did not grant Proponents leave to amend to enable them to demonstrate
17 some further reason why the protections of Section 1123(a)(5) might be available to them in the
18 circumstances of this case. To the contrary, it stated unequivocally that it had rendered a definitive,
19 final ruling rejecting the availability of express preemption under Section 1123(a)(5). *See* Order at 3
20 (observing that Proponents’ rights under Section 1123(a)(5) “will not be revisited: it is the law of
21 this case and the court’s decision on that claim is final”). And it then disapproved the First
22 Amended Disclosure Statement as facially unconfirmable on that basis. Appellees’ suggestion that
23 the Bankruptcy Court did not “finally” determine that question is incorrect.

24 First, Appellees suggest no claim has been “finally” adjudicated because the express
25 preemption ruling is not a separate claim. *See* Mot. at 17. Quite apart from the fact that we have
26 demonstrated that it *is* a separate claim, their suggestion to the contrary adds nothing to the different
27 question about whether that claim has been “finally” determined. *See Continental Airlines*, 819 F.2d
28 at 1524 (“claims must be multiple *and* at least one must be adjudicated finally”) (emphasis added).

In arguing that the Bankruptcy Court did not “finally” resolve the express preemption claim,
Appellees rely principally on *Wade v. Hatcher (In re Hatcher)*, 208 B.R. 959 (B.A.P. 10th Cir.
1997), which held that an order denying an objection to a plan of reorganization on the ground that it
was unconfirmable because the term of repayment was unreasonable as a matter of law, was not
final and appealable, where the Bankruptcy Court had sustained other (unspecified) objections to the
plan and denied confirmation, and granted the debtor an opportunity to amend the plan. The case

1 contains language that the order “would not have been an appropriate order for Rule 54(b)
2 certification” because it “did not finally resolve the discrete issue of the term of the Plan, because
3 the debtors could have modified the plan term.” *Id.* at 967. But *Hatcher* is plainly distinguishable.
4 Because it involved an appeal from the *denial* of an objection to a plan provision, there was nothing
5 about the court’s ruling that might have prevented the plan proponent from later modifying that plan
6 provision. Here, by contrast, the Bankruptcy Court *sustained* objections to the “discrete issue” of
7 express preemption, and so unlike in *Hatcher*, Proponents cannot now modify the Plan in any way
8 that would provide for express preemption under Section 1123(a)(5).¹⁹

9 Appellees also argue that the express preemption ruling is not final because “[t]he main case
10 continues; litigation of the preemption issue continues; and PG&E has been granted leave to file,
11 and has actually filed, an amended plan that does not rely on express preemption.” Mot. at 17. The
12 same could be said about virtually every Rule 54(b) order. Appellees beg the question by conflating
13 the issue of what constitutes a “claim” with the issue of whether it has been “finally” resolved within
14 the meaning of Rule 54. In determining the latter question, courts look only to whether a claim *itself*
15 has been finally adjudicated. *See, e.g., Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7
16 (1980) (judgment entered pursuant to Rule 54(b) “must be ‘final’ in the sense that it is ‘an ultimate
17 disposition of an individual claim . . .’”) (emphasis added) (quoting *Sears, Roebuck & Co. v.*
18 *Mackey*, 351 U.S. 427, 436 (1956)); *Sears*, 351 U.S. at 436-37 & n.9 (finding “no doubt” that
19 dismissal of two claims without leave to amend constitutes a “final decision” under Rule 54, despite
20 that two other claims remained pending). Indeed, the very purpose of Rule 54 is to allow issues that
21 have been finally resolved to be severed for appeal when circumstances warrant. *See* 10 Charles
22 Alan Wright et al., *Federal Practice and Procedure* §2654, at 33 (3d ed. 1998) (“Wright & Miller”).

24 ¹⁹Appellees’ reliance on *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997),
25 also is misplaced. There, the Ninth Circuit held that an order dismissing some claims with prejudice
26 but others with leave to amend was not final, and that therefore the Court lacked jurisdiction to
27 review it. *Id.* at 1134, 1136. But the Bankruptcy Court here did not grant Proponents leave to
28 amend their express preemption claim. And more to the point, the district court in *WMX* did not
certify its ruling under Rule 54 for immediate appeal. Had it done so on the claims it dismissed with
prejudice, the Ninth Circuit might well have taken a different view of its appellate jurisdiction. *See,*
e.g., Sears, Roebuck & Co., 351 U.S. at 437 (upholding Rule 54(b) certification).

1 If continued litigation could defeat a finding that a distinct claim was “finally” resolved, then Rule
2 54 could never apply to anything at all. Here, the Bankruptcy Court stated, unequivocally, that it
3 had finally determined the question of express preemption, would not revisit it, and disapproved
4 Proponents’ disclosure statement on that basis. It was a final determination.

5 **3. The Bankruptcy Court Did Not Abuse Its Discretion In Finding No Just**
6 **Reason To Delay The Entry Of Judgment.**

7 In certifying Proponents’ Section 1123(a)(5) claim for immediate appeal, the Bankruptcy
8 Court found there was no just reason to delay appellate review for many reasons including,
9 principally, that: (1) “this is a Chapter 11 case of enormous significance to thousands of creditors
10 owed billions of dollars. Not to mention millions of ratepayers/customers of the state’s largest
11 utility”; (2) delay would cause significant harm to the thousands of creditors waiting to be paid,
12 which have a real economic interest in the speedy resolution of this case, and (3) delay would cause
13 significant harm to PG&E and its creditors, in the form of potentially “staggering” administrative
14 expenses they might otherwise incur in attempting to confirm an alternate plan premised upon
15 implied preemption. *See* Order at 5-6 & n.4.²⁰ Reviewing courts accord tremendous deference to
16 certifications made under Rule 54(b), and in particular the question of whether there is “no just
17 reason to delay” the entry of judgment. *See Curtiss-Wright Corp.*, 446 U.S. at 10. Substantial
18 deference is due because the lower court is “the one most likely to be familiar with the case and any
19 justifiable reasons for delay.” *Sears*, 351 U.S. at 437; *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798
20 (9th Cir. 1991). Thus, “the proper role of the Court of Appeals is not to reweigh the equities or
21

22 ²⁰In addition, the Bankruptcy Court observed that prompt appellate review diminished the
23 possibility of the Catch-22 that might otherwise arise if review were deemed to be unavailable *now*
24 due to *the possibility* that confirmation of an alternate plan could later moot the appeal, whereas an
25 appeal *later on* might be deemed to be mooted through the *actual* confirmation of an alternate plan.
26 *See* Mem Dec. at 6-7. The Bankruptcy Court was justifiably concerned. For if a competing plan is
27 confirmed (and not stayed) and proceeds too far toward implementation, then its proponents
28 undoubtedly would attempt to argue that issues respecting the confirmability of Proponents’ plan are
moot. *See, e.g., Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 797 (9th
Cir. 1981) (dismissing appeal from challenge to plan that “has been so far implemented that it is
impossible to fashion effective relief for all concerned;” reversal of order confirming the plan
“would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy
Court”).

1 reassess the facts but to make sure that the conclusions derived from these weighings and
2 assessments are juridically sound and supported by the record.” *Curtiss-Wright Corp.*, 446 U.S. at
3 10. Despite this highly deferential standard, Appellees contend that the Bankruptcy Court abused its
4 discretion here. They are wrong.

5 Contrary to Appellees’ principal argument, the Bankruptcy Court’s “main purpose” in
6 certifying the express preemption ruling under Rule 54(b) was *not* “to avoid the necessity of a new
7 trial” if it were later determined to have decided the Section 1123(a)(5) question incorrectly. Mot. at
8 18. The Bankruptcy Court said no such thing; indeed, if Proponents prevail on their Section
9 1123(a)(5) express preemption claim after all appellate remedies have been exhausted, there may
10 well be no need to retry any issue respecting preemption, for in that event it will have been
11 conclusively determined that preemption operates as a matter of law, by virtue of the express terms
12 of the statute. Thus, Appellees’ reliance on *Hogan v. Consolidated Rail Corp.*, 961 F.2d 1021 (2nd
13 Cir. 1992) is misplaced, quite apart from the fact that it is not the law in the Ninth Circuit and also
14 quite distinguishable.²¹

15 On the contrary, the Bankruptcy Court was chiefly concerned with the consequences of
16 delaying an ultimate disposition of whether PG&E’s plan, as proposed, could be confirmed, and the
17 consequent harms that delay could entail as other alternate plans are pursued. Its weighing of these
18 factors was appropriate (particularly in a case of this magnitude), and its conclusions amply

19
20 ²¹*Hogan* was a multi-defendant wrongful death action in which the Second Circuit held that
21 the district court abused its discretion in entering judgment under Rule 54 on summary judgment
22 rulings exonerating one defendant, because its only reason was a concern it might have to try the
23 entire case against the remaining defendants twice if, upon review of a final judgment, its rulings as
24 to the exonerated defendant were overturned. The Ninth Circuit does not apply Rule 54 so rigidly.
25 *See Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993) (upholding Rule 54(b)
26 certification of order dismissing certain defendants because “dealing with the jurisdictional issue
27 now may obviate the need for a second trial”); *see also* 15A Wright & Miller, *supra*, §3914.7, at 593
28 (Rule 54(b) certification can be appropriate to allow trial court “to be able to shape the eventual trial
in light of the appellate decision and to avoid the risk that the first trial will be made waste by a later
appellate decision”). Indeed, *Hogan* rests an overly restrictive view of Rule 54(b) that that the Ninth
Circuit has moved away from. *Compare Hogan*, 961 F.2d at 1025 (reserving Rule 54(b)
certification for “the ‘infrequent harsh case’”) *with, e.g., Texaco*, 939 F.2d at 798 (criticizing
“unusual case” approach as “outdated and overly restrictive”); *Ginett v. Computer Task Group, Inc.*,
962 F.2d 1085, 1094 (2d Cir. 1992) (similar). *Hogan* also is inapposite because unlike here, the
district court did not give any indication that the case was exceptional, or that deferring appellate
review would create hardship. *See* 961 F.2d at 1025.

1 supported by the record. *See, e.g., Continental Airlines*, 819 F.2d at 1525 (upholding Rule 54(b)
2 certification, stressing, *inter alia*, need for “efficient judicial administration” and “size and
3 complexity of this case”); *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993)
4 (“Rule 54(b) certification is proper if it will aid ‘expeditious decision’ of the case”); *Columbia Steel*
5 *Casting Co. v. Portland Gen. Elec. Co.*, Civ. No. 90-524-FR, 1993 WL 312703, at *7 (D. Or.
6 Aug. 11, 1993) (certifying partial summary judgment on some, but not all, antitrust claims because
7 “the issues involved . . . have been a major source of the controversy in this case”).

8 Appellees also maintain that express and implied preemption issues are too intertwined to
9 permit separate appeals. Mot. at 19-20. But we have already demonstrated that the questions are
10 not nearly so overlapping as Appellees suggest, and not even Appellees have suggested it is
11 *impossible* to decide express and implied preemption independently of one another. *See Sears*, 351
12 U.S. at 436 (rejecting argument that district court abused its discretion in certifying that there exists
13 no just reason for delay under Rule 54(b) on the ground that the certified claims are so inherently
14 separable from, or closely related to, remaining claims; “They certainly *can* be decided
15 independently of each other”). The Supreme Court also has made plain that concerns about non-
16 separability alone do not make a Rule 54 certification invalid, and recognized that other
17 circumstances could present “a sufficiently important reason for nonetheless granting certification.”
18 *See Curtiss-Wright*, 446 U.S. at 8 n.2. Here, we have that. Indeed, Appellees have not pointed to
19 any case finding an abuse of discretion on the ground that separate claims were too inter-related to
20 be reviewed separately in similar circumstances as we have here, and *Spiegel v. Trustees of Tufts*
21 *College*, 843 F.2d 38 (1st Cir. 1988) is not to the contrary.²² Under the Ninth Circuit’s “pragmatic

22
23 ²²In holding that the district court had erred in determining that there was “no just reason to
24 delay” entry of judgment on its dismissal of breach of contract and tort claims when the plaintiff’s
25 civil rights claim remained pending, the First Circuit in *Spiegel* applied a *de novo* standard of review
26 because the district court had made no findings on that question, unlike the Bankruptcy Court here.
27 *See id.* at 44. Independently reviewing the record (in essence, exercising the discretion that the
28 district court had not), the First Circuit found that the claims were too inter-related to justify separate
appeals, principally because they “all stem from the same overall series of events” (e.g., a tenure
dispute), a favorable ruling on the remaining civil rights count would largely moot the other claims,
and there were no “unusual and compelling circumstances” that countervailed such concerns. *Id.* at
44-45. But quite apart from the exacting standard of review *Spiegel* applied which is inappropriate
here, that was a case concerning a tenure grievance between private parties and nothing more, and
(continued . . .)

1 approach” to Rule 54(b), severed claims need not be entirely separate from and independent of
2 remaining claims, but rather, “Rule 54(b) certification is proper if it will aid ‘expeditious decision’
3 of the case.” *Texaco*, 939 F.2d at 797; *see also Lundell v. Ulrich (In re Lundell)*, 236 B.R. 720, 724
4 (9th Cir. 1999) (“[r]esolving this appeal will aid in expeditiously resolving the adversary proceeding
5 since the Trustee may not have to proceed further against the remaining defendants”).

6 Appellees also ignore controlling Ninth Circuit authority holding that proof of the same facts
7 will *not* in and of itself invalidate a Rule 54(b) order. *See Texaco*, 939 F.2d at 797-98 (affirming
8 entry of Rule 54(b) judgment; “[a]lthough the claims disposed of on appeal and the remaining
9 counterclaims require proof of the same facts, the legal issues now appealed will streamline the
10 ensuing litigation. Furthermore, [the] rulings separated the legal from the factual questions . . . [and]
11 certain theories of recovery were eliminated, limiting the issues to be tried below”). Here, the
12 Bankruptcy Court “carved out” PG&E’s Section 1123(a)(5) claim in an effort to streamline further
13 litigation, and thereby separated out this legal issue from an implied preemption inquiry that it
14 viewed as being subject to a heightened evidentiary burden. As the one most familiar with the
15 claims at issue, its judgment is entitled to substantial deference. Indeed, if Proponents prevail on
16 their Section 1123(a)(5) claim (including after all available appellate remedies have been finally
17 exhausted by the parties), then it may well no longer be necessary for them to pursue an implied
18 preemption claim in the context of this reorganization, and suffer the added delay and expense that
19 that would entail, including up through the appellate courts.²³

20 _____
(. . . continued)

21 involved none of the concerns here with speeding this reorganization to resolution as quickly as
22 possible. Indeed, a court certainly enjoys *the discretion* to certify a claim that arises out of the same
23 transaction and occurrence as pending claims (*Cold Metal Process Co. v. United Eng’g & Foundry*
24 *Co.*, 351 U.S. 445, 452-53 (1956)) and nothing in *Spiegel* is to the contrary. Supreme Court
25 guidance and recent Ninth Circuit authority also casts doubt on *Spiegel*’s reliance on early Ninth
26 Circuit case law that took an overly restrictive view of Rule 54. *See Morrison-Knudsen Co. v.*
27 *Archer*, 655 F.2d 962, 965 (9th Cir. 1981) (Rule 54(b) order proper “only where necessary to avoid
28 a harsh and unjust result” if legal and factual issues are similar with claims still pending); *Spiegel*,
843 F.2d at 42 (relying on *Morrison-Knudsen Co.*); *but see Curtiss-Wright*, 446 U.S. at 9-10 (“the
phrase ‘infrequent harsh case’ in isolation is neither workable nor entirely reliable as a benchmark
for appellate review”); *Texaco*, 939 F.2d at 798 (criticizing *Morrison-Knudsen* for its “outdated and
overly restrictive view” of Rule 54(b)).

²³To give some indication, the Bankruptcy Court rendered its ruling on express preemption on
February 7, 2002, and Proponents have done everything possible to move this appeal along. Yet
(continued . . .)

1 Appellees also suggest that the threat that the Section 1123(a)(5) ruling could be rendered
2 possibly moot undermines the Bankruptcy Court’s considered conclusion that there is no just reason
3 to delay its review. Mot. at 16. But a possibility of mootness does not render Rule 54(b)
4 inappropriate if immediate appeal would otherwise result in judicial efficiencies. *See Continental*
5 *Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987) (affirming entry
6 of Rule 54(b) judgment on certain claims, despite that undecided claims left open the possibility of
7 “potentially full recovery,” making it possible that plaintiff “might never have needed to appeal the
8 instant judgments if the case had been compelled to go forward”); *Cadillac Fairview/Cal., Inc. v.*
9 *United States*, 41 F.3d 562, 564 n.1 (9th Cir. 1994) (per curiam) (upholding entry of Rule 54(b)
10 judgment on defendants’ contribution claim despite possibility of their later being contractually
11 indemnified; “eliminating issues and parties from a case justifies the entry of final judgment on a
12 claim, even if subsequent trial proceedings might obviate the need for an appeal”).

13 Finally, Appellees’ more peripheral concerns also do not establish any abuse of discretion.
14 They suggest that this Court might not be the last stop in the appellate process on the express
15 preemption issue. Mot. at 21-22. We do not disagree; but far from militating against the need for
16 immediate review, the length of time it could take for any party to fully exhaust their appellate
17 remedies *heightens* the need to initiate the appellate process sooner rather than later, in view of all of
18 the very real, practical considerations weighed by the Bankruptcy Court. Similarly, Appellees
19 predict that confusion could reign if the express preemption ruling is reversed in the midst of voting
20 on Proponents’ alternate plan, or during confirmation hearings. Mot. at 21. But it is impossible to
21 see why that would occur.²⁴ And to be sure, those misplaced concerns are ones that the Bankruptcy
22

(. . . continued)

23 despite that it has gone up on a limited record (because it arose at the disclosure statement approval
24 stage), Proponents do not reasonably expect this Court to render a definitive ruling on the merits
25 before approximately July 2002 at the very earliest (five months), given, among other things, the
26 time it has taken to certify the question for appeal and the jurisdictional challenges that ruling has
27 spawned. After that, there may well be additional levels of review. Any appeal from an implied
28 preemption claim, on the other hand, is still far off (after the conclusion of confirmation hearings,
which are still months away even from beginning), and will be on a vastly lengthier record,
including of the confirmation hearings, which could well last for a substantial time. Thus, the added
delay and expense of having to pursue the implied preemption claim will be considerable.

²⁴Appeals of the express preemption ruling likely will not be *finally* exhausted before creditors
(continued . . .)

1 Court was in a far better position to assess than the appellate courts.

2 In light of the substantial deference due the Bankruptcy Court’s weighing of the equities—
3 which it was uniquely situated to judge—it cannot be said that the Bankruptcy Court abused its
4 discretion in certifying Proponents’ Section 1123(a)(5) claim for appeal.

5 **D. Jurisdiction Also Exists Under The Practical Finality Doctrine Established In**
6 ***Gillespie v. United States Steel Corp.***

7 Quite apart from the Bankruptcy Court’s entry of judgment pursuant to Rule 54(b), immediate
8 review of the Order is also appropriate under the “pragmatic” or “practical” finality doctrine
9 established in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). Under this exception to
10 the final judgment rule, appeal may be taken from an order deciding an issue “fundamental to the
11 further conduct of the case,” where the benefits of immediate review outweigh the costs of
12 “piecemeal” litigation. *Id.* at 152-53.

13 **1. Under The Ninth Circuit’s Interpretation Of The Doctrine In Bankruptcy**
14 **Appeals, The Order Is Appealable Under 28 U.S.C. Section 158(a)(1).**

15 Although the Ninth Circuit’s rule is different in non-bankruptcy appeals (*see* Section D(2),
16 *infra*), the Ninth Circuit does not restrictively interpret *Gillespie* in bankruptcy appeals, where courts
17 are “free to apply the policies behind *Gillespie* more broadly” and “to develop new principles to fit
18 the special problems of bankruptcy administration,” particularly “if necessary for the efficient
19 operation of bankruptcy proceedings.” *Sulmeyer v. Karbach Enters. (In re Exennium, Inc.)*, 715
20 F.2d 1401, 1402, 1403 n.1 (9th Cir. 1983); *cf. Elliott v. Four Seasons Props. (In re Frontier Props.,*
21 *Inc.)*, 979 F.2d 1358, 1362-64 (9th Cir. 1992) (applying “pragmatic” approach to bankruptcy appeals
22 under Section 158(a)(1)); *Cannon v. Hawaii Corp. (In re Hawaii Corp.)*, 796 F.2d 1139, 1142 n.1

23 (. . . continued)

24 vote on the plan (the solicitation period is to commence on June 17, 2002 and ballots are due on
25 August 12, 2002 (Lopes Dec. ¶4)), nor before confirmation hearings are concluded (the Bankruptcy
26 Court has scheduled a preliminary status conference on August 1, 2002 (*Id.* ¶5)). Moreover, success
27 on Proponents’ Section 1123 claim would not affect the treatment of creditors one iota as contrasted
28 with the current plan which is premised on a multitude of implied preemption claims (other than to
heighten the prospect they would get paid faster). In addition, the Disclosure Statement (recently
approved by the Bankruptcy Court on April 24, 2002) fully discloses the initiation and pendency of
this appeal and so creditors voting on the Plan will be making fully informed choices, aware the
express preemption ruling could be reversed.

1 (9th Cir. 1986) (noting “congressional grants of appellate jurisdiction over bankruptcy matters” are
2 construed “in accord with the Code purposes”).²⁵

3 *In re Exennium* involved an appeal from a decision of the Bankruptcy Appellate Panel
4 (“BAP”) reversing a bankruptcy court’s order authorizing the trustee to complete a sale of leasehold
5 interests of the estate to the Debtor’s former attorney. *In re Exennium, Inc.*, 715 F.2d at 1402. The
6 BAP’s order was found to be non-final, as it did not settle a dispute between the trustee and the
7 objecting landlord under one of the leases, but rather determined that the buyer, as the debtor’s
8 former attorney, was disqualified from purchasing the lease. *Id.* The Ninth Circuit held that the
9 order could be appealed under *Gillespie* because the buyer’s rights to the leases “raise an issue
10 ‘fundamental to the further outcome of this case,’” which, until settled, “will cast its shadow over
11 further administration of the estate.” *Id.* at 1403. At the same time, the Ninth Circuit emphasized
12 that because the case was a bankruptcy appeal, it did not have to meet the strict requirements for
13 applying *Gillespie* that the Ninth Circuit applies to non-bankruptcy appeals. *Id.* at 1403 n.1.

14 Similarly, in *Fireman’s Fund Insurance Cos. v. Grover (In re Woodson Co.)*, 813 F.2d 266,
15 268 (9th Cir. 1987), the Ninth Circuit held that *Gillespie* permitted an appeal from a district court
16 order affirming the bankruptcy court’s partial summary judgment on some, but not all, of the
17 plaintiffs’ claims to ownership of promissory notes and deeds of trust held by the estate. It held that
18 the district court order was “final” on the ground that (1) the “discrete legal issue” addressed by the
19 bankruptcy court’s order could be separately decided from the remaining claims in the case, and (2)

21 ²⁵Other Circuits also recognize that *Gillespie* should apply more broadly in bankruptcy
22 appeals in light of the policies and purposes of the bankruptcy laws. *See, e.g., Fruehauf Corp. v.*
23 *Jartran, Inc. (In re Jartran, Inc.)*, 886 F.2d 859, 864 (7th Cir. 1989) (“*Gillespie*’s admonition, made
24 apropos of the finality requirement articulated by 28 U.S.C. section 1291, takes on additional
25 significance in bankruptcy cases, given the already ‘relaxed’ character of finality in the bankruptcy
26 context”); *Martin Bros. Toolmakers, Inc. v. Industrial Dev. Bd. (In re Martin Bros. Toolmakers,*
27 *Inc.)*, 796 F.2d 1435, 1437 (11th Cir. 1986) (noting “accommodative” approach to finality under
28 *Gillespie*, under which “an order of marginal finality should be reviewed if the question presented is
fundamental to further conduct of the case,” is “vital in the context of bankruptcy”); *Kearney-*
National, Inc. v. E.H. Mann, Inc. (In re E.H. Mann, Inc.), 118 B.R. 895, 897 (S.D. Ga. 1990)
 (“[b]ecause bankruptcy proceedings are protracted and involve multiple claimants, the district court
should generally take an ‘accommodative approach’ toward bankruptcy appeals to avoid rendering a
distribution or plan ‘purely contingent until completion of appeals after conclusion of the case’”) (emphasis added).

1 the appeal presented an issue “exceedingly important to the course of the future administration of
2 the estate and the rights of general creditors.” *Id.* at 269-70. Thus, in the Ninth Circuit, in appeals
3 arising in bankruptcy cases, *Gillespie* permits appeal where the appeal involves issues “fundamental
4 to the further outcome of a case,” if “the course of litigation would be impeded, rather than
5 advanced, by dismissing the appeal.” *In re Exennium*, 715 F.2d at 1402-03.²⁶

6 This appeal, as in *In re Exennium* and *In re Woodson*, involves an issue “fundamental to the
7 further outcome of this case.” As the Bankruptcy Court repeatedly noted, express preemption is one
8 of the central issues of this reorganization. *See* Mem. Dec. at 4; Order at 3-4. As in *In re Exennium*
9 and *In re Woodson*, declining review of this issue now would merely forestall its determination,
10 thereby “cast[ing] a shadow over further administration of the estate” until the proper basis for
11 preemption is determined with finality. *In re Exennium*, 715 F.2d at 1403; *see also Martin Bros.*
12 *Toolmakers, Inc. v. Industrial Dev. Bd. (In re Martin Bros. Toolmakers, Inc.)*, 796 F.2d 1435, 1437
13 (11th Cir. 1986) (“[d]elayed review of . . . claims involving key assets of the debtor’s estate, would
14 render any distribution or plan purely contingent until completion of appeals after conclusion of the
15 case. Such an approach would be especially devastating in reorganizations, which proceed most
16 smoothly when at least some variables become fixed and operate as the basis for further
17 negotiation”).

18 Indeed, as the Bankruptcy Court recognized, it is critical that appellate review of the Order
19

20 ²⁶Recently, the Ninth Circuit BAP in *Belli v. Temkin (In re Belli)*, 268 B.R. 851, 856 (B.A.P.
21 9th Cir. 2001), without analysis or discussion, apparently applied the same standard for “finality” to
22 a bankruptcy appeal as in ordinary civil cases under Section 1291. It held that no appellate
23 jurisdiction existed by applying one of the elements of the four-factor test applicable to non-
24 bankruptcy appeals under Section 1291: “The pragmatic finality doctrine requires, among other
25 elements, an unsettled issue of national significance. This appeal presents a garden-variety non-
26 dischargeability issue of significance only to the parties.” *Id.* at 857 (citing *SEIU Local 102 v.*
27 *County of San Diego*, 60 F.3d 1346, 1350 (9th Cir. 1994)) (other citations omitted). Although
28 applying this factor here would strongly *support* application of the practical finality doctrine (*see*
Part D(2) below), the BAP nonetheless need not have applied the four-factor test under the above
controlling Ninth Circuit authority. Decisions by the BAP are of course not binding on this Court.
See Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990). And there is little to
be learned from *Belli* by way of non-binding but persuasive authority, since it does not recognize
In re Exennium or other Ninth Circuit authority endorsing a more liberal approach to bankruptcy
appeals, and the case offers no useful explanation or analysis of why it was necessary or appropriate
to strictly apply the four-factor test applicable to appeals under Section 1291.

1 commence promptly. This will maximize the chances of exhausting all appellate remedies before
2 the Bankruptcy Court, Proponents, government parties and other parties in interest commit the time
3 and resources for full and potentially protracted litigation (including appeals) on implied preemption
4 under the standard articulated by the Bankruptcy Court. Even if it is not possible for all parties to
5 exhaust their appellate remedies on the express preemption claim before the confirmation hearing
6 concludes (thus meaning that Proponents may proceed with the hearing on implied preemption),
7 *proceeding promptly with the present appeal still is necessary to the efficient progress of the*
8 *confirmation litigation and this bankruptcy case*, and therefore is consonant with *Exennium* and
9 other Ninth Circuit authority. That is because appeals from any ruling on implied preemption—
10 which will be costly and time-consuming because implied preemption under the standard set by the
11 Bankruptcy Court requires a fact-intensive inquiry and findings—cannot begin until the
12 confirmation hearing has taken place, which at a minimum is many months away. By promptly
13 commencing the appellate process with respect to the purely legal question of express preemption,
14 which has already been finally decided by the Bankruptcy Court, the appellate process regarding
15 Proponents’ plan of reorganization is effectively being advanced by months; equally important, a
16 final appellate determination that express preemption applies could potentially render unnecessary
17 any pending or future appeal of implied preemption issues resulting from the confirmation hearing.
18 Thus, it is certainly both compelling and pragmatic, from the vantage point of the judiciary and
19 interested parties alike, to have this appeal decided promptly.

20 **2. In Addition, The Order Meets The Four-Factor *Gillespie* Test Applied To**
21 **Non-Bankruptcy Cases.**

22 Even if this appeal did *not* warrant application of the Ninth Circuit’s liberal approach to
23 bankruptcy appeals, it would still meet the Ninth Circuit’s more restrictive requirements for
24 application of *Gillespie* in non-bankruptcy civil appeals, as follows:

25 (1) the [decision appealed] was a “marginally final order,” (2) [which] “disposed of an
26 unsettled issue of national significance,” (3) review “implemented the same policy
Congress sought to promote in § 1292(b),”^[27] and (4) the finality issue was not

27 ²⁷28 U.S.C. Section 1292(b) allows courts of appeals to hear appeals from interlocutory orders
28 (continued . . .)

1 presented to the [appellate court] until argument on the merits, thereby ensuring that
2 policies of judicial economy would not be served by remanding the case with an
3 important unresolved issue. (*SEIU, Local 102 v. County of San Diego*, 60 F.3d 1346,
4 1350 (9th Cir. 1994) (quoting *In re Subpoena Served on the California Pub. Utils.*
5 *Comm’n*, 813 F.2d 1473, 1480 (9th Cir. 1987) and *Coopers & Lybrand v. Livesay*, 437
6 U.S. 463, 477 n.30 (1978)))

7 *First*, the Order is more than “marginally final.” It conclusively resolved a pure issue of law
8 central to this case that the Bankruptcy Court made clear will *not* be revisited. *See SEIU*, 60 F.3d at
9 1350 (partial summary judgment orders that determined liability but not damages held marginally
10 final “because the calculation of damages ‘will not affect the potentially dispositive and obviously
11 central issue’ in this case” decided by summary judgment orders); *Wabol v. Villacrusis*, 958 F.2d
12 1450, 1454-1455 (9th Cir. 1992) (order “marginally final” because pending proceedings “will not
13 affect the potentially dispositive and obviously central issue” decided).

14 *Second*, this appeal plainly involves “an unsettled issue of national significance,” *viz.*, whether
15 Section 1123(a)(5) expressly preempts state laws and regulations that obstruct a public utility’s
16 ability to consummate its reorganization plan under the Bankruptcy Code. This legal issue is
17 certainly unsettled: as explained more fully in Appellants’ Opening Brief, no other court in the Ninth
18 Circuit has addressed it, and the Bankruptcy Court’s ruling is in direct conflict with the only court
19 that has addressed the issue as well as the leading commentator in the field. *See, e.g., Public Serv.*
20 *Co. of New Hampshire v. New Hampshire (In re Public Serv. Co. of New Hampshire)* (“*In re*
21 *PSNH*”), 108 B.R. 854, 891 (Bankr. D.N.H. 1989); 7 Lawrence P. King, *Collier on Bankruptcy*
22 ¶1123.01[5][c], at 1123-12 & n.25 (15th ed. rev. 2001) (same).

23 This issue also has national significance. Whether this “powerful and necessary tool” is
24 available to PG&E and other entities seeking to reorganize is relevant to Chapter 11 reorganizations
25 across the country, and neither depends on nor is limited to the facts of this particular case. *See*
26 *SEIU*, 60 F.3d at 1350 (orders addressing interpretation of exemption pertaining to requirements set
27 forth in Fair Labor Standards Act, 29 U.S.C. §§201-219, addressed issue of national significance);

28 (. . . continued)

where the district court has certified that the order involves a controlling issue of law as to which
there is substantial grounds for difference of opinion and that an immediate appeal could advance
the termination of the litigation.

1 *Gillespie*, 379 U.S. at 152-53 (holding order addressing interpretation of Jones Act, 46 U.S.C. §688,
2 appropriate for review); *cf. Williamson v. UNUM Life Ins. Co. of America*, 160 F.3d 1247, 1251 (9th
3 Cir. 1998) (orders that merely “addressed issues that were specific to the facts of this case,” such as
4 interpretation of insurance policy and actions of parties did not raise issues of national importance).
5 This issue is of particular importance to the reorganization of public utilities, which are otherwise
6 susceptible to being held hostage by state or county regulatory agencies that have the power, under
7 state law, to prevent otherwise lawful reorganizations until their demands are met. *See In re PSNH*,
8 108 B.R. at 891. The question thus has significant importance outside the present litigation. In
9 addition, as the Bankruptcy Court noted, this ruling affects not just the state and local regulatory
10 agencies that oppose the Plan, but the thousands of creditors and millions of ratepayers and
11 customers served by PG&E, who may suffer adverse consequences from delay. *See Paluso v.*
12 *Mathews*, 573 F.2d 4, 8 (10th Cir. 1978) (holding order remanding black lung benefits case for
13 further administrative consideration appealable under *Gillespie* because issues raised by appeal were
14 important to too many potential claimants, so that the inconvenience and costs of piecemeal review
15 were outweighed by the danger of denying justice by delay).

16 *Third*, and as more fully discussed in our pending motion for protective leave to appeal, appeal
17 now would serve the goals of Section 1292(b). The Bankruptcy Court’s ruling on this central issue
18 has affected the entire confirmation process. Review of its ruling—which will otherwise remain,
19 untouched, precluding resort to the most critical Code provisions for implementing a reorganization
20 plan—could save courts and the parties valuable time and resources. Even in ordinary civil appeals,
21 the Ninth Circuit under *Gillespie* has allowed appeals raising important issues that could
22 dramatically affect the course of litigation.²⁸ Given that this appeal involves the most important
23

24 ²⁸*See, e.g., Wabol*, 958 F.2d at 1455 (immediate review of “important and potentially
25 dispositive questions” raised by appeal of order upholding Northern Marina Islands Constitution’s
26 land use restrictions appropriate because “[i]f we find the restriction invalid, then the remand
27 becomes unnecessary”); *SEIU*, 60 F.3d at 1350 (immediate review of “important and potentially
28 dispositive questions” appropriate because “[r]emanding would not promote judicial economy and
would therefore frustrate the very purpose of the final judgment rule”) (internal quotation marks
omitted); *Smith v. Eggar*, 655 F.2d 181, 185 (9th Cir. 1981) (appeal of order involving issue
“fundamental to the litigation” held appropriate).

1 ruling in one of the largest bankruptcies in history, immediate review is appropriate.

2 *Last*, the Order meets the fourth factor, *viz.*, that the finality issue not be raised until argument
3 on the merits, thereby ensuring that policies of judicial economy will not be served by remanding
4 the case with an important unresolved issue. *SEIU*, 60 F.3d at 1350. Consistent with the pragmatic
5 rationale of *Gillespie*, the Ninth Circuit does not interpret this fourth factor as a strict technical
6 timing requirement, but looks to whether judicial economy would be served or disserved by
7 remanding the matter with an important issue left unresolved. *See, e.g., SEIU*, 60 F.3d at 1350
8 (applying *Gillespie* to appeal from partial summary judgment ruling because “deciding the merits
9 [of the applicability of the FLSA to government employees would] dispose of an unsettled issue of
10 national significance” and remanding at this juncture would not promote—and indeed would
11 frustrate—judicial economy); *cf. Wabol*, 958 F.2d at 1454-55 (discussing four-factor test for
12 practical finality and finding appellate jurisdiction, notwithstanding that issues remaining in the trial
13 “could eventually ascend” to the appellate court; not finding appellate jurisdiction “would disserve
14 the cause of judicial economy and therefore frustrate the very purpose of the final judgment rule”);
15 *see also 19 Moore’s Federal Practice, supra*, §202.10, at 202-40.13 (“To the extent that this
16 additional restriction [regarding the timing of presentation of the finality issue] has been applied, it
17 merely requires a showing that an immediate appeal will serve the goal of judicial economy”).²⁹
18 This approach is consistent with *Gillespie*’s reasoning that the relevant concern is one of judicial
19 economy. 379 U.S. at 153 (“it seems clear now that the case is before us that the eventual costs, all
20 the parties recognize, will certainly be less if we now pass on the questions presented here rather
21 than send the case back with those issues undecided”). Here, as demonstrated above, appeal now
22 will serve the goal of judicial economy.³⁰

23
24 ²⁹The Ninth Circuit has never considered whether an appeal that meets all *other* requirements
25 of *Gillespie* would nonetheless lack jurisdiction if the arguable finality issue were raised *before*
26 argument on the merits. *Cf. Williamson v. UNUM Life Ins. Co. of America*, 160 F.3d 1247, 1250-51
27 (9th Cir. 1998) (holding *Gillespie* inapplicable because *none* of the four factors were met). The
28 complete absence of any discussion of this requirement in the cases cited above, as well as the
principles animating the practical finality doctrine, indicate that Professor Moore is correct in his
conclusion that this requirement “merely requires a showing that an immediate appeal will serve the
goal of judicial economy.” *19 Moore’s Federal Practice, supra*, §202.10, at 202-40.13.

³⁰Moreover, even if one were to strictly apply this fourth requirement, Appellees’ delay in
(continued . . .)

1 In sum, even if the four-prong test for practical finality applicable to ordinary, non-bankruptcy
2 appeals under Section 1291 were strictly applied to this bankruptcy appeal, the Order still would be
3 appealable under 28 U.S.C. Section 158(a)(1).

4 **CONCLUSION**

5 For the foregoing reasons, Proponents respectfully request that this Court deny the motion to
6 dismiss this appeal.

7 DATED: May 23, 2002.

Respectfully,

8 HOWARD, RICE, NEMEROVSKI, CANADY,
9 FALK & RABKIN
A Professional Corporation

10
11 By: _____
12 AMY E. MARGOLIN

13 Attorneys for Appellant, Cross-Appellee, Debtor and
14 Debtor-in-Possession PACIFIC GAS AND ELECTRIC
COMPANY

– and –

15 DEWEY BALLANTINE LLP
16 Attorneys for Appellant and Cross-
Appellee PG&E CORPORATION

PROFESSOR LAURENCE H. TRIBE
Co-Counsel to Appellant and Cross-Appellee PG&E
CORPORATION for Constitutional Law Matters

17 WEIL, GOTSHAL & MANGES LLP
18 Attorneys for Appellant and Cross-
Appellee PG&E CORPORATION

19 WD 052302/1-1419974/142/992764/
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24 (. . . continued)

25 moving to dismiss this appeal satisfies it principally because the appellate briefing already is
26 underway. Proponents initiated this appeal on March 22, 2002; Appellees did not move to dismiss
27 it. Thereafter, on April 17, 2002 Appellants filed their opening brief on the merits; Appellees still
28 did not move to dismiss it. Not until the Appellees' own brief on the merits was due (May 7, 2002)
did they finally file this motion—rather than their appellate brief. By the time they did so, it was
more than 20 days after Proponents had filed their opening brief, and more than *one month* after this
appeal was initiated (not to mention, more than one week after Proponents had filed a motion (on
April 29, 2002) asking the Court to expedite its consideration of this appeal).

1 JAMES L. LOPES (No. 63678)
JEFFREY L. SCHAFFER (No. 91404)
2 AMY E. MARGOLIN (No. 168192)
CEIDE ZAPPARONI (No. 200708)
3 HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
4 A Professional Corporation
Three Embarcadero Center, 7th Floor
5 San Francisco, California 94111-4065
Telephone: 415/434-1600
6 Facsimile: 415/217-5910

7 Attorneys for Appellant, Debtor and Debtor in
Possession PACIFIC GAS AND ELECTRIC
8 COMPANY

9 – and –

10 Attorneys for Appellant PG&E CORPORATION
listed on attached Counsel Page

11
12 UNITED STATES BANKRUPTCY COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

15 In re No. 01-30923 DM
16 PACIFIC GAS & ELECTRIC COMPANY, Chapter 11 Case
17 Debtor/Appellant.
18
19 Federal I.D. No. 94-0742640
20

21
22 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
23 [PROTECTIVE] MOTION OF PACIFIC GAS AND ELECTRIC COMPANY AND
PG&E CORPORATION FOR LEAVE TO FILE INTERLOCUTORY APPEAL
24 (28 U.S.C. §158(a)(3))

25 [Notice of Motion, Declaration of James L. Lopes and
Request For Judicial Notice in Support hereof filed concurrently]
26
27
28

Additional Counsel Page

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PROFESSOR LAURENCE H. TRIBE
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4621

DEWEY BALLANTINE LLP
Two Houston Center
909 Fannin Street, Suite 1100
Houston, Texas 77010
Telephone: (713) 576-1500

Co-Counsel to PG&E CORPORATION for
Constitutional Law Matters

Attorneys for PG&E CORPORATION

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000

Attorneys for PG&E CORPORATION

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

1 **INTRODUCTION**

2 This motion for leave to file an interlocutory appeal is occasioned by a ruling of the
3 United States Bankruptcy Court on February 7, 2002, embodied in a subsequent order
4 entered on March 18, 2002 (the “Express Preemption Order”). Such ruling rejected as a
5 matter of law an important legal avenue for Pacific Gas and Electric Company (“PG&E”) to
6 reorganize itself under the federal bankruptcy laws and emerge successfully from one of the
7 largest bankruptcies in United States history, without at the same time being held hostage to
8 the veto of a myriad of state and local authorities—and the *only* avenue for PG&E to do so
9 without a protracted, expensive and highly fact-intensive confirmation fight with some of its
10 loudest critics in State government.

11 The Bankruptcy Court ruled that PG&E’s proposed plan of reorganization is
12 unconfirmable as a matter of law to the extent that it depends on the Bankruptcy Code to
13 expressly preempt state and local laws in order to consummate the reorganization
14 transactions under the plan, and the Bankruptcy Court sustained objections to PG&E’s
15 proposed disclosure statement on that basis. The precise issue that it reached, leave to seek
16 immediate review of which is sought here, concerns the express preemptive effect of Section
17 1123(a)(5) of the United States Bankruptcy Code, which commands that “[n]otwithstanding
18 any otherwise applicable nonbankruptcy law, a plan [of reorganization] shall . . . provide
19 adequate means for the plan’s implementation.” It is PG&E’s position that this statute
20 preempts a variety of state and local laws that would interfere with the implementation of the
21 restructuring transactions contemplated by its proposed plan of reorganization.

22 There is only one other reported decision directly on point: a 1989 decision by another
23 respected Bankruptcy Court judge in a utility reorganization that reached precisely the
24 *opposite* conclusion that the Bankruptcy Court did in this case, after equally careful study.
25 Many other courts (and the leading commentator) have held that Section 1123(a)(5) is an
26 empowering statute that has preemptive effect over conflicting state law.

27 In light of the conflict between the only two bankruptcy courts to reach the issue, this
28 question is of great significance to PG&E’s reorganization. If review of the Bankruptcy

1 Court’s express preemption ruling is left to another day, it will mean that PG&E will face
2 complex, costly and time-consuming litigation on its alternate basis for seeking confirmation
3 of its plan of reorganization (implied preemption). That process, and the mounting costs to
4 PG&E’s estate that it will entail, will unnecessarily diminish the estate, consume substantial
5 additional judicial resources and materially delay the day that PG&E can emerge from
6 bankruptcy, all to the detriment of the parties and judiciary alike if PG&E is correct in its
7 position that the Bankruptcy Code makes available the straighter, simpler path of express
8 preemption. Accordingly, delaying appellate review of the Bankruptcy Court’s express
9 preemption ruling will redound to nobody’s benefit—neither creditors, shareholders, the
10 court and its staff alike, nor the people of Central and Northern California served by PG&E.
11 Indeed, the Bankruptcy Court itself has recognized the importance of prompt appellate
12 review of its Express Preemption Order, stating that “[i]f this court’s decision is going to be
13 reversed, then PG&E and its creditors should not suffer the consequences and delay (and
14 potentially staggering administrative expenses) of having to attempt to confirm its
15 alternative plan.” Express Preemption Order, at 6:13-17.

16 Before turning to the reasons why immediate interlocutory review is warranted, one
17 point should be made clear. This motion is filed as a protective measure, inasmuch as the
18 Express Preemption Order has been entered as a final judgment by the Bankruptcy Court
19 pursuant to Rules 54(b) and 58 of the Federal Rules of Civil Procedure and Rules 7054,
20 9014 and 9021 of the Federal Rules of Bankruptcy Procedure. Thus, the Express
21 Preemption Order is an appealable order pursuant to 28 U.S.C. Section 158(a)(1), and no
22 motion for leave to file an interlocutory appeal pursuant to 28 U.S.C. Section 158(a)(3)
23 should be necessary. Nonetheless, because in the Bankruptcy Court certain appellees took
24 the position that the Bankruptcy Court’s express preemption ruling would only be
25 reviewable with leave of the appellate court (a position rejected by the Bankruptcy Court and
26 not at issue in this motion), this motion requests such leave as a backup measure. For the
27 reasons that follow, such relief is plainly warranted.

1 **STATEMENT OF FACTS**

2 PG&E is a utility providing gas and electric services to more than 4.5 million
3 customers in Central and Northern California. On April 6, 2001, following months of
4 skyrocketing wholesale electricity costs and inadequate rate relief from state regulators,
5 PG&E filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy
6 Code in the United States Bankruptcy Court for the Northern District of California.
7 Declaration of James L. Lopes (“Lopes Decl.”) ¶2; Request For Judicial Notice (“RJN”)
8 Ex. 5, at 6, 71. It is one of the few investor-owned public utilities to seek Chapter 11
9 bankruptcy protection in United States history. Lopes Decl. ¶2.

10 On September 20, 2001, PG&E, together with plan co-proponent PG&E Corp.
11 (collectively the “Plan Proponents” or “Proponents”), filed a proposed Plan of
12 Reorganization and accompanying Disclosure Statement, which they subsequently amended
13 by the filing of a First Amended Plan of Reorganization and First Amended Disclosure
14 Statement on December 19, 2001 (as so amended, hereinafter referred to as the “Plan” and
15 “Disclosure Statement”). See Lopes Decl. ¶3; Disclosure Statement (RJN Ex. 5). The
16 proposed Plan is designed to enable PG&E to emerge from Chapter 11 as a strong and
17 sustainable enterprise. In broadest terms, it restructures PG&E into several separate entities,
18 resulting in the transfer of some regulatory jurisdiction from the state level to the federal
19 level, and pays off all valid creditor claims in full.¹

20 As a public utility, of course, PG&E is subject to both federal and state regulation.² In

21 ¹Specifically, the proposed Plan contemplates that the business responsibilities and assets of
22 PG&E will be disaggregated into four separate and individually financially-sound entities based on
23 PG&E’s historical functions: namely, retail gas and electricity distribution (to be carried on by the
24 Reorganized Debtor); electric transmission (conducted by ETrans LLC (“ETrans”)); interstate gas
25 transmission (conducted by GTrans LLC (“GTrans “)); and electric generation (conducted by
26 Electric Generation LLC (“Gen”). See Disclosure Statement (RJN Ex. 5) at 6. As a result of the
27 contemplated restructuring, the electric transmission, interstate gas transmission and electric
28 generation businesses will be under the exclusive ratemaking jurisdiction of the Federal Energy
Regulatory Commission (“FERC”). The Reorganized Debtor will continue to perform the
traditional functions of a utility, including retail electricity and gas distribution, and will continue to
be subject to the jurisdiction of the California Public Utilities Commission (“CPUC”). See
Disclosure Statement (RJN Ex. 5) at 85, 88. Significantly, the proposed Plan provides for payment
in full of all valid creditor claims. See *id.* at 133-57.

²For example, at the federal level, the Federal Energy Regulatory Commission (“FERC”)
regulates, among other things, electric transmission rates and access, interconnections, and the terms
(continued . . .)

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

1 particular, PG&E under California law is subject to the regulatory jurisdiction of the
2 California Public Utilities Commission (“CPUC”) and thus, outside of bankruptcy, certain
3 fundamental steps required to consummate the Plan (such as transferring assets and issuing
4 debt or equity securities) would require prior approval by the CPUC under certain
5 circumstances. See Disclosure Statement (RJN Ex. 5) at 127-28. In addition, other
6 provisions of state law that might otherwise apply outside of bankruptcy could preclude
7 implementation of portions of the Plan. See *id.* at 129-32.

8 Section 1123(a)(5) of the Bankruptcy Code, however, provides in pertinent part that

9 [n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . .
10 provide adequate means for the plan’s implementation, such as [among other
11 things] . . . (B) transfer of all or any part of the property of the estate to one or
12 more entities, whether organized before or after the confirmation of such plan; . .
13 . or (J) issuance of securities of the debtor, or of any entity referred to in
14 subparagraph (B) (11 U.S.C. §1123(a)(5) (emphasis added))

15 To accomplish the restructuring contemplated by the Plan, therefore, the Proponents
16 contended that the confirmation order approving the Plan and authorizing the transactions
17 pursuant to the Plan would preempt “otherwise applicable nonbankruptcy law,” including in
18 the following areas: (1) any approval or authorization of the CPUC or compliance with the
19 California Public Utilities Code or CPUC rules, regulations or decisions otherwise required
20 to transfer public utility property, issue securities and implement the Plan; and (2) the
21 exercise of discretion by any other state or local agency or subdivision to deny the transfer or
22 assignment of any of PG&E’s property (including existing permits or licenses) or the
23 issuance of identical permits and licenses on the same terms and conditions as PG&E’s
24 existing permits and licenses where necessary (*e.g.*, where both the reorganized PG&E and

25 (. . . continued)

26 and rates of wholesale electric power sales. In addition, most of PG&E’s hydroelectric facilities
27 operate pursuant to licenses issued by FERC. At the state level, for example, the CPUC has
28 jurisdiction, among other things, to set retail rates and conditions of service for PG&E’s electric
distribution, gas distribution and gas transmission services in California. It also has jurisdiction over
PG&E’s sales of securities, dispositions of utility property, energy procurement on behalf of its
electric and gas retail customers, and certain aspects of PG&E’s siting and operation of its electric
and gas transmission and distribution systems. Ratemaking for retail sales from PG&E’s generation
facilities also is under the jurisdiction of the CPUC. To the extent such power is sold for resale into
wholesale markets, however, it is under the ratemaking jurisdiction of the FERC. PG&E’s
operations and assets are also regulated by a variety of other federal, state and local agencies.

1 one or more of the newly created entities require such permit or license for their operations).
2 *See* Disclosure Statement (RJN Ex. 5) at 128.³ (And to be clear, the Plan Proponents have
3 never argued that the Bankruptcy Code preempts or otherwise exempts debtors from the
4 ordinary regulatory oversight of state agencies on a going-forward, post-reorganization
5 basis. Rather, it is the Plan Proponents’ contention that state law and regulations may not
6 prevent a debtor from *reorganizing* through transactions specifically authorized by Congress
7 under the Bankruptcy Code.)

8 The preemption of state and local laws under the proposed Plan drew immediate
9 objections from a number of governmental entities, including the California Public Utilities
10 Commission (“CPUC”) and the California Attorney General.⁴ Lopes Decl. ¶4. The
11 Bankruptcy Court ultimately concluded that this critical issue should be decided early on, as
12 part of the disclosure statement approval process.⁵ *See* 12/4/01 Trans. (RJN Ex. 2) at 11-12;
13 Lopes Decl. ¶4. According to the Bankruptcy Court:

14 I [do] not believe it would be appropriate to approve a disclosure statement
15 without finding out if it is *facially defective as a matter of law*. That is a much
16 different subject from the question of whether a plan is feasible for any variety of
17 reasons. [¶] But if as a matter of law, the debtor, in my mind, if it cannot preempt
18 the state laws that it seeks to preempt, *I would not feel comfortable approving a*
19 *disclosure statement that left that up for grabs*. (12/4/01 Trans. (RJN Ex. 2) at
20 10-11 (emphases added))

21 In particular, the Bankruptcy Court concluded that if PG&E was not entitled to the relief it
22 sought in the Plan, “*then there’s no point in going on with a case of this magnitude and*
23 *soliciting votes.*” *Id.* at 17 (emphasis added).

24 ³For a more comprehensive discussion of the specific laws and regulations that the proposed
25 Plan would preempt, *see* Disclosure Statement (RJN Ex. 5) at 129-33 & Ex. I.

26 ⁴The issue was discussed at a status conference on October 9, 2001, shortly after PG&E filed
27 its original plan and disclosure statement. Lopes Decl. ¶4. Thereafter, on or about November 26,
28 2001, several governmental entities filed objections to the disclosure statement on the ground, *inter*
alia, that it described a facially unconfirmable plan because the scope of preemption sought in the
plan was not permitted by law. *Id.*

⁵The Bankruptcy Code requires plan proponents to submit a court-approved disclosure
statement to creditors that contains adequate information about the content and import of a proposed
plan of reorganization, so that creditors may make an informed choice to support the plan or reject
it. *See* 11 U.S.C. §1125(b); *In re Ferretti*, 128 B.R. 16, 18 (Bankr. D.N.H. 1991) (purpose of
disclosure statement is “to provide ‘adequate information’ to creditors to enable them to decide
whether to accept or reject a proposed plan”).

1 Consequently, on December 5, 2001, the Bankruptcy Court entered an order setting a
2 briefing and hearing schedule to determine “whether the revised Plan of Reorganization is
3 facially invalid based upon . . . preemption.” In particular, the Court directed briefing from
4 the CPUC, the California Attorney General and any other governmental unit contending that
5 the Plan was facially invalid based upon “impermissible federal preemption,” and that
6 therefore the revised Disclosure Statement should not be approved. *See* December 5, 2001
7 Order Rescheduling Hearings on Approval of Disclosure Statement (RJN Ex. 3) at 3 (“the
8 Scheduling Order”).⁶ Among other things, the Scheduling Order also directed the Plan
9 Proponents to file a revised plan of reorganization and revised disclosure statement by
10 December 19, 2001 to amplify upon certain aspects of the preemptive effect of the proposed
11 Plan. *See id.* at 1-2. The Proponents did so on December 19, 2001. Lopes Decl. ¶5; *see*
12 *also* Disclosure Statement (RJN Ex. 5) at 126-33 & Exs. H, I.

13 Thereafter, eight briefs were filed on behalf of governmental entities objecting to the
14 proposed Plan on the basis of federal preemption, with a total of 10 briefs filed on the
15 subject, many of them voluminous. Lopes Decl. ¶6.

16 Relying on, *inter alia*, the text of Section 1123(a)(5), legislative history, principles of
17 statutory interpretation, and the leading case of *Public Service Co. of New Hampshire v. New*
18 *Hampshire (In re Public Service Co. of New Hampshire)*, 108 B.R. 854 (Bankr. D.N.H.
19 1989) (“the *PSNH* Opinion”), the only case to address the express preemptive effect of
20 Section 1123(a)(5) in the context of a public utility reorganization, the Proponents argued
21 that Section 1123(a)(5) of the Bankruptcy Code expressly preempts the application of state
22 law that obstructs the implementation of a valid plan of reorganization.⁷ *See* PG&E

23 ⁶A number of governmental entities also contended that certain aspects of the Plan violated the
24 Eleventh Amendment. Lopes Decl. ¶4. Therefore, in addition to preemption, the separate briefing
25 and hearing schedule set by the Bankruptcy Court in its Scheduling Order also applied to questions
concerning sovereign immunity. *See* Scheduling Order (RJN Ex. 3) at 3. However, such issues are
not relevant to this motion or the underlying appeal.

26 ⁷The Bankruptcy Court in the *PSNH* Opinion found that Section 1123(a)(5) reflects “an
express preemptive intent”:

27 In terms of the literal language of §1123(a)(5) it seems obvious that that
28 section on its face contemplates that restructuring transactions necessary to a
plan of reorganization may be provided notwithstanding nonbankruptcy law,

(continued . . .)

1 Response to Preemption and Eleventh Amendment Immunity Objection (RJN Ex. 8) at 14-
2 36. Alternatively, they argued that such laws were, in any event, impliedly preempted. *See*
3 *id.* at 37-44.

4 The CPUC, on the other hand, maintained that Section 1123(a)(5) governs the required
5 *contents* of a plan, not the substantive legality of the transactions described in a plan. *See*
6 CPUC Memorandum in Further Support of Its Objection (“CPUC Brief”) (RJN Ex. 7) at 8-
7 15. And it argued that the *PSNH* Opinion was wrong (as well as “not controlling”) (*see id.*
8 at 21:9-22:6), as did the California Attorney General. *See* Objection of the People of the
9 State of California to Approval of Disclosure Statement (“Attorney General’s Brief”) (RJN
10 Ex. 6) at 38. They and the other governmental objectors argued that the principles of
11 implied preemption also did not apply, principally on the ground that the state laws at issue
12 are integral to public health and safety. *See, e.g.*, CPUC Brief (RJN Ex. 7) at 18-20, 24-26;
13 Attorney General’s Brief (RJN Ex. 6) at 8-12, 23-32.

14 On January 25, 2002, the Bankruptcy Court heard nearly four hours of argument.
15 Lopes Decl. ¶7.⁸ Two weeks later, on February 7, 2002, it issued a 49-page Memorandum
16 Decision in which it rejected the Proponents’ position regarding the express preemption of
17 state law under Section 1123(a)(5) of the Code. *See* Memorandum Decision Regarding
18 Preemption and Sovereign Immunity (attached hereto as Exhibit A) (“Mem. Dec.”). It found
19 that Section 1123 was *not* intended to expressly preempt state law, declined to follow the
20

21 (. . . continued)

22 and that upon confirmation of the plan pursuant to §1129(a) of the
23 Bankruptcy Code the confirmed plan—and the reorganized debtor created
24 thereby—will be governed by those provisions. (108 B.R. at 882 (emphasis
25 omitted))

26 And it concluded that that the text, structure and history of Section 1123(a)(5) all demonstrate that
27 “Congress *did* intend to remove state regulatory agencies from the ‘restructuring’ transactions
28 necessary in any complex reorganization, to avoid the time delays, confusion, and interference with
prompt and orderly processes necessary to an effective reorganization ‘before the patient dies.’”
108 B.R. at 891 (emphasis added). Thus, it held that a variety of state law restrictions that would
have applied to the restructuring transactions of the debtor utility, including those that would have
required the debtor to seek the approval of the New Hampshire Public Utilities Commission, were
preempted by Section 1123(a)(5).

⁸The briefing and argument also were directed to sovereign immunity questions that, as
mentioned, also were at issue. *See* note 6, *supra*.

1 *PSNH* Opinion, and found that “there is no express preemption of nonbankruptcy law that
2 permits a wholesale unconditional preemption of numerous state laws” Mem. Dec. at
3 3. Rather, it concluded that:

4 Paragraph (5) [of Section 1123(a)] can be read simply as a directive to the plan
5 proponent about what must go into the plan. It does not have to be read as an
“empowering” statute (Mem. Dec. at 17)

6 The Bankruptcy Court expressly disagreed with the *PSNH* Opinion. *See id.* at 30-31
7 (“the court cannot agree that Section 1123(a)(5) is an ‘empowering’ statute that explicitly
8 preempts or overrides all contrary nonbankruptcy law”); *id.* at 23 (disagreeing with the
9 “plain meaning” analysis of *PSNH* Opinion). And it ruled that, “[i]f Proponents adhere to
10 their contention that express preemption is available to them, the Disclosure Statement must
11 be disapproved since the Plan could not be confirmed in the face of the vigorous objections
12 made by the State and the [CPUC].” *Id.* at 3.

13 The Bankruptcy Court nevertheless allowed for the possibility that the Plan Proponents
14 could prove the elements of implied preemption. It found that the Plan could be confirmed
15 “if Proponents are able to establish with particularity the requisite elements of implied
16 preemption.” Mem. Dec. at 3. In its ruling, the Bankruptcy Court also described “the
17 minimum disclosures” that it believed would be necessary for the Plan Proponents to
18 proceed to plan confirmation on a theory of implied preemption. *See id.* at 40. As to that,
19 the Bankruptcy Court’s ruling made clear that the Plan Proponents must establish implied
20 preemption with particularity as to each nonbankruptcy law and regulation and their
21 particular application(s) to the reorganization plan. *See id.* at 3:15-20; 16:3-6; 40:19-41:05.
22 Specifically, the Court directed the Proponents to show that (1) these nonbankruptcy laws
23 and regulations are primarily economic in nature rather than directed at public safety or other
24 noneconomic concerns, and (2) their particular applications to the proposed plan stand as an
25 obstacle to the accomplishment and execution of the purposes and objectives of Congress
26 and the Bankruptcy Code. *See id.* at 40-41.

27 After the Bankruptcy Court issued its Memorandum Decision requiring, among other
28 things, that Plan Proponents state their intentions in light of such Decision, the Plan

1 Proponents announced their intention to proceed to confirmation and attempt to carry the
2 burden, imposed by the Bankruptcy Court, to show that implied preemption of specified
3 statutes is available under the circumstances. *See* Statement of Plan Proponents’ Intentions
4 filed February 21, 2002 (RJN Ex. 12) (“Statement of Intentions”) at 1. Doing so, however,
5 will significantly expand the scope and duration of the confirmation hearing, as well as pre-
6 hearing discovery.⁹ Lopes Decl. ¶11. At the same time, the Plan Proponents sought the
7 entry of an order disapproving the Disclosure Statement on express preemption grounds, and
8 asked the Bankruptcy Court to direct the entry of such order as an immediately appealable
9 final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Lopes Decl.
10 ¶8; RJN Ex. 10.

11 Consistent with the Statement of Intentions, on March 7, 2002, the Plan Proponents
12 filed a Second Amended Plan of Reorganization and a Second Amended Disclosure
13 Statement, amending the Plan and Disclosure Statement to eliminate reliance on express
14 preemption. Lopes Decl. ¶9; RJN Exs. 15, 16.¹⁰ On March 18, 2002, the Court entered the
15 Express Preemption Order, a copy of which is attached hereto as Exhibit B.

16
17 **STATEMENT OF QUESTIONS PRESENTED BY APPEAL**
18 **AND NATURE OF RELIEF SOUGHT**

19 By this Motion, PG&E seeks leave to appeal the Express Preemption Order. The
20

21 ⁹In order to be confirmed, a plan must meet the requirements of 11 U.S.C. Section 1129. *See*
22 11 U.S.C. §1129(a), (b). Although there are 13 separate technical requirements in Section 1129,
23 most salient for present purposes are two of the most critical requirements, *viz.*, the Proponents must
24 demonstrate via an evidentiary showing on a preponderance of the evidence that (1) the Plan
25 provides adequate means for its implementation (11 U.S.C. §1123(a)(5) as incorporated into 11
26 U.S.C. §1129(a)(1)), and (2) the Plan is *feasible, i.e.*, that it offers a reasonable prospect of success
27 and is workable (7 Lawrence P. King, *Collier on Bankruptcy* ¶1129.03[11], at 1129-64 (15th ed. rev.
28 2001); 11 U.S.C. §1129(a)(11) (requiring that confirmation “is not likely to be followed by the
liquidation, or the need for further financial reorganization, of the debtor or any successor to the
debtor under the plan, unless such liquidation or reorganization is proposed in the plan”)).

¹⁰Although the Proponents have recently filed a Second Amended Plan of Reorganization and
Second Amended Disclosure Statement, the defined terms “Plan” and “Disclosure Statement” as
used in this motion intentionally refer to the earlier version of them—the First Amended Plan of
Reorganization and the First Amended Disclosure Statement—because they are the subject of the
Bankruptcy Court’s Express Preemption Order that the Proponents by this motion are seeking leave
to appeal.

1 question presented by the appeal is whether the Bankruptcy Court erred in ruling that the
2 Plan is unconfirmable as a matter of law to the extent that it seeks to expressly preempt state
3 and local laws under 11 U.S.C. Section 1123(a)(5) that otherwise would permit the State to
4 exercise a veto over the transactions implementing the reorganization Plan, and disapproving
5 the Plan Proponents' Disclosure Statement on that basis.

7 **ARGUMENT**

8 **A. The Governing Legal Standards.**

9 The appealability of bankruptcy court orders to the District Court or to the Bankruptcy
10 Appellate Panel is governed by 28 U.S.C. Section 158(a), which provides in pertinent part
11 that:

12 [t]he district courts of the United States shall have jurisdiction to hear appeals

13 (1) from final judgments, orders, and decrees;

14 (2) from interlocutory orders and decrees issued under section 1121(d) of
15 title 11 increasing or reducing the time periods referred to in section 1121 of such
16 title [governing the debtor's period of exclusivity to file a plan of reorganization];
17 and

18 (3) with leave of the court, from other interlocutory orders and decrees;

19 and, with leave of the court, from interlocutory orders and decrees, of bankruptcy
20 judges entered in cases and proceedings referred to the bankruptcy judges under
21 section 157 of this title. (28 U.S.C. §158(a))¹¹

22 In applying Section 158(a)(3), courts within the Ninth Circuit (and others) generally
23 look for guidance from 28 U.S.C. Section 1292(b), which provides for the discretionary
24 review of interlocutory orders of district courts by the circuit courts of appeal where the
25 district judge is of the opinion that the order "involves a controlling question of law as to
26 which there is substantial ground for difference of opinion" and "an immediate appeal from
27 the order may materially advance the ultimate termination of the litigation." 28 U.S.C.

28 ¹¹This provision is made applicable to bankruptcy appellate panels under subsection (b) of
Section 158. *See* 28 U.S.C. §158(b).

1 §1292(b);¹² *see, e.g., Belli v. Temkin (In re Belli)*, 268 B.R. 851, 858 (B.A.P. 9th Cir. 2001)
2 (“We look for guidance to standards developed under 28 U.S.C. §1292(b) to determine if
3 leave to appeal should be granted, even though the procedure is somewhat different”);
4 *Bertain v. Mitchell (In re Bertain)*, 215 B.R. 438, 441 (B.A.P. 9th Cir. 1997) (court is
5 “guided” by Section 1292(b)); *Roderick v. Levy (In re Roderick Timber Co.)*, 185 B.R. 601,
6 604 (B.A.P. 9th Cir. 1995) (Notwithstanding absence of statutory standards, court “looks to
7 the standards set forth in 28 U.S.C. §1292(b)”); *Nicholes v. Johnny Appleseed of Washington*
8 *(In re Nicholes)*, 184 B.R. 82, 86 (B.A.P. 9th Cir. 1995); *McDonald v. Sperna (In re*
9 *Sperna)*, 173 B.R. 654, 658 (B.A.P. 9th Cir. 1994); *Leisure Dev. Inc. v. Burke (In re Burke)*,
10 95 B.R. 716, 717 (B.A.P. 9th Cir. 1989); *Lompa v. Price (In re Price)*, 79 B.R. 888, 889
11 (B.A.P. 9th Cir. 1987), *aff’d*, 871 F.2d 97 (9th Cir. 1989); *Waddill v. Meador (In re*
12 *Advantage Communications Group, Inc.)*, No. C-97-700 TEH, 1997 WL 414169, at *3
13 (N.D. Cal. July 10, 1997) (“Courts faced with this issue [regarding the applicable standard]
14 have sought guidance from 28 U.S.C. [Section] 1292(b), which governs the review of
15 interlocutory orders generally”); *Musicians Union, AFM Local 6 v. Lewis (In re Lewis)*, No.
16 C-93-3893 MHP, 1994 WL 125201, at *3 (N.D. Cal. Mar. 31, 1994).

17 However, in applying and adapting this standard in the unique context of bankruptcy
18 cases, courts do not apply the standard rigidly, but rather give great weight to pragmatic
19 considerations such as judicial economy, the interests of creditors, the promotion of a
20 successful reorganization and prejudice to the appellant. *See, e.g., Kashani v. Fulton (In re*
21

22 ¹²In full, Section 1292(b) provides that:

23 (b) When a district judge, in making in a civil action an order not
24 otherwise appealable under this section, shall be of the opinion that such
25 order involves a controlling question of law as to which there is substantial
26 ground for difference of opinion and that an immediate appeal from the
27 order may materially advance the ultimate termination of the litigation, he
28 shall so state in writing in such order. The Court of Appeals which would
have jurisdiction of an appeal of such action may thereupon, in its
discretion, permit an appeal to be taken from such order, if application is
made to it within ten days after the entry of the order: *Provided, however,*
That application for an appeal hereunder shall not stay proceedings in the
district court unless the district judge or the Court of Appeals or a judge
thereof shall so order. (28 U.S.C. §1292(b) (emphasis in original))

1 *Kashani*), 190 B.R. 875, 882-83 (B.A.P. 9th Cir. 1995) (granting leave to appeal
2 interlocutory order; “[h]earing the appeal now saves the Panel and the parties unnecessary
3 effort, [and] promotes judicial economy”); *Foreign Car Ctr., Inc. v. Salem Suede, Inc. (In re*
4 *Salem Suede, Inc.)*, 221 B.R. 586, 599 (D. Mass 1998) (the discretionary standard under
5 Section 158 “must be more flexible [than under Section 1292(b)] if the articulated goals of
6 discretionary appellate jurisdiction . . . are to be achieved . . . with respect to each challenged
7 determination of the bankruptcy court”); *BancBoston Real Estate Capital Corp. v. JBI*
8 *Assocs. Ltd. P’ship (In re Jackson Brook Inst., Inc.)*, 227 B.R. 569, 582 (D. Me. 1998)
9 (applying the Section 1292(b) factors as a “guide” but “adopting the pragmatic and liberal
10 approach required in determining the appealability of an interlocutory order in a bankruptcy
11 proceeding”); *Mishkin v. Ageloff*, 220 B.R. 784, 791 (S.D.N.Y. 1998) (endorsing a “flexible
12 approach” to granting review of interlocutory orders of a bankruptcy court); *Williams v.*
13 *United States (In re Williams)*, 215 B.R. 289, 298 n.6 (D.R.I. 1997) (analogizing between
14 Section 158(a)(3) and Section 1292(b) “albeit useful, is not perfect,” and noting that Section
15 *158(a)(3) “obviously vests broader discretion in the district courts” to allow appeals in*
16 *appropriate circumstances*) (emphasis added); *In re Madill*, 65 B.R. 729, 731 (D. Mont.
17 1986) (granting leave to appeal order rejecting debtors’ Chapter 13 plan because, *inter alia*,
18 “[h]earing the appeal now saves the court and the parties [the] unnecessary effort” of
19 requiring the bankruptcy court to rule on pending motion to dismiss debtor’s entire case,
20 after which the debtor could appeal the same issues); *Robinson v. Johns-Manville Corp. (In*
21 *re Johns-Manville Corp.)*, 45 B.R. 833, 835 (S.D.N.Y. 1984) (interlocutory review “should
22 be liberally granted where it can help the expeditious resolution of the case”); *In re Manville*
23 *Forest Prods. Corp.*, 31 B.R. 991, 995 n.5 (S.D.N.Y. 1983) (“applications for leave to
24 appeal are addressed to the discretion of the District Court and should be liberally granted
25 where it can help the expeditious resolution of the case”); *In re New Haven Radio, Inc.*, 23
26 B.R. 762, 764 (S.D.N.Y. 1982) (“Since Chapter XI cases usually involve ongoing
27 proceedings, including the entry of various orders that affect the substantive rights and
28 interests of creditors, third parties and debtors, unless an appeal is patently frivolous, leave

1 to appeal should be liberally granted where resolution of the issue sought to be reviewed on
2 appeal will serve to bring about the expeditious termination of the case either by an
3 approved plan or liquidation”; allowing immediate review to ameliorate “inordinate delay in
4 concluding the cases to the prejudice of interested parties”).¹³

5 In *In re Nitec Paper Corp.*, 43 B.R. 492 (S.D.N.Y. 1984), for example, the District
6 Court granted leave to appeal an interlocutory bankruptcy court order approving the debtor’s
7 sale of power over opposition from state regulatory authorities. It reasoned that

8 abstaining from accepting this appeal until the reorganization is finalized will
9 make effective review more difficult. *The planned reorganization will be based*
10 *on the propriety of the resale in question*, and the review of the resale should
11 therefore be made before the plan is finalized. If review is delayed until the
reorganization plan is in place, *any modification may have the potential to upset*
the entire plan. (*Id.* at 495 (citation omitted) (emphases added))

12 See also, e.g., *In re Johns-Manville Corp.*, 45 B.R. at 836 (granting leave to appeal
13 interlocutory bankruptcy court order; “[i]f appeal is not made now but is made as of right
14 once a reorganization plan is finally formulated and future litigant’s rights have ripened, *the*
15 *entire plan will be in jeopardy and the period of formulation potentially wasted*”) (emphasis
16 added).¹⁴

17
18 ¹³And that is so, despite that courts sometimes assess these considerations in terms of
19 “exceptional circumstances.” See, e.g., *Anderson v. Duvoisin (In re Southern Indus. Banking*
20 *Corp.)*, 70 B.R. 196, 200 (E.D. Tenn. 1986) (“Leave to appeal should be granted ‘only in
21 exceptional cases *where an immediate appeal may avoid protracted and expensive litigation*’”) (emphasis added); *In re Williams*, 215 B.R. at 299 (“bankruptcy proceedings can extend over a
22 period of years. . . . Although the court cannot overstate the maxim that permissive appeal should be
23 made available sparingly and only in exceptional circumstances, it finds that the combination of
threatened, continuing injury over a prolonged period of time justifies the exercise of the court’s
discretion in this case. Moreover, the merits of this appeal neither slows or affects the progress of
the proceedings below”) (citations and internal quotation marks omitted); *In re Jackson Brook Inst.*,
227 B.R. at 581 (“Courts have stated that interlocutory certification under section 1292(b), and thus
leave to appeal under section 158(a)(3), should be used ‘sparingly and only in exceptional
circumstances.’ However, courts have also reasoned that discretion under section 158(a)(3) is
greater than that afforded under section 1292(b)”) (citation omitted).

24 ¹⁴The flexibility that courts employ in this context is analogous to the flexible and pragmatic
25 approach that courts generally take when determining the finality of orders entered in a bankruptcy
26 for purposes of appeal, in light of the unique nature of a bankruptcy case and its differences from an
27 ordinary civil proceeding. *Mishkin v. Ageloff*, 220 B.R. at 791 (“Because the concept of finality is
28 significantly and integrally linked to the standard for granting interlocutory appeals . . . , a flexible
approach to the concept of finality in the bankruptcy context supports a similarly flexible approach
to the standard for granting interlocutory appeals from interlocutory orders of a bankruptcy court”);
see also, e.g., *Elliott v. Four Seasons Props. (In re Frontier Props., Inc.)*, 979 F.2d 1358, 1363 (9th
Cir. 1992) (“[T]his court has repeatedly held that the finality rules are to be given additional
(continued . . .)

1 The object in a Chapter 11 case normally is to formulate a restructuring or
2 reorganization plan that will enable the debtor to emerge from bankruptcy as a viable,
3 sustainable enterprise. 7 Lawrence P. King, *Collier on Bankruptcy* ¶1100.09, at 1100-26
4 (15th ed. rev. 2001). Thus, the plan of reorganization is central to a successful Chapter 11
5 case, and its confirmation “is the statutory goal of every chapter 11 case.” *Id.* ¶1129.01, at
6 1129-10. Not surprisingly, then, numerous cases have granted leave to appeal interlocutory
7 orders on a variety of plan issues.

8 Time and time again, for example, courts have granted discretionary review of
9 bankruptcy court orders denying confirmation of plans of reorganization. *See, e.g., Lievsay*
10 *v. Western Fin. Sav. Bank, F.S.B. (In re Lievsay)*, 199 B.R. 705, 707 (B.A.P. 9th Cir. 1996)
11 (granting leave to appeal from order denying confirmation of plan and disclosure statement
12 due to “substantial differences” among circuits on legal issue under Section 1123 presented
13 by appeal); *Nicholes v. Johnny Appleseed of Washington (In re Nicholes)*, 184 B.R. 82, 86-
14 87 (B.A.P. 9th Cir. 1995) (granting leave to appeal denial of plan confirmation under Section
15 158(a)(3)); *In re Madill*, 65 B.R. 729, 730-31 (D. Mont. 1986) (granting leave to appeal
16 order denying confirmation of a plan that implicates a controlling issue of law where
17 immediate appeal would promote judicial economy); *see also Flor v. BOT Fin. Corp. (In re*
18 *Flor)*, 79 F.3d 281, 283 (2d Cir. 1996) (observing that district court had discretion to hear
19 appeal from bankruptcy court ruling denying confirmation of plan); *Lewis v. United States,*
20 *Farmers Home Admin.*, 992 F.2d 767, 771 (8th Cir. 1993) (same); *Pleasant Woods Assocs.*

21 _____
(. . . continued)

22 flexibility in bankruptcy proceedings”); *Flor v. BOT Fin. Corp. (In re Flor)*, 79 F.3d 281, 283 (2d
23 Cir. 1996) (“the concept of ‘finality’ is more flexible in the bankruptcy context than in ordinary civil
24 litigation. Immediate appeal is allowed of orders in bankruptcy matters that ‘finally dispose of
25 discrete disputes within the larger case’”) (citation omitted); *Path-Science Labs., Inc. v. Greene*
26 *County Hosp. (In re Greene County Hosp.)*, 835 F.2d 589, 593 (5th Cir. 1988) (“Many courts have
27 referred to the more flexible notions of finality included in the traditional bankruptcy
28 jurisprudence”); *Belli v. Temkin (In re Belli)*, 268 B.R. 851, 854 (B.A.P. 9th Cir. 2001) (“A
pragmatic approach has emerged for bankruptcy disputes which poorly fit the traditional finality
model. ‘Flexible finality’ focuses upon whether the order affects substantive rights and finally
determines a discrete issue”). The rationale for flexibility in the “finality” area is that
“[b]ankruptcy orders that determine and seriously affect substantive rights may cause irreparable
harm to the losing party if a party must wait sometimes years until the end of the bankruptcy
administration before taking an appeal.” *Frontier Props.*, 979 F.2d at 1363 (quoting *Turgeon v.*
Victoria Station, Inc. (In re Victoria Station, Inc.), 840 F.2d 682, 683 (9th Cir. 1988)).

1 *Ltd. P'ship v. Simmons First Nat'l Bank (In re Pleasant Woods Assocs. Ltd. P'ship)*, 2 F.3d
2 837, 838 (8th Cir. 1993) (noting district court heard appeal from bankruptcy court ruling
3 denying confirmation); *In re Blankemeyer*, 861 F.2d 192, 193 (8th Cir. 1988) (same);
4 *McDonald v. Sperna (In re Sperna)*, 173 B.R. 654, 657-58 (B.A.P. 9th Cir. 1994) (granting
5 discretionary leave to appeal order overruling U.S. Trustee's objection that proposed plan
6 unfairly discriminated against a class of creditors, where there were conflicting decisions on
7 the issue).

8 For the reasons that follow, the standards for granting immediate review of the
9 Bankruptcy Court's order disapproving the Disclosure Statement are plainly met in this case.

10
11 **B. Immediate Review Of The Express Preemption Ruling Is Warranted**
12 **Because The Proponents' Contemplated Appeal Involves A Controlling**
13 **Question Of Law Upon Which There Is Substantial Ground For Difference**
14 **Of Opinion And Immediate Review Would Materially Advance The**
15 **Progress Of The Reorganization.**

16
17 **1. The Express Preemption Order Implicates A Controlling Question Of**
18 **Law.**

19 In the bankruptcy context, courts tend to conflate the "controlling issue" analysis with
20 the question of whether immediate review of an interlocutory order "may materially advance
21 the ultimate termination of the litigation." *See, e.g., Chemical Bank v. Slaner (In re Duplan*
22 *Corp.)*, 591 F.2d 139, 148 n.11 (2d Cir. 1978) (Friendly, J.) (noting that "courts have tended
23 to make the 'controlling questions' requirement one with the requirement that its
24 determination 'may materially advance the ultimate termination of the litigation'"); *Fleet*
25 *Data Processing Corp. v. Branch (In re Bank of New England Corp.)*, 218 B.R. 643, 654
26 n.21 (B.A.P. 1st Cir. 1998) (noting the overlap in the two elements and explaining: "both
27 are directed toward assuring that the interlocutory review will advance the resolution of the
28 underlying action"); *see also KPMG Peat Marwick, L.L.P. v. Estate of Nelco, Ltd.*, 250 B.R.
74, 80 (E.D. Va. 2000) (defining "controlling issue of law" as "a narrow, dispositive
question of pure law"); *In re Nicholes*, 184 B.R. at 86 (the "controlling issue" presented was
legal issue that was "[t]he crux of the court's order"); *In re Sperna*, 173 B.R. at 657

1 (Chapter 13 plan disallowed due to discriminatory treatment of student loans; “controlling
2 issue” was whether student loans could be so treated under new statute). In reality, the
3 critical requirement is that an interlocutory appeal has “the potential for substantially
4 accelerating the disposition of the litigation.” *In re Duplan Corp.*, 591 F.2d at 148 n.11; *see*
5 *also* 10 Lawrence P. King, *Collier on Bankruptcy* ¶8003.03, at 8003-6 (15th ed. rev. 2001)
6 (“The critical requirement [for a controlling question of law] is that resolution of the
7 question will *advance the ultimate resolution of the litigation*”) (emphasis added) (citing
8 19 J. Moore, *Moore’s Federal Practice* §203.31[3] (3d ed. 1999)).¹⁵

9 Here, it is indisputable that the Express Preemption Order presents a question of law.
10 *See Niehaus v. Greyhound Lines, Inc.*, 173 F.3d 1207, 1211 (9th Cir. 1999) (“A district
11 court’s decision that state law claims are not preempted by federal law is a question of
12 law . . .”); *Toumajian v. Frailey*, 135 F.3d 648, 652 (9th Cir. 1998) (“The often-related issue
13 of preemption is also a question of law”). Moreover, courts routinely conclude that
14 preemption rulings involve “controlling questions of law” subject to interlocutory appeal
15 pursuant to Section 1292(b). *See, e.g., Total TV v. Palmer Communications, Inc.*, 69 F.3d
16 298, 300-01 (9th Cir. 1995) (Cable Television Consumer Protection and Competition Act
17 preemption); *Wells Fargo Bank v. Bourns, Inc.*, 860 F. Supp. 709, 712-13, 717 (N.D. Cal.
18 1994) (Patel, J.) (ERISA preemption); *see also Taylor v. PPG Indus., Inc.*, 256 F.3d 1315,
19 1316, 1318 (Fed. Cir. 2001) (federal patent preemption); *Zenith Elecs. Corp. v. Exzec, Inc.*,
20 182 F.3d 1340, 1345 (Fed. Cir. 1999) (Lanham Act preemption); *Abdullah v. American*
21 *Airlines, Inc.*, 181 F.3d 363, 366 (3d Cir. 1999) (Federal Aviation Act preemption); *Kemp v.*
22 *IBM Corp.*, 109 F.3d 708, 711 (11th Cir. 1997) (ERISA preemption); *MacDonald v.*
23 *Monsanto Co.*, 27 F.3d 1021, 1023 (5th Cir. 1994) (FIFRA preemption); *Cipollone v. Liggett*
24 *Group, Inc.*, 789 F.2d 181, 183, 187-88 (3d Cir. 1986) (Federal Cigarette Labeling And
25 Advertising Act preemption); *see also Philip Morris Inc. v. Harshbarger*, 957 F. Supp. 327,

26
27 ¹⁵In the nonbankruptcy context, by contrast, a question is said to be “controlling” within the
28 meaning of Section 1292(b) in the Ninth Circuit if “resolution of the issue on appeal could
materially affect the *outcome* of litigation in the district court.” *Arizona v. Ideal Basic Indus. (In re*
Cement Antitrust Litigation), 673 F.2d 1020, 1026 (9th Cir. 1982) (emphasis added).

1 330 (D. Mass 1997) (“[P]reemption is an issue naturally appropriate for interlocutory
2 appeal . . .”), *aff’d*, 122 F.3d 58 (1st Cir. 1997).

3 Here, the standard for interlocutory review is plainly met. The Bankruptcy Court, on
4 the basis of its express preemption ruling, disapproved the Disclosure Statement as a matter
5 of law. The preemption of state and local laws is one of the cornerstones of the proposed
6 Plan, which pays off all valid creditor claims in full. Without express preemption,
7 Proponents will be required to specifically demonstrate that a panoply of state laws and
8 regulations are impliedly preempted—a task that will entail a different legal inquiry, a higher
9 standard of proof, and a potentially far more protracted confirmation hearing consuming
10 significantly more resources of the Bankruptcy Court and parties alike. *See* Lopes Decl.
11 ¶¶11-13; Mem. Dec. at 40-41. As the Bankruptcy Court itself recognized:

12 [T]he court’s ruling on express preemption raises the evidentiary burden they
13 [Plan Proponents] must sustain to obtain plan confirmation premised upon
14 implied preemption. If this court’s decision is going to be reversed, then PG&E
15 and its creditors should not suffer the consequences and delay (and potentially
staggering administrative expenses) of having to attempt to confirm its [PG&E’s]
alternative plan. (Express Preemption Order, at 6:11-17)

16 In light of the many decisions cited above granting interlocutory review of preemption
17 issues, this Court should have little trouble concluding that the Express Preemption Order
18 involves a controlling issue of law.

19
20 **2. There Is Substantial Ground For Difference Of Opinion Concerning**
21 **The Preemptive Effect Of Section 1123(a)(5).**

22 Nor can there be any question that there is substantial ground for a difference of
23 opinion concerning the express preemptive effect of Section 1123(a)(5) in this context.

24 First, neither the Ninth Circuit nor any other lower court within the Ninth Circuit has
25 addressed whether 11 U.S.C. Section 1123(a) expressly preempts state laws that obstruct
26 plan provisions that are “adequate means for the plan’s implementation.”¹⁶ *See Klinghoffer*

27 ¹⁶As the Bankruptcy Court acknowledged, the Ninth Circuit’s decision in *Baker & Drake, Inc.*
28 *v. Public Service Commission (In re Baker & Drake, Inc.)*, 35 F.3d 1348 (9th Cir. 1994), addressed
(continued . . .)

1 v. *S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990) (holding that substantial grounds for
2 difference of opinion existed, in part, because of the absence of precedent); *North Fork Bank*
3 v. *Abelson*, 207 B.R. 382, 388-90 (E.D.N.Y. 1997) (same); *Red Bull Assocs. v. Best Western*
4 *Int'l, Inc.*, 686 F. Supp. 447, 453 (S.D.N.Y.) (“[I]t would seem that the very absence of
5 precedent leaves the field wide open for differences of opinion”), *aff’d*, 862 F.2d 963 (2d
6 Cir. 1988); *Lamont v. Schultz*, 748 F. Supp. 1043, 1057 (S.D.N.Y. 1990) (certifying novel
7 issues), *aff’d*, 948 F.2d 825 (2d Cir. 1991); *see also Young v. Nationwide Life Ins. Co.*, 2 F.
8 Supp. 2d 914, 930 (S.D. Tex. 1998) (certifying the appeal because there was no circuit
9 decision on point and there was a paucity of case law generally).

10 Second, and perhaps of even greater import, in reaching its decision the Bankruptcy
11 Court parted ways with the one decision that is most directly on point—an exhaustive
12 bankruptcy court opinion concerning the proposed reorganization plan of another investor-
13 owned utility, which surveyed the entire legislative history of the Bankruptcy Code,
14 including the extent to which 1978 legislative reforms eliminated the role of regulatory
15 bodies from the reorganization process. *Public Service Co. of New Hampshire v. New*
16 *Hampshire (In re Public Service Co. of New Hampshire)*, 108 B.R. 854 (Bankr. D.N.H.
17 1989) (the “*PSNH* Opinion”). After conducting what the Bankruptcy Court in this case
18 acknowledged was a “scholarly, thorough and helpful analysis of the legislative history and
19 statutory framework” (Mem. Dec. at 26), the *PSNH* Opinion concluded that Section
20 1123(a)(5) expressly preempts a variety of state laws requiring state regulatory approval for
21 restructuring transactions contemplated by a plan of reorganization in the debtor’s case. *See*
22 108 B.R. at 882-85, 892.¹⁷

23 _____
(. . . continued)

24 only the question of whether “the Bankruptcy Code *impliedly* preempts Nevada’s regulation of taxi
services.” *Id.* at 1353 (emphasis added).

25 ¹⁷Outside bankruptcy, the restructuring proposed by PSNH—like the restructuring transactions
26 outlined in PG&E’s Plan—would have been subject to an array of state regulatory restrictions. For
27 example, PSNH would have been required to seek NHPUC approval to transfer or lease its assets to
28 the new entities and to issue new securities or bonds, while the contracts between Reorganized
PSNH and DISCO would have been subject to NHPUC review. *See, e.g., N.H. Rev. Stat. Ann.*
§374:30 (1984); *id.* §369:7(I); *id.* §366:5. The *PSNH* Opinion held that those state-law provisions
were all expressly preempted by Section 1123(a)(5).

1 The *PSNH* decision regarding preemption has been cited with approval by the leading
2 bankruptcy commentator and other courts.¹⁸ However, the Bankruptcy Court in this case did
3 not agree with it. *See* Mem. Dec. at 30-31 (“The court does not disagree with most of the
4 *PSNH* analysis[,] [a]lthough the court cannot agree that Section 1123(a)(5) is an
5 ‘empowering’ statute that explicitly preempts or overrides all contrary nonbankruptcy law”);
6 *id.* at 23 (disagreeing with the “plain meaning” analysis of *PSNH* Opinion).

7 In rejecting the Plan Proponents’ position, the Bankruptcy Court also expressly
8 disagreed with the Fourth Circuit’s interpretation of Section 1123(a)(5) in a closely
9 analogous case.¹⁹

10 Interlocutory review is also appropriate in light of the Supreme Court’s decision in
11 *New York v. FERC*, —U.S.—, 122 S. Ct. 1012 (Mar. 4, 2002), which was issued after the
12 Bankruptcy Court’s ruling on preemption. In *New York v. FERC*, the Supreme Court made
13 clear that the “presumption against preemption” applied by the Bankruptcy Court (*see* Mem.
14 Dec. at 16) is *not* properly invoked to construe a statute such as Section 1123(a)(5).²⁰ Of
15 particular note, the contrary view accepted by the Bankruptcy Court was pressed by
16 California and the CPUC as *amici curiae* in *New York v. FERC*, and the Supreme Court

17 ¹⁸*Collier* cites the *PSNH* Opinion with approval, including particularly its holding that Section
18 1123(a)(5) “preempted state regulatory requirements that would otherwise have governed certain
19 restructuring transactions included in [the] debtor’s pending plan of reorganization,” as well as the
20 court’s conclusion that “Section 1123(a)(5) is a very powerful and necessary restructuring tool in
21 this regard and is essential to the corporate reorganization process.” 7 *Collier on Bankruptcy*
¶1123.01[5][c], at 1123-12 n.25; *see also In re Eastern Maine Elec. Coop., Inc.*, 121 B.R. 917, 923
(Bankr. D. Me. 1990) (calling *PSNH* opinion “a reasoned decision,” but declining to decide as a
matter of law whether the only role of a state public utilities commission in a utility bankruptcy
concerns rate-making, all other roles being preempted by the Bankruptcy Code).

22 ¹⁹In *Universal Cooperatives, Inc. v. FCX, Inc. (In re FCX, Inc.)*, 853 F.2d 1149, 1154-55 (4th
23 Cir. 1988), the Fourth Circuit held that state law restrictions against the redemption, or set-off
24 against indebtedness, of “patronage certificates” that the debtor held in a creditor were preempted by
25 Section 1123(a)(5)(D). In so holding, it determined that Section 1123(a)(5) “is an empowering
26 statute” that sets forth “self-executing” alternatives for a plan of reorganization, and “does not
27 simply provide a means to exercise the debtor’s pre-bankruptcy rights [but] enlarges the scope of
28 those rights, thus enhancing the ability of a trustee or debtor in possession to deal with property of
the estate.” The Bankruptcy Court disagreed. *See* Mem. Dec. at 35-37 (explaining why “[t]he court
disagrees with *FCX* to the extent, if any, that it supports an unfettered right to dispose of assets
without regard to state law as part of a plan pursuant to Section 1123(a)(5)(D)”).

²⁰Specifically, the Supreme Court made clear that the “presumption against preemption” arises
only when courts are called upon to assess *the validity of state law or state regulations* (in areas
considered historic police powers of the states), but not when courts are called upon to “defin[e] the
proper scope of federal power,” as in this case. *See* 122 S. Ct. at 1023.

1 flatly *rejected* their arguments.

2 The Bankruptcy Court’s conflict with these leading cases—not to mention the sheer
3 volume of briefing that the parties devoted to the express preemption issue and the extensive
4 treatment the Bankruptcy Court has given it in this case (*see* Mem. Dec. at 11-40)—
5 demonstrates that there is “substantial ground for difference of opinion” over the preemptive
6 effect of Section 1123(a) in this context. *See, e.g., Souza v. Scalone*, 563 F.2d 385, 385 (9th
7 Cir. 1977) (“Because at the time of the district court’s certification there was a conflict
8 among the circuits on this controlling question of law, we permitted this appeal to be taken
9 pursuant to 28 U.S.C. §1292(b)”); *McDonnell Douglas Fin. Corp. v. Pennsylvania Power &*
10 *Light Co.*, 849 F.2d 761, 765 (2d Cir. 1988) (holding that a single district court decision
11 contrary to the instant decision “is evidence of some difference of opinion regarding the
12 interpretation of very similar arbitral clauses”); *White v. Nix*, 43 F.3d 374, 378 (8th Cir.
13 1994) (“[A] sufficient number of conflicting and contradictory opinions would provide
14 substantial ground for disagreement”) (internal quotation marks omitted).²¹

15 In short, the absence of any controlling authority and the conflicting conclusion
16 reached by the only other court to directly address (and carefully consider) the express
17 preemptive effect of Section 1123(a)(5) in this context—the restructuring transactions in a
18 reorganization plan of a regulated utility— demonstrates “substantial ground for difference
19 of opinion.”

20
21 ²¹*See also Terra Indus., Inc. v. Commonwealth Ins. Co. of America*, 981 F. Supp. 581, 609
22 (N.D. Iowa 1997) (“It is also clear to the court that ‘there is substantial ground for difference of
23 opinion’ . . . on each of these questions . . . since there is some contrary authority . . .”); *Guesby v.*
24 *Kennedy*, 580 F. Supp. 1280, 1286 (D. Kan. 1984) (“We note that this matter is one of first
25 impression in this circuit, and that our decision herein is in conflict with the conclusion reached by
26 the only two courts to previously address the question. Although we are not persuaded by these
27 authorities to the contrary, we believe that there is substantial ground for difference of opinion on
28 the issue of the private club exemption”). For cases in the preemption context, *see also Haley v.*
Medtronic, Inc., No. CV 94-4113 WJR (GHKX), 1995 WL 688240, at *1 (C.D. Cal. June 9, 1995)
 (“As is evidenced from opinions outside of this circuit, there is substantial ground for difference of
opinion as to whether the MDA preempts plaintiff’s stated causes of action. Although the Court’s
Order tracks what Ninth Circuit authority is available, the Ninth Circuit has not directly confronted
the issues decided by the Court”); *Garrelts v. SmithKline Beecham Corp.*, 943 F. Supp. 1023, 1071
(N.D. Iowa 1996) (certifying the appeal where there was no case directly on point and similar cases
had reached opposite conclusions); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532, 542 (E.D.
Pa. 1989) (“[P]reemption question is an issue of first impression in this circuit and one on which
courts disagree . . .”).

1 **C. An Immediate Appeal Will Substantially Advance The Progress Of PG&E’s**
2 **Reorganization.**

3 Finally, immediate resolution of the express preemption question will advance the
4 progress of this reorganization. The goal of PG&E’s Chapter 11 case—as in all
5 reorganization cases—is an effective restructuring that will enable it to emerge from
6 Chapter 11 as a viable entity as swiftly as possible. Indeed, it is well recognized that speed
7 is essential to a debtor’s effective reorganization. *See, e.g., Katchen v. Landy*, 382 U.S. 323,
8 328 (1966) (“[T]his Court has long recognized that a chief purpose of the bankruptcy laws is
9 to secure a prompt and effectual administration and settlement of its estate of all bankrupts
10 within a limited period”) (citation omitted); *In re Acequia, Inc.*, 34 F.3d 800, 807 (9th Cir.
11 1994) (acknowledging “Bankruptcy Code’s goal of quick and equitable reorganization”);²²
12 *see also In re New Haven Radio, Inc.*, 23 B.R. 762, 764 (S.D.N.Y. 1982) (delay in
13 concluding bankruptcy cases and consequent prejudice to interested parties relevant to
14 court’s decision to allow appeal). By contrast, delaying the confirmation and
15 implementation of a viable plan of reorganization is virtually never in the best interests of
16 the estate or the creditors in a Chapter 11 context.²³

17 PG&E has literally thousands of prepetition creditors, most of whom must await plan
18 consummation for payment. Lopes Decl. ¶13. In addition, the maintenance of this case is
19 costly to the estate and other interested parties in legal and other professional costs.
20 Moreover, PG&E’s customers (approximately 4.5 million of them in Central and Northern

21 ²²*See also, e.g., In re Interco Inc.*, 137 B.R. 993, 997 (Bankr. E.D. Mo. 1992) (“key issue” in
22 determining whether to allow arbitration of estimation of large claim was whether “arbitration
23 would unduly delay administration of these bankruptcy cases” and considering whether delay “could
adversely affect the timing and certainty of any distributions to other creditors, and might cause such
holders to vote against the plan or oppose confirmation”).

24 ²³*See, e.g., In re PSNH*, 108 B.R. at 891 (“Any experienced professional involved in corporate
25 reorganization proceedings will recognize that reasonable ‘promptness’ in resolving a corporate
26 reorganization under chapter 11 is important—not only due to the enormous cost of reorganization
27 proceedings in complex cases—but also to avoid the ‘suspended disasters’ that can come loose in
28 any reorganization case if the parties do not see a resolution coming forward within a reasonable
timeframe”); *In re Newport Harbor Assocs.*, 589 F.2d 20, 23 n.6 (1st Cir. 1978) (“the complicated
restructuring involved in a Chapter XI proceeding [is] focused towards rehabilitating a business,
which if successful, is to the benefit of all persons who had dealings with the debtor. Such plans are
not easily devised, and once accomplished a short time frame for challenging such plan is necessary
to keep alive the potential life of that business”).

1 California) undoubtedly would prefer the uncertainties that surround PG&E's financial
2 condition to be resolved as expeditiously as possible. Delay also poses a risk that the
3 financing necessary to fund a plan could be on less favorable borrowing terms for the
4 company and that market conditions may deteriorate and undermine PG&E's ability to
5 obtain the necessary financing. *Id.* In addition, delay in plan confirmation inevitably means
6 more expenses for the Debtor (including the fees of attorneys and consultants for the Debtor
7 and Creditors' Committee and the fees of the U.S. Trustee), more expenses for the many
8 other interested parties in this Chapter 11 case, and more consumption of judicial resources
9 and court costs. *Id.*

10 As noted above, in keeping with PG&E's efforts to proceed expeditiously with its
11 reorganization, the Plan Proponents already have filed a Second Amended Plan of
12 Reorganization and Second Amended Disclosure Statement, amending the Plan and
13 Disclosure Statement documents to eliminate their express preemption provisions in order to
14 proceed to a confirmation hearing where they intend to show that implied preemption of
15 specified state and local law is available under the circumstances to confirm the Plan. Lopes
16 Decl. ¶9. However, the standard that the Bankruptcy Court has set for the Plan Proponents
17 to establish implied preemption is considerably more exacting than recognizing that Section
18 1123(a)(5), as a matter of law, expressly preempts the laws and regulations in question.
19 Thus the showing the Bankruptcy Court has required the Plan Proponents to make at the
20 confirmation hearing to demonstrate that the Plan fully meets the criteria for implied
21 preemption will be a substantial one. In particular, the Proponents will be required to prove
22 the following:

- 23 • The disaggregation of PG&E's assets as provided by the Plan is necessary
24 for PG&E and its successors to obtain the financing necessary to pay all Allowed
25 Claims in full, and for PG&E to emerge from the Chapter 11 Case as a financially
26 healthy, viable going-concern.
- 27 • A limited number of laws, regulations and decisions administered by the
28 CPUC would effectively prohibit, veto or nullify the restructuring transactions
necessary to implement the Plan. These laws are directed primarily at economic
regulatory goals, not at protecting public health and safety.
- Application of the specific CPUC laws to the Plan would effectively veto an

1 effective reorganization within a reasonable time frame, and therefore stand as an
2 obstacle to the purposes and policies of Congress in enacting the Bankruptcy
Code.

3 • Public health and safety regulation of PG&E and the entities created
4 pursuant to the Plan will continue on an on-going basis before, during and after
5 consummation of the Plan, and therefore there will be no “gap” in such regulation
6 as a result of the Plan. Thus, even if the limited number of laws to be preempted
7 are directed in part at protecting public safety, any impacts due to such limited
preemption will be wholly mitigated by the other regulation or contractual
8 provisions applicable to the Plan. (Second Amended Disclosure Statement (RJN
Ex. 16) at 150)

8 The particularized showing that the Plan Proponents intend to make to establish
9 implied preemption is discussed more extensively at pages 151–173 of the Second Amended
10 Disclosure Statement (RJN Ex. 16). As even a cursory review of that material demonstrates,
11 the confirmation hearing on implied preemption (and any appeals therefrom) will be far
12 from simple or straightforward, or in any sense swift. This in turn, of course, not only will
13 dramatically lengthen the confirmation process and impose additional burdens on the
14 resources of the Bankruptcy Court,²⁴ but it also will expand the scope and complexity of pre-
15 hearing discovery, add to the already extensive costs of the reorganization proceedings that
16 all interested parties are incurring, and ultimately delay the day that creditors can be paid.
17 Lopes Decl. ¶¶11-13.

18 And getting to confirmation on implied preemption is just the first step. Appellate
19 review of an order confirming (or denying) a plan on the basis of implied preemption also
20 can be expected to consume far more time than appellate review of the purely legal question

21
22 ²⁴The fact that this case is complex and time consuming for the Bankruptcy Court is an
23 appropriate consideration for this Court in deciding the Proponents’ request for discretionary review,
24 as courts “would rather undo a few stitches at the outset than unravel the entire garment.” *Moix-
25 McNutt v. Coop (In re Moix-McNutt)*, 215 B.R. 405, 408 & n.7 (B.A.P. 8th Cir. 1997) (granting
26 leave to appeal interlocutory order refusing recusal motion on judicial economy grounds: “If we
27 postpone appellate review until the entry of a final order, we risk tainting the entire course of
28 judicial proceedings”); *see also Waddill v. Meador (In re Advantage Communications Group, Inc.)*,
No. C 97-700 TEH, 1997 WL 414169, at *4 (N.D. Cal. July 10, 1997) (granting leave to appeal
order in Chapter 11 proceeding: “Because the appeal concerns primarily a question of law, the
policies of judicial efficiency and finality are best served by resolving the question now”); *In re
Kong*, 196 B.R. 167, 170 (N.D. Cal. 1996) (immediate review granted because, *inter alia*, judicial
economy will be served by determining the issues raised in this appeal at this time); *In re Madill*, 65
B.R. 729, 731 (D. Mont. 1986) (appropriate to grant leave when, *inter alia*, “appeal is in the interest
of judicial economy”).

1 under Section 1123(a)(5) presented by the Plan Proponents’ contemplated appeal: it will
2 require consideration of a lengthy record consisting of the entire confirmation hearing, and
3 undoubtedly raise highly fact-intensive questions on a number of different legal issues. A
4 swift and final determination on appeal of the purely legal question of express preemption
5 could render it unnecessary for Plan Proponents (or any other interested parties with
6 standing) to pursue this highly-factual, resource-intensive alternative theory in the
7 Bankruptcy Court and on up through the appellate courts.²⁵

8 Indeed, it is undoubtedly for some or all of these reasons that the Bankruptcy Court
9 itself has indicated that it favors an expeditious final resolution of important issues in the
10 reorganization, including, perhaps most importantly, the express preemption issue. *See, e.g.*,
11 Express Preemption Order, at 6:7-11 (“[c]reditors have a real economic interest in a speedy
12 resolution of the case . . . [i]f a court on appeal believes that express preemption is available
13 here, the rule of law should be settled forthwith”); Mem. Dec. at 4:23-26 (“[t]he magnitude
14 and complexity of this case weigh heavily in favor of addressing the central issues as early
15 as possible”); *id.* at 47 (“the court will not impede Proponents if they wish to attempt an
16 appeal of an interlocutory order [disapproving the Disclosure Statement on express
17 preemption grounds]” and/or to seek entry of such order as a final judgment pursuant to Rule
18 54(b)); 2/27/02 Trans. (RJN Ex. 14) at 40:19 (there is “no reason [to] delay” appellate
19 resolution of the express preemption question). On this point, the Bankruptcy Court was
20 undeniably correct.

21
22
23 ²⁵The availability of this alternative course of action by no means precludes the grant of leave
24 to appeal. *See, e.g., Nicholes v. Johnny Appleseed of Washington (In re Nicholes)*, 184 B.R. 82, 87
25 (B.A.P. 9th Cir. 1995) (granting leave to appeal bankruptcy court order denying confirmation of the
26 debtor’s plan under Chapter 13 notwithstanding “alternatives” to appeal); *Kashani v. Fulton (In re*
27 *Kashani)*, 190 B.R. 875, 879 (B.A.P. 9th Cir. 1995) (court granted debtor leave to appeal bankruptcy
28 court’s denial of request to sue trustee without immediately filing draft complaint, notwithstanding
that debtor could have chosen to file the required complaint). Indeed, an order denying confirmation
of a plan of reorganization is a quintessential example of a situation in which there may exist an
alternative to immediate appellate review (*i.e.*, the filing and pursuit of an amended plan or a new
plan), but appellate courts have not hesitated to grant discretionary interlocutory review of such
orders. *See generally* cases cited in text at pp. 14-15, *supra*.

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CONCLUSION

For the reasons set forth above, the Plan Proponents respectfully request leave to pursue an interlocutory appeal from the Bankruptcy Court’s Express Preemption Order, on the terms set forth more fully in the proposed form of order attached as Exhibit C to this memorandum.

DATED: March 22, 2002.

Respectfully submitted,

HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
A Professional Corporation

By: _____
JAMES L. LOPES

Attorneys for Debtor/Appellant PACIFIC GAS
AND ELECTRIC COMPANY

– and –

PROFESSOR LAURENCE H. TRIBE
Co-Counsel to Appellant PG&E CORPORATION
for Constitutional Law Matters

DEWEY BALLANTINE LLP
Attorneys for Appellant PG&E CORPORATION

WEIL, GOTSHAL & MANGES LLP
Attorneys for Appellant PG&E CORPORATION

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

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**EXHIBIT A: Memorandum Decision Regarding Preemption
And Sovereign Immunity (February 7, 2002)**

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN

A Professional Corporation

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EXHIBIT B: Order And Judgment Disapproving Disclosure Statement; Rule 54(b) Certification (March 18, 2002)

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**EXHIBIT C: [Proposed] Order Granting Protective
Interlocutory Appeal**

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN

A Professional Corporation

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9 B. Immediate Review Of The Express Preemption Ruling Is
10 Warranted Because The Proponents’ Contemplated Appeal
11 Involves A Controlling Question Of Law Upon Which There
12 Is Substantial Ground For Difference Of Opinion And
13 Immediate Review Would Materially Advance The Progress
14 Of The Reorganization. 15

15 1. The Express Preemption Order Implicates A Controlling
16 Question Of Law. 15

17 2. There Is Substantial Ground For Difference Of Opinion
18 Concerning The Preemptive Effect Of Section
19 1123(a)(5). 17

20 C. An Immediate Appeal Will Substantially Advance The
21 Progress Of PG&E’s Reorganization. 21

22 CONCLUSION 25

23 **Exhibits**

- 24 Exhibit A: Memorandum Decision Regarding Preemption And Sovereign Immunity
25 (February 7, 2002)
- 26 Exhibit B: Order And Judgment Disapproving Disclosure Statement; Rule 54(b)
27 Certification (March 18, 2002)
- 28 Exhibit C: [Proposed] Order Granting Protective Interlocutory Appeal

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