

JAN 31 2006

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP Nos.	EC-05-1187-PaNMa
)		EC-05-1213-PaNMa
COAST GRAIN COMPANY,)		(Cross-Appeals)
)		
Debtor.)	Bk. No.	01-19647
)		
BOUMA DAIRY,)	Adv. No.	03-01466
)		
Appellant and)		
Cross-Appellee,)		
)		
v.)	MEMORANDUM¹	
)		
GREG BRAUN, Plan Agent,)		
)		
Appellee and)		
Cross-Appellant.)		

Argued and Submitted on January 19, 2006
at Sacramento, California

Filed - January 31, 2006

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable W. Richard Lee, Bankruptcy Judge, Presiding.

Before: PAPPAS, NAUGLE² and MARLAR, Bankruptcy Judges.

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¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. David N. Naugle, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Bouma Dairy ("Bouma") and Greg Braun ("Braun") both appeal
2 from the judgment entered by the bankruptcy court implementing its
3 order granting, in part, Braun's motion for partial summary
4 judgment and other relief, and denying Bouma's motion for summary
5 judgment. We AFFIRM in part and REVERSE AND REMAND in part.

6
7 **FACTS**

8 **1. The Coast Grain prepayment program.**

9 Bouma operates a dairy business and purchased grain and feed
10 products from Coast Grain Company ("Coast Grain"). Most of Coast
11 Grain's customers were large dairy farms such as Bouma located in
12 the Chino or Central Valley areas of California and Arizona.

13 Coast Grain sold its feed products under both fixed price
14 agreements using written sales contracts and on a variable "spot
15 market" basis. Under a sales contract, Coast Grain would sell to
16 a customer a certain quantity of a product at an agreed price to
17 be delivered at a particular time, or over a range of times, in
18 the future. Bouma usually purchased products from Coast Grain
19 under one or more contracts as well as making frequent spot market
20 purchases.

21 Coast Grain accepted cash deposits or advance payments from
22 its dairy customers. The parties refer to this arrangement as
23 Coast Grain's "prepayment program." Apparently, this program was
24 attractive to Coast Grain customers because it allowed them
25 flexibility in obtaining or scheduling feed deliveries during the
26 year.³ In addition, Coast Grain would pay customers with

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³ There are suggestions in the record that customers also
enjoyed tax advantages by participation in this prepayment
program. We have no reason to doubt this, but do not find it
necessary to consider any tax implications in disposing of the
issues.

1 prepayment accounts what it referred to as "quality adjustments,"
2 or, in effect, interest, on the balance in the prepayment
3 accounts.⁴

4 Coast Grain deposited customer prepayments in its general
5 operating bank account and recorded a corresponding current
6 liability on its books identified as "deferred feed sales." If a
7 customer had established a prepayment account, the costs of any
8 purchases from Coast Grain made by that customer under a sales
9 contract or on the spot market would ordinarily be paid by
10 debiting that customer's prepayment account.

11 Coast Grain offered another service to customers with a
12 prepayment account. Without restriction, Coast Grain would, upon
13 instruction from the customer, make payments from the prepayment
14 account to third parties on the customer's behalf. Payments would
15 be paid from the prepayment account until it was exhausted.
16 Remarkably, Coast Grain did not require, as a condition of
17 accepting a prepayment deposit from a customer, that the customer
18 agree to purchase any products from Coast Grain. Although most
19 customers made purchases during the year from Coast Grain, under
20 this arrangement, customers were free to direct Coast Grain to pay
21 third parties any sum up to the entire amount of the prepayment
22 deposit, plus all accumulated interest. There were no
23 restrictions on the types of persons or entities to whom a
24 customer could direct a third party payment, nor did Coast Grain

25 ⁴ Coast Grain would credit its customers' prepayment
26 accounts additional amounts each month based on the account
27 balances at the end of the previous month. In the several years
28 preceding Coast Grain's bankruptcy, the rate of "interest" earned
by customers was either 6.5 percent per annum for a prepayment
deposit of less than \$1 million or 7.5 percent per annum for a
prepayment deposit greater than \$1 million. Coast Grain did not
report these quality adjustment credits to any taxing authorities.

1 have any procedure in place to determine the nature of the
2 customer's obligation to the third party to whom the check was
3 being issued or, indeed, whether there was any such obligation.⁵

4 **2. Bouma's Dealings with Coast Grain.**

5 For approximately the fifteen years before Coast Grant filed
6 for bankruptcy, Bouma participated in the Coast Grain prepayment
7 program by paying certain amounts to Coast Grain each year for
8 feed purchases and other expenditures to be made the following
9 year. On November 6, 2000, Bouma exhausted the balance remaining
10 in its Coast Grain account from the \$650,000 prepayment deposit
11 Bouma had made in December 1999.⁶ Thereafter, Bouma continued to
12 order and receive products from Coast Grain on an open account
13 basis. As of December 29, 2000, Bouma had unpaid Coast Grain
14 invoices on its current account totaling \$65,872.71.

15 On December 29, 2000, Bouma issued Coast Grain a check for
16 \$1,630,000 which Coast Grain credited to Bouma's prepayment
17 account. On December 31, 2000, that entire amount was transferred
18 from Bouma's prepayment account to its current account, paying off
19 the accumulated unpaid invoices and creating a credit balance.
20 Bouma made no further prepayment deposits to Coast Grain after
21 December 29, 2000.

22 ⁵ Again, presumably, as a tax planning tool for customers,
23 most of the prepayment deposits Coast Grain received came in the
24 last few days of December each year. Although Coast Grain had
25 accepted prepayment deposits for many years, in the last few years
26 before its bankruptcy filing, the amount of prepayment deposits
27 increased dramatically. In December 1998, Coast Grain received
28 \$18,015,945 in deposits, while in December 2000, it received
\$92,104,832. From January through August 2001, at the request of
customers, Coast Grain sent out \$27,489,643 in third party
payments.

⁶ Of this deposit, Coast Grain sent out, at Bouma's
direction, \$296,628 as third party payments from January through
June, 2000.

1 When Bouma made its December 29, 2000, deposit with Coast
2 Grain, there was only one existing written sales contract between
3 them, for rolled corn (the "Rolled Corn Contract").⁷ Delivery
4 under the Rolled Corn Contract began in October 2000; the
5 remaining obligation on December 29, 2000, was \$321,510.56. The
6 Rolled Corn Contract did not require that Bouma prepay for any
7 deliveries. The parties entered into no other written contracts
8 for delivery of products before October 2001.

9 Bouma made 765 separate purchases from Coast Grain of
10 fourteen different feed and grain products between January 1 and
11 August 25, 2001. Except for the Rolled Corn Contract, Bouma did
12 not have any written sales contracts with Coast Grain for any of
13 these products.

14 Coast Grain generated an invoice for each shipment to Bouma
15 and entered it into the Coast Grain accounting system. From
16 January 1 to August 25, 2001, upon entry, each invoice was paid by
17 deduction (a debit) in the same amount against the credit balance
18 in Bouma's current account. During this time, at Bouma's request,
19 Coast Grain issued seventeen checks totaling \$900,371 to third
20 parties, each of which were deducted from the credit balance in
21 Bouma's current account. Four of the third party checks, totaling
22 \$381,480.55, were issued and cleared Coast Grain's bank account
23 during the 90-day period prior to Coast Grain's bankruptcy filing.
24 During the same time period, invoices representing product
25 deliveries from Coast Grain to Bouma in the amount of \$101,844.92

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28 ⁷ This was sales contract S-800789, originally entered into
by Bouma and Coast Grain on August 1, 2000, for \$392,000. The
delivery period was October 1, 2000 through September 30, 2001.

1 were paid by deduction against the credit balance in Bouma's
2 current account.

3 In August 2001, Coast Grain terminated the prepayment
4 program. On August 25, 2001, Coast Grain announced it would no
5 longer permit product invoices to be paid by debits against
6 prepayment balances. Coast Grain transferred Bouma's remaining
7 prepayment deposit and accumulated interest from its current
8 account back to its prepayment account. As a result of one final
9 charge,⁸ Bouma's prepayment account balance was reduced to
10 \$65,581.56.

11 Over the next few months, Bouma continued to make purchases
12 from Coast Grain, presumably on open account. As of November 1,
13 2001, Bouma's purchases exceeded the amount remaining on its
14 prepayment account by \$3,711.28. On December 6, 2001, Bouma paid
15 this amount to Coast Grain and there were no further transactions
16 between the parties.

17 **3. The Coast Grain bankruptcy and this litigation.**

18 On October 17, 2001, an involuntary chapter 11⁹ bankruptcy
19 petition was filed against Coast Grain. On November 28, 2001, an
20 order for relief was entered. On March 13, 2002, the bankruptcy
21 court appointed Braun chapter 11 trustee. The bankruptcy court
22 confirmed the "Third Amended Chapter 11 Plan for Coast Grain
23 Company" on October 28, 2003 and appointed Braun as the Plan Agent

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25 ⁸ This deduction was for products shipped to Bouma before
26 August 25, 2001 even though the invoice for the shipment was
apparently not entered in Coast Grain's system until after the
termination date.

27 ⁹ Unless otherwise indicated, all references to chapter or
28 section are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and
references to Rules are to the Federal Rules of Bankruptcy
Procedure.

1 with authority to implement the Third Amended Chapter 11 Plan.

2 As authorized by the confirmed plan, Braun filed a large
3 number of adversary proceedings against former customers of Coast
4 Grain who held prepayment accounts. Braun's amended complaint in
5 this adversary proceeding includes fifteen separate claims for
6 relief, seeking to recover the amount of all shipments of grain
7 and third party payments made by Coast Grain on Bouma's account
8 during the 90 days preceding the chapter 11 filing, as well as
9 payment for feed delivered from Coast Grain to Bouma after the
10 petition was filed. Braun asserted claims against Bouma for
11 recovery of alleged preferences, fraudulent conveyances, accounts
12 receivable, as well as for avoidance of prohibited setoffs.

13 The parties filed cross-motions for summary judgment. In a
14 published decision containing findings of fact and conclusions of
15 law, the bankruptcy court concluded that the transactions between
16 Coast Grain and Bouma could not be avoided as preferences, but
17 should instead be analyzed as setoffs under § 553:

18 It is the court's conclusion that [Braun]
19 cannot collect Coast Grain's accounts
20 receivable from Bouma as preferential
21 transfers. A pre-petition transfer of
22 property of the debtor may not be avoided
23 under § 547 if the transfer was made in
24 exchange for an asset or property right of
25 equal value, or if the transfer was made in
26 satisfaction of an obligation secured by the
27 right of setoff. Both of these situations
28 existed here. Coast Grain's sales of dairy
feed to Bouma, and the third-party payments
made for Bouma's benefit, generated contract
rights against Bouma of equal value. Bouma's
liability for those contracts and Coast
Grain's liability on the prepaid account were
mutual obligations subject to potential
setoff. The actual "transfer of property of
the debtor" occurred each time Coast Grain
gave up the right to collect its accounts
receivable, when Coast Grain debited its claim
against Bouma's prepaid account. At that

1 time, Bouma was potentially secured by its
2 right of setoff pursuant to § 506(a). If
3 Bouma improved its position through these
4 debits, then the Plan Agent's right to recover
5 from Bouma is through avoidance of the setoff,
6 the debit transaction, under § 553(b). The
7 Plan Agent did not move for summary judgment
8 under § 553(b) and resolution of that issue
9 will require further proceedings.

6 In re Coast Grain Co., 317 B.R. 796, 805 (Bankr. E.D.Cal. 2004)
7 (emphasis added) (hereafter "the First Bouma Decision" and cited
8 as Coast Grain).¹⁰

9 Although Braun had not moved for summary judgment to avoid
10 the debits made to Bouma's accounts during the 90-day period
11 before Coast Grain's bankruptcy filing under § 553(b), in the
12 First Bouma Decision the bankruptcy court was able to address
13 several aspects of Bouma's setoff and recoupment defenses.¹¹

14 First, the bankruptcy court held that Bouma could not
15 properly claim an offset under § 553(a) for any purchases made
16 after Coast Grain terminated the prepay program and before its
17 bankruptcy filing. Coast Grain, 317 B.R. at 806. The court found
18 that an affidavit from Bouma's manager showed that Bouma continued
19 to make purchases from Coast Grain after August 25, 2001, solely
20 for the purpose of creating offsets against amounts on deposit in
21 its prepayment account. Id. at 801, n. 4; 806. Therefore, the
22 bankruptcy court concluded, setoff of these purchases was barred

23 _____
24 ¹⁰ Although the First Bouma Decision is the bankruptcy
25 court's most complete analysis of the parties' setoff and
26 recoupment arguments, further proceedings were necessary to
27 finally resolve Braun's claims. Coast Grain, 317 B.R. at 805.
28 The bankruptcy court made several subsequent rulings, including
the Second Bouma Decision, based upon which the Final Judgment was
entered giving rise to this appeal.

¹¹ Bouma moved for summary judgment on its asserted
recoupment defense. Braun, in turn, moved for summary judgment
striking this defense and also Bouma's setoff defense.

1 under § 553(a)(3) (disallowing a claim for offset based upon debt
2 incurred within 90 days pre-bankruptcy "for the purpose of
3 obtaining a right of setoff from the debtor"). Id. at 806.

4 The bankruptcy court also concluded that Bouma could not
5 assert a recoupment defense. For recoupment to apply, the court
6 reasoned, the competing claims of the parties must arise out of
7 the same transaction or occurrence. Id. at 806, citing Newbery
8 Corp. v. Fireman's Fund Ins. Co. (In re Newbery Corporation), 95
9 F.3d 1392, 1399 (9th Cir. 1996). To determine whether claims
10 arise from the same transaction, the bankruptcy court determined
11 that it must apply the "logical relationship test," as adopted in
12 Sims v. United States Department of Health and Human Services (In
13 re TLC Hospitals, Inc.), 224 F.3d 1008, 1011 (9th Cir. 2000); see
14 also Aetna U.S. Healthcare, Inc. v. Madigan (In Re Madigan), 270
15 B.R. 749, 754 (9th Cir. BAP 2001). Although in applying that
16 test, the Ninth Circuit notes that the term "transaction" is a
17 flexible one, Newbery, 95 F.3d at 1402 (citing Moore v. New York
18 Cotton Exchange, 270 U.S. 593 (1926)), the bankruptcy court was
19 "not persuaded that Bouma's prepayment in December 2000, and the
20 subsequent purchases and third party payments which benefited
21 Bouma months later, had such a 'logical relationship' that they
22 should be deemed to constitute the same transaction." Coast
23 Grain, 317 B.R. at 809. As a result, the bankruptcy court
24 concluded that the competing claims of Bouma and Coast Grain
25 arising from the prepayment account and the post-termination
26 purchases did not arise out of a single transaction and,
27 therefore, Bouma could not assert a recoupment defense.

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1 Following the First Bouma Decision, Braun filed a motion for
2 a partial summary judgment on the twelfth, thirteenth and
3 fourteenth claims for relief of his complaint. After another
4 hearing, in an extended oral ruling, the bankruptcy court
5 concluded that Braun was entitled to a judgment on the twelfth
6 claim, which sought to recover the amount of the purchases made
7 during the 90 days pre-bankruptcy as prohibited offsets under
8 § 553, the claim that was not before the court in the First Bouma
9 Decision. Transcript of hearing (March 24, 2005), pp. 74-86. As
10 it had suggested it would, the bankruptcy court found that the
11 prepayment agreement between Coast Grain and Bouma was in the
12 nature of a global setoff agreement.

13 The Court can only characterize the
14 prepayment agreement on December 29th, 2000,
15 as an agreement to create a debit account on
16 Coast Grain's records for Bouma's benefit,
17 against which future goods and services
18 delivered and provided for Bouma's benefit
19 would be paid or compensated by a debit
20 transaction against the account.

21 In other words, in my view, the
22 prepayment agreement that we've been talking
23 about was nothing more than a . . . global
24 setoff agreement. . . . Bouma here offers
25 that there were no actual setoffs taken during
26 the preference period and that there's no
27 evidence that it exercised the right of
28 setoff. The court disagrees.

29 One, Mr. Schoenveld's declaration clearly
30 establishes that the prepayment was made to
31 create future debit rights, and there's no
32 showing that Bouma ever made any effort to
33 otherwise pay for the goods and services that
34 it received. And it's clear that Bouma knew
35 and understood at all times that the goods and
36 services . . . would be debited against the
37 prepayment account.

38 In this context, the court's directly
39 equating the term "debit" with the concept of
40 . . . a setoff.

41 Accordingly, the court finds that if
42 setoff were taken against the prepayment
43 accounts [in the 90-day pre-petition period],
44 that those setoffs did improve Bouma's

1 position by the amounts that were debited and
2 that the setoffs are voidable pursuant to
3 § 553(b). So judgment will be entered for
4 [Braun].

5 Transcript of hearing (March 24, 2005), pp. 79-80. We refer to
6 this ruling as the "Second Bouma Decision."

7 The bankruptcy court made one alteration to its earlier First
8 Bouma Decision. In the Second Bouma Decision, the court decided
9 that because the Rolled Corn Contract between Bouma and Coast
10 Grant was in existence, and that approximately \$321,000 of that
11 contract still remained to be performed on the day Bouma's
12 prepayment deposit was made, and that \$35,403 of that Rolled Corn
13 Contract was performed during the 90 days prior to the
14 commencement of the bankruptcy case, Bouma was entitled to recoup
15 that \$35,403.

16 Since the court had decided that neither the recoupment
17 doctrine nor § 553(a) offered Bouma a defense to Braun's claims,
18 except for the Rolled Corn Contract, the bankruptcy court granted
19 Braun a summary judgment for the avoidable setoffs (§ 553(b)-
20 twelfth claim), for the accounts receivable (§ 542 - thirteenth
21 claim) and for the post-bankruptcy purchases (§ 549 - fourteenth
22 claim). On April 29, 2005, the bankruptcy court entered an Order
23 Granting Plaintiff's Motion for Partial Summary Judgment,
24 Bifurcating Claims, Dismissing Claims, and Directing Entry of
25 Final Judgment, and then issued the Final Judgment.¹²

26 The bankruptcy court certified the Final Judgment under Fed.
27 R. Civ P. 54(b), as incorporated by Fed. R. Bankr. P. 7054. Bouma

28 ¹² The Final Judgment effectively incorporates by reference
the First Bouma Decision, as well as the court's oral findings of
fact and conclusions of law stated on the record at the March 24
hearing.

1 timely appealed, arguing that recoupment was an absolute defense
2 to all Braun's claims. Braun then timely cross-appealed, arguing
3 that the \$35,403 recoupment should not have been allowed.

4 JURISDICTION

5 The bankruptcy court had jurisdiction pursuant to
6 28 U.S.C. § 1334 and § 157(b). This Panel has jurisdiction over
7 the appeal pursuant to 28 U.S.C. § 158(a)(1) and (b).

8 STANDARD OF REVIEW

9 Both Bouma's appeal and Braun's cross-appeal arise from the
10 bankruptcy court's entry of Final Judgment, which in turn is based
11 upon the bankruptcy court's Order Granting [Braun's] Motion for
12 Partial Summary Judgment, Bifurcating Claims, Dismissing Claims,
13 and Directing Entry of Final Judgment. A bankruptcy court's
14 decision to grant summary judgment is reviewed de novo. See
15 Thrifty Oil Co. v. Bank of America Nat. Trust and Sav. Ass'n, 322
16 F.3d 1039, 1046 (9th Cir. 2003); In re Stanton, 303 F.3d 939, 941
17 (9th Cir. 2002); In re Betacom of Phoenix, Inc., 240 F.3d 823, 828
18 (9th Cir. 2001); In re Home America T.V.-Appliance Audio, Inc., 232
19 F.3d 1046, 1050 (9th Cir. 2000); In re Bakersfield Westar
20 Ambulance, Inc., 123 F.3d 1243, 1245 (9th Cir. 1997); In re
21 Madigan, 270 B.R. at 753. A bankruptcy court's decision to grant
22 partial summary judgment is reviewed de novo. Guerin v. Winston
23 Industries, Inc., 316 F.3d 879, 882 (9th Cir. 2002).

24 ISSUES ON APPEAL

25 1. Did the bankruptcy court err in concluding that there was a
26 "global setoff agreement" covering all transactions between
27 Bouma and Coast Grain, and that any setoffs effected in the
28 90-day period before the filing of Coast Grain's bankruptcy
petition were avoidable by Braun under § 553(b)?

- 1 2. Did the bankruptcy court err in finding that the competing
2 claims of Bouma and Coast Grain, arising from the prepayment
3 account and the post-termination purchases, did not arise out
4 of "the same transaction" and therefore Bouma could not
5 assert a recoupment defense?
- 6 3. Did the bankruptcy court err in allowing Bouma a partial
7 recoupment for the Rolled Corn Contract?

8 **BOUMA'S REQUEST FOR JUDICIAL NOTICE**

9 On August 30, 2005, Bouma filed a Request for Judicial Notice
10 in which it asked the Panel to take judicial notice of the
11 decisions of the bankruptcy court in two other adversary
12 proceedings in the Coast Grain bankruptcy case: (i) Memorandum
13 Decision regarding Plaintiff's Motion for Partial Summary Judgment
14 in Braun v. Schakel Dairy, Adv. No. 03-1432; and (ii) Amended
15 Findings of Fact and Conclusions of Law re Motion for Summary
16 Judgment in Braun v. Walter H. Jensen Cattle Co., Inc., Adv. No.
17 03-1419-B (together, the "Requested Decisions"). Bouma stated no
18 reasons or justification for its request, other than quoting case
19 law holding that a federal court "may take notice of proceedings
20 in other courts, both within and without the federal judicial
21 system, if those proceedings have a direct relation to matters at
22 issue." United States Ex Rel. Robinson Rancheria Citizens Council
23 v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992). Bouma's
24 Request for Judicial Notice at p. 1. However, Braun has not
25 objected to Bouma's request.

26 The Panel will grant Bouma's Request for Judicial Notice. The
27 Panel will consider the bankruptcy court's decisions in the two
28 adversary proceedings for at least two reasons.

1 First, the parties acknowledge that Braun is pursuing a large
2 number of adversary proceedings against various Coast Grain
3 customers involving similar (but not identical) facts and legal
4 theories, all presided over by the same bankruptcy judge. Bouma
5 asks that we consider the court's decisions in two of those
6 adversary proceedings. In those decisions, the bankruptcy court
7 applied a legal analysis similar to that employed in the decisions
8 on appeal. Indeed, the court references the First Bouma Decision
9 to serve as a foundation of the legal analysis of setoff and
10 recoupment in the two other decisions. For example, in Jensen,
11 the bankruptcy court distinguished the facts from those in Bouma
12 and explains why recoupment is available under the Jensen
13 circumstances but not (or only to a very limited extent) in our
14 case. Arguably, a review of these decisions may be helpful to the
15 Panel to understand the bankruptcy court's application of the same
16 law to three fact patterns that are both similar and dissimilar.
17 In effect, the Panel has considered these decisions in the same
18 fashion as it would any non-binding decision of a bankruptcy court
19 to support, or to oppose, a particular interpretation or
20 application of the Bankruptcy Code.

21 Second, Braun does not oppose Bouma's request. Presumably,
22 Braun agrees it is appropriate for the Panel to consider the
23 bankruptcy court's decisions in the other adversary proceedings,
24 or, in the alternative, concedes that he will suffer no prejudice
25 if the Panel does so.

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1 **DISCUSSION**

2 1. The bankruptcy court did not err in finding that there
3 was a "global setoff agreement" and that the setoffs
4 effected during the 90-day period before the filing of
5 the bankruptcy petition were avoidable by Braun.

6 Under certain circumstances, a creditor's right of "setoff"
7 is recognized in the Bankruptcy Code. Section 553(a) specifies
8 that "Except as otherwise provided . . . this title does not
9 affect any right of a creditor to offset a mutual debt owing by
10 such creditor to the debtor that arose before the commencement of
11 the case." The Ninth Circuit has described the right of setoff
12 allowed in bankruptcy cases in these terms:

13 The defining characteristic of setoff is that
14 "the mutual debt and claim . . . are generally
15 those arising from different transactions." 4
16 Collier on Bankruptcy ¶ 553.03, at 553-14
17 (15th ed. 1995). . . .
18 Under section 553(a), each debt or claim
19 sought to be offset must have arisen prior to
20 filing of the bankruptcy petition. In
21 addition, "a claim may . . . be set off
22 without regard to whether it is contingent or
23 unliquidated, as long as the claim qualifies
24 as 'mutual' under applicable non-bankruptcy
25 law. . . ." 5 Collier ¶ 553.01[4] at 553-6
26 (citation omitted [in original]). In order
27 for countervailing debts to be "mutual," they
28 must be "in the same right and between the
same parties, standing in the same capacity."
5 Collier ¶ 553.04[2], at 553-22 (citing
England v. Industrial Comm. Of Utah (In re
Visiting Home Services, Inc.), 643 F.2d 1356,
1360 (9th Cir. 1981).

24 Newbery Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392, 1398-99
25 (9th Cir. 1996).

26 Under § 553 and the relevant Ninth Circuit case law, a
27 creditor's right to offset is recognized and preserved under three
28 conditions: (1) The creditor holds a claim against the debtor that

1 arose before the commencement of the case; (2) The debtor owes a
2 debt to the creditor that also arose before the commencement of
3 the case; (3) The claim and debt are mutual, as determined by
4 applicable non-bankruptcy law.¹³ See In re Luz Int'l, Ltd., 219
5 B.R. 837, 843 (9th Cir. BAP 1998).

6 As discussed earlier, the bankruptcy court in the First Bouma
7 Decision determined that the three conditions required for setoff
8 were present in the transactions between Bouma and Coast Grain:
9 "Coast Grain's sales of dairy feed to Bouma, and the third-party
10 payments made for Bouma's benefit, generated contract rights
11 against Bouma of equal value. Bouma's liability for those
12 contracts and Coast Grain's liability on the prepaid account were
13 mutual obligations subject to potential setoff." Coast Grain, 317
14 B.R. at 805. Later, in the Second Bouma Decision, the bankruptcy
15 court determined that there were actual setoffs. Based on the
16 deposition testimony of Bouma's managing director, Mr. Schoenveld,
17 the court concluded that the prepayment agreement created a debit
18 account on Coast Grain's records for Bouma's benefit, against
19 which Coast Grain offset the cost of the goods and services
20 provided to Bouma, and third party payments made for Bouma, via a
21 debit against the account. The court observed that Bouma made no
22 other payments to Coast Grain for these goods or third party
23 payments other than by debit to its account. Therefore, the

24 ¹³ The applicable non-bankruptcy law in the instant appeal is
25 that of California. Neither of the parties have examined the
26 mutuality of the parties' obligations to one another under
27 California law. The bankruptcy court correctly noted that the
28 Coast Grain account receivable created when it sold products to
Bouma would be independently enforceable under California law.
Coast Grain, 317 B.R. at 802. Regarding the mutuality of the
Coast Grain obligation, the court noted that "[i]t is undisputed
that Bouma's prepaid account represented a liability for Coast
Grain and a claim for Bouma." Id.

1 bankruptcy court concluded that the parties' prepayment agreement
2 constituted a global setoff agreement.

3 Having determined that the transactions were subject to
4 setoff, the bankruptcy court then found that the setoffs effected
5 during the 90-day period preceding the filing of Coast Grain's
6 bankruptcy petition improved Bouma's position by the amounts that
7 were debited from its prepayment account.¹⁴ Consequently, the
8 bankruptcy court concluded that the setoffs were avoidable
9 pursuant to § 553(b)(1). The bankruptcy court also concluded that
10 any of these setoffs that occurred after termination of the
11 prepayment program by Coast Grain should be disallowed and were
12 recoverable by Braun because the purchases made by Bouma were,
13 according to the testimony of its officer, "for the purpose of
14 obtaining a right of setoff from the debtor." § 553(a)(3)(C).
15 Finally, the bankruptcy court decided that any post-petition
16 setoffs were not debts "arising before the commencement of the
17 case," not protected by § 553(a), and therefore recoverable by
18 Braun.

19 Bouma objects to the bankruptcy court's decision on two
20 grounds: (1) that no mutual debts existed between Bouma and Coast
21
22

23 _____
24 ¹⁴ The "improvement of position" standard is a shorthand
25 reference to § 553(b)'s requirement that, to be avoidable, a
26 creditor's offset reduce any "insufficiency" in accounts existing
27 between the debtor and creditor during the 90 days before the
28 bankruptcy petition is filed. § 553(b)(1). An "insufficiency" is
in turn defined by the Code as "that amount, if any, by which a
claim against the debtor exceeds a mutual debt owing to the debtor
by the holder of such claim." § 553(b)(2). Given this complicated
statutory formulation, it can be understood how the reference to
"improvement of position" developed. At oral argument, this
"improvement of position" test was conceded by Bouma.

1 Grain; and (2) the facts do not satisfy the requirements for a
2 setoff.¹⁵ We disagree.

3 First, Bouma insists there were no mutual debts owing by the
4 parties to one another under these facts. In Bouma's view, at the
5 time Bouma received products from Coast Grain, or whenever Coast
6 Grain made third party payments on Bouma's behalf, it was simply
7 taking delivery of a product, or accepting a service, for which it
8 had already paid Coast Grain. Under this approach, given its
9 positive prepayment account balance, Bouma argues no debt to Coast
10 Grain arose from such transactions.

11 The parties illustrate their positions concerning Bouma's
12 "mutual debts" argument in their respective reply briefs by
13 offering conflicting interpretations of the same analogy. In its
14 brief, Bouma argues the facts of this case resemble a situation
15 where an individual overpays a credit card account by \$1,000,
16 thereby creating a credit balance on the account. When the
17 cardholder then incurs a \$500 additional charge on the card, Bouma
18 suggests no new independent debt arises in favor of the credit
19 card issuer. Instead, the existing credit balance is simply
20 reduced by the amount of the new charges. So long as there is a
21 credit balance on the account, in Bouma's view, the cardholder is
22 never indebted to the issuer for new charges that do not exceed
23 the credit balance.

24 Braun acknowledges that the cardholder's
25 overpayment/prepayment of \$1,000 properly reflects Bouma's status

26
27 ¹⁵ As near as we can tell from its briefs, while Bouma argues
28 the transactions in question do not qualify as setoffs for
purposes of § 553, if indeed we conclude setoffs did occur, Bouma
does not challenge the bankruptcy court's decision that they are
recoverable by Braun under § 553.

1 when it made its \$1.6 million deposit with Coast Grain in December
2 2000. Braun also agrees that, under the analogy, such an
3 overpayment created an obligation on the part of the credit card
4 issuer in favor of the cardholder. However, it is Braun's
5 position that this debt must be balanced by the cardholder's
6 obligation to pay the credit card company for any charges made on
7 the account. In other words, to Braun, whenever the cardholder
8 uses the card to make a purchase, a new debt arises that the
9 issuer then sets off against the cardholder's credit balance. To
10 Braun, the analogy applied to the Bouma-Coast Grain relationship
11 evidences a classic setoff arrangement.

12 In our opinion, Braun's interpretation of the analogy more
13 accurately reflects legal reality. When Bouma gave Coast Grain
14 its funds in December, 2000, Coast Grain became indebted to Bouma
15 for the amount deposited. However, each time Bouma purchased feed
16 from Coast Grain, or on each occasion when Bouma directed Coast
17 Grain to make a payment to a third party on its behalf, a
18 separate, distinct debt was created which Bouma owed to Coast
19 Grain for the cost of the product or the amount of the third-party
20 payment. This characterization of the parties' relationship is
21 evidenced by the fact that for purchases, Coast Grain created an
22 invoice and then "paid" that invoice by making an entry in its
23 books debiting the amount of the invoice against Bouma's
24 prepayment account. For third party payments, Coast Grain issued
25 its check and then debited Bouma's account for the amount of that
26 check. When Coast Grain made these entries in its books, Bouma's
27 debt to Coast Grain was effectively satisfied and a setoff for
28 purposes of § 553(a) occurred. To the extent these setoffs

1 occurred within 90 days before Coast Grain's bankruptcy, and
2 thereby improved Bouma's position, they were avoidable by Braun
3 under § 553(b).

4 Bouma's second objection to the bankruptcy court's setoff
5 conclusion is that the facts here do not satisfy the requirements
6 for a setoff according to the U.S. Supreme Court. Bouma points
7 out that, as set forth in Citizens Bank of Maryland v. Strumpf,
8 516 U.S. 16, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995):

9 . . . [A] setoff has not occurred until three
10 steps have been taken: (i) a decision to
11 effectuate a setoff; (ii) some action
12 accomplishing the setoff; and (iii) a recording
13 of the setoff.

14 Strumpf, 116 S.Ct. at 289. Bouma argues that there was no showing
15 here that Coast Grain intended to effectuate a setoff in these
16 transactions, or that Bouma ever effected a setoff.

17 As an initial matter, it is unclear whether, under California
18 law, to constitute an offset, there must be a conscious decision
19 to offset by the one of the parties, or, indeed, the specific use
20 of some "magic words." Strumpf considered the application of the
21 automatic stay under § 362(a)(3) and (7) to a bank's right to set
22 off amounts in a debtor's account against debts owed by the debtor
23 to the bank after bankruptcy. The full text of the first line of
24 the quotation from the Court's decision actually reads as follows:

25 A requirement of such an intent [the intent to
26 permanently reduce an account by the amount of
27 the claim asserted against the account] is
28 implicit in the rule followed by a majority of
jurisdictions addressing the question, that a
setoff has not occurred until three steps have
been taken

Id. In Strumpf, the Supreme Court acknowledged that there is no
federal right of setoff created by the Bankruptcy Code but that

1 any such right must be based upon state law - in that case,
2 Maryland law. Id.¹⁶ The Strumpf Court derived the requirement
3 that a creditor intend to permanently settle accounts as a
4 condition for setoffs under § 362(a) from what it perceived to be
5 the majority rule of law in the states. Strumpf did not cite any
6 California cases to support its conclusion.

7 California recognizes setoffs as an equitable right at common
8 law. Meherin v. Saunders, 131 Cal. 681, 684, 63 P. 1084, 1087
9 (Cal. 1901), Salaman v. Bolt, 141 Cal.Rptr. 841, 847 (Cal.Ct.App.
10 1977) (cited with approval in Keith G. v. Suzanne H., 52
11 Cal.App.4th 853, 859, 72 Cal.Rptr.2d 525, 530 (Cal.Ct.App. 1998)).
12 There is also a statutory right to offset mutual debts pursuant to
13 California Code of Civil Procedure ("CCP") § 431.70. The
14 principal concern of the California cases and statute seems to be
15 that setoff be allowed only where the debts being offset against
16 one another are mutual, fully matured obligations. Eistrat v.
17 Humiston, 160 Cal.App.2d 89, 90, 324 P.2d 957, 958-959
18 (Cal.Ct.App. 1958). There is no California statutory provision,
19 and we have found no case law, that supports Bouma's alleged
20 three-part requirement for a setoff.

21 Moreover, it is apparent to us from the record that, by
22 debiting Bouma's prepayment account for the cost of each purchase
23 of product or third-party payment, Coast Grain intended to effect
24 an offset. Both in establishing the prepayment account¹⁷

25
26 ¹⁶ Indeed, as Bouma notes, the Supreme Court's decision is
27 described by one source as establishing the "general rules" for
28 setoffs. See 4 Colliers on Bankruptcy ¶ 553.05[1]. Transcript of
hearing (March 24, 2005), pp. 62-63.

¹⁷ Indeed, there is no evidence in the record that Bouma ever
objected to the custom and practice of the parties.

1 relationship and in documenting each transaction, Coast Grain
2 obviously intended that Bouma's charges be settled by debit
3 against its account. If an intent by a creditor to effect an
4 offset is indeed required, the debit process employed here
5 sufficiently evidences this intent.

6 But Bouma argues that it never set off any debts; Coast Grain
7 did. As a result, it argues that Braun can not recover. This
8 argument also ignores the realities of its arrangement with Coast
9 Grain. Bouma indeed effected setoffs by making purchases of
10 product from Coast Grain, and by having Coast Grain send checks to
11 others, just as surely as it would have benefited from taking
12 money out of an account it held for Coast Grain. Under its
13 arrangement with Coast Grain, Bouma had the ability to control
14 and, as it turned out, to improve its position vis-à-vis its debt
15 to Coast Grain, by simply buying more product from Coast Grain, or
16 instructing Coast Grain to make payments to others on its behalf.
17 In this sense, we agree with the bankruptcy court that both Bouma
18 and Coast Grain were "creditors" and that both were involved in
19 setting off the obligations of each other. That Coast Grain acted
20 as the "bank", and Bouma as the customer, is of no significance in
21 this case.

22 For these reasons, we conclude that the bankruptcy court
23 correctly determined that a global setoff agreement existed
24 between Bouma and Coast Grain and that the purchases and third-
25 party payments and corresponding debits to Bouma's account, made
26 in the 90-day period before the filing of the bankruptcy petition,
27 were avoidable by Braun pursuant to § 553(b).

28

1 2. The bankruptcy court did not err in finding that Bouma
2 could not assert a recoupment defense.

3 The Panel has previously examined in depth the application of
4 the equitable doctrine of recoupment in bankruptcy cases.
5 Madigan, 270 B.R. at 753-56. However, a summary of the lessons of
6 Madigan and other decisions regarding that doctrine, its
7 relationship to setoff, and the application of the logical
8 relationship test, is again appropriate here.

9 First, recoupment is an equitable, common law doctrine that
10 is not expressly recognized in the Bankruptcy Code but is
11 preserved through judicial decisions. The U.S. Supreme Court has
12 allowed the use of recoupment in bankruptcy cases. Reiter v.
13 Cooper, 507 U.S. 258, 265, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993).

14 Recoupment is "the setting up of a demand arising from the
15 same transaction as the plaintiff's claim or cause of action,
16 strictly for the purpose of abatement or reduction of such claim."
17 Newbery, 95 F.3d at 1399. It involves "netting out of debt,"
18 Oregon v. Harmon (In re Harmon), 188 B.R. 421, 425 (9th Cir. BAP
19 1995) and is allowed "because it would be inequitable not to allow
20 the defendant to recoup those payments against the debtor's
21 subsequent claim." Newbery, 95 F.3d at 1401.

22 The justification for the defensive use of recoupment in
23 bankruptcy is that there is no independent basis for a "debt," and
24 therefore there is no "claim" against estate property. Harmon,
25 188 B.R. at 425.

26 The respective claims involved in a recoupment may arise
27 either before or after the commencement of the bankruptcy case,
28 but they must arise out of the same transaction. Newbery, 95 F.3d

1 at 1399. It is this "same transaction" requirement that
2 essentially distinguishes recoupment from setoff.

3 In order to determine if two claims arose from the same
4 transaction, in the Ninth Circuit, we apply the logical
5 relationship test. TLC Hosps., 224 F.3d at 1012; Newbery, 95 F.3d
6 at 1403. In other words, the two dealings that support a
7 recoupment must be logically related to one another for the
8 doctrine to be available.

9 It is this "same transaction" requirement that lies at the
10 heart of Bouma's appeal. The bankruptcy court decided that, under
11 these facts, it could not find a logical relationship between
12 Bouma's prepayment arrangement with Coast Grain and the subsequent
13 discretionary purchases from, and third party payments made on its
14 behalf by, Coast Grain to support application of the doctrine of
15 recoupment.

16 The court cannot connect Bouma's pre-payment
17 to the subsequent purchases and third party
18 payments to find a "logical relationship"
19 sufficient to support the doctrine of
20 recoupment. The opposing obligations between
21 Bouma and Coast Grain were effectuated as
22 separate and distinct contracts in the
23 continuous commercial relationship between the
24 parties. At the time of the prepayment, Bouma
25 was not legally obligated to purchase \$1.5
26 million of product to Bouma. Those contracts
27 came into existence months later, when Bouma
28 purchased dairy feed on the "spot market."
Coast Grain clearly was under no legal
obligation to make third party payments to
Bouma's vendors—the court can describe that
activity as nothing more than a gratuitous
accommodation to Coast Grain's customers, a
marketing ploy to promote participation in the
prepayment program.

27 Coast Grain, 317 B.R. at 808.

1 The bankruptcy court supported its conclusion that there was
2 no logical relationship between Bouma's claims and the prepayment
3 arrangement by applying the analysis required under two Ninth
4 Circuit decisions, Newbery and TLC Hosps. In Newbery, the Court
5 of Appeals applied a "proximate cause" test to connect the
6 parties' competing claims. Fireman's Fund had issued performance
7 and payment bonds to an electrical subcontractor, Newbery Electric
8 Inc., to insure its involvement in several construction projects.
9 Newbery abandoned the projects and Fireman's Fund was required to
10 take them over. Newbery and Fireman's Fund executed a contract
11 providing that Fireman's Fund could use Newbery's equipment to
12 complete the jobs and, in return, would pay rent to Newbery's
13 secured lender, Citibank. Citibank then assigned the right to
14 collect such rent back to Newbery. When Fireman's Fund failed to
15 make the rent payments, Newbery sued. The court noted that, but
16 for Newbery's breach of the construction contracts, Fireman's Fund
17 would not have needed to rent the equipment. As Newbery was
18 contractually obligated to indemnify Fireman's Fund for its
19 losses, the parties' opposing claims, according to the Ninth
20 Circuit, arose from and were intertwined in the same contracts and
21 acts of the parties. As a result, the court allowed Fireman's
22 Fund to recoup its claims against Newbery from the rent it owed.

23 In TLC Hosps., the Ninth Circuit allowed a recoupment when it
24 found evidence of Congressional intent in enacting the Medicare
25 statutory scheme to connect the estimated payments and
26 reimbursements based on the ongoing Medicare contract. Based upon
27 the intricate system established in the legislation, the court
28

1 allowed the Government to withhold the amount of overpayments made
2 to a hospital from future payments due to the hospital.

3 In both Newbery and TLC Hosps., the Court of Appeals looked
4 to the legal relationships among the parties to determine the
5 "logical relationship" between the competing claims. Comparing
6 the Bouma-Coast Grain relationship with those examined in Newbery
7 and TLC Hosps., the bankruptcy court concluded that the opposing
8 claims of Bouma and Coast Grain lacked any causal connection or
9 that they were entwined by anything "but an unwritten,
10 noncommittal, amorphous 'understanding' based on their prior
11 course of business." Coast Grain, 317 B.R. at 808-09. The
12 bankruptcy court opined that for recoupment to be available, Bouma
13 needed to establish, at a minimum, that the prepayment arrangement
14 had a legally cognizable relationship to the subsequent sale of
15 goods and third party payments made by Coast Grain. The court
16 found that, given the "loose knit structure" of the parties'
17 understandings, as well as the lack of a "definite agreement" to
18 memorialize the terms of the prepayment agreement, Bouma had
19 failed to establish the requisite logical relationship.

20 Bouma argues that the logical relationship between the
21 prepayment and the subsequent shipments and third party transfers
22 can be established by deposition testimony and the conduct of the
23 parties, and cites authorities for its contention that the
24 prepayment agreement and subsequent sales and transfer formed a
25 unitary contract. Bouma reminds us that in Newbery, the court
26 stated that "transaction is a word of flexible meaning. It may
27 comprehend a series of many occurrences, depending not so much
28 upon the immediateness of their connection as upon their logical

1 relationship." Newbery, 96 F.3d at 1402 (quoting Moore v. New York
2 Cotton Exchange, 270 U.S. 593 (1926)). Bouma also relies upon
3 Ashland Petroleum Company v. Appel (In re B&L Oil Co.), 782 F.2d
4 155 (10th Cir. 1986) which, in turn, had been favorably cited by
5 the Supreme Court in Reiter v. Cooper, supra.

6 In B&L Oil, the debtor granted Ashland Oil the right, but
7 with no obligation, to purchase unspecified amounts of crude oil
8 from B&L. Ashland purchased oil and, prior to B&L's filing for
9 bankruptcy, overpaid for the oil. After bankruptcy, Ashland
10 withheld payments for subsequent deliveries from B&L to recover
11 the amount of overpayment. In the litigation that followed, B&L
12 argued that the original contract between B&L and Ashland never
13 required Ashland to purchase any oil and, therefore, that
14 Ashland's payment obligation arose independently for each
15 delivery. Ashland argued that there was a contract and that all
16 purchases under it should be treated as arising from the same
17 transaction. The Tenth Circuit settled the dispute by finding
18 that there was a single contract, despite the fact that orders
19 were entered at different times and for varying amounts.

20 Although we find B&L informative, we are more persuaded by
21 Braun's arguments, which liken the facts of this appeal with those
22 presented in our decision in Cal. Cannery and Growers v. Military
23 Distributors of Va., Inc. (In re Cal. Cannery and Growers), 62
24 B.R. 18 (9th Cir. BAP 1986) (cited with approval in Madigan, 270
25 B.R. at 758). Cal. Cannery filed for bankruptcy in 1983. Before
26 bankruptcy, Cal. Cannery sold and delivered goods to Military
27 Distributors, which thereafter, on the order of Cal. Cannery,
28 shipped the goods to various military installations. Cal. Cannery

1 received payment from the U.S. government for these shipments but
2 did not pay Military Distributors for several separate orders and
3 shipments before the bankruptcy filing. Military Distributors
4 admitted that it owed Cal. Cannery for post-bankruptcy purchases
5 but asserted that the defense of recoupment applied to the payment
6 of the pre-petition debt. This Panel held that each delivery
7 under a single distributor's agreement was a separate transaction
8 for recoupment purposes. It also found significant that "the
9 purchaser's claim involved the purchase and sale of different
10 goods. Id. at 20-21.

11 Cal. Cannery is indeed on point in this case. Bouma made a
12 prepayment deposit, not to guarantee that it would have a secure
13 supply of feed products or to nail down favorable contract terms,
14 but presumably to take advantage of tax savings or other financial
15 advantages it could hopefully realize. This prepayment
16 relationship was not evidenced by any formal contract and, as the
17 bankruptcy court found, was at best a nebulous "oral arrangement."
18 Under this vague understanding, Bouma was not required to purchase
19 goods from Coast Grain and Coast Grain was not required to sell
20 goods to Bouma on any specified terms. Bouma's act of making a
21 prepayment deposit with Coast Grain simply cannot reasonably be
22 connected in any logical fashion to the 765 separately invoiced
23 purchases of fourteen different products it thereafter made from
24 Coast Grain. Moreover, these purchases amounted to considerably
25 less than 50 percent of the prepayment deposit and we are at a
26 loss to connect the prepayment deposit to the over \$900,000
27 distributed by Coast Grain on seventeen different occasions to
28 various third parties, who were not even identified at the time of

1 the original oral prepayment agreement. It seems undisputed that,
2 had it instructed Coast Grain to do so, all of the prepayment
3 deposit could have been distributed to third parties, with any
4 product purchases carried by Coast Grain on open account,
5 something that actually occurred after the prepayment deposit was
6 exhausted in years past and again in 2001.

7 As the Ninth Circuit noted in TLC Hosps., "the logical
8 relationship concept is not to be applied so loosely that multiple
9 occurrences in any continuous commercial relationship would
10 constitute one transaction." TLC Hosps., 244 F.3d at 1012.
11 Although there was a continuing commercial relationship between
12 Bouma and Coast Grain through the period at issue in this appeal,
13 that relationship is best characterized as an on-going series of
14 separate transactions. We therefore agree with the bankruptcy
15 court that "the opposing obligations between Bouma and Coast Grain
16 were effectuated as separate and distinct contracts in the
17 continuous commercial relationship between the parties." Coast
18 Grain, 317 B.R. at 808.

19 The bankruptcy court correctly determined that there was no
20 logical relationship between the prepayment agreement and the
21 subsequent purchases and third party payments. There was no single
22 transaction or contract which is a fundamental requirement for
23 exercise of recoupment rights. Consequently, the bankruptcy court
24 did not err in its decision that recoupment could not be applied
25 in the instant case, a conclusion that was consistent with the
26 case law of this Circuit and well-reasoned.¹⁸

27 ¹⁸ Before leaving this issue, we note the following from the
28 bankruptcy court's opinion: "Recoupment is an equitable doctrine
which may be denied based on the parties' conduct or other

(continued...)

1 3. The bankruptcy court erred in allowing Bouma a partial
2 recoupment for the Rolled Corn Contract.

3 After rejecting Bouma's recoupment defense in the First Bouma
4 Decision, the bankruptcy court partly reversed positions in the
5 Second Bouma Decision by allowing Bouma a partial recoupment for
6 purchases and payments made by Coast Grain on the Rolled Grain
7 Contract during the 90-day pre-petition period. This ruling is
8 the subject of Braun's cross-appeal. To us, the allowance of a
9 partial recoupment to Bouma under these facts is inconsistent with
10 the bankruptcy court's persuasive and cogent analysis of the "same
11 transaction" requirement. Because the bankruptcy court did not
12 identify specific facts sufficient to justify why a "logical
13 relationship" existed between the Rolled Corn Contract and the
14 prepayment deposit, the bankruptcy court's allowance of partial
15 recoupment to Bouma for the Rolled Corn Contract must be reversed.

16 We find no indication in the record that, at the time Bouma
17 made its prepayment deposit, the parties intended to treat Bouma's
18 obligations under the Rolled Corn Contract in any special manner,
19 as compared with its other purchases, vis-à-vis Bouma's prepayment
20 account. Significantly, the Rolled Corn Contract was entered into
21 by the parties in October, 2000 and deliveries to Bouma from Coast
22 Grain commenced the same month. In fact, some \$70,000 in
23 purchases had already been made by Bouma prior to the date it made
24 the December prepayment deposit. Although the Rolled Corn

25 ¹⁸ (...continued)

26 'equitable factors' which the court does not need to address
27 here." Coast Grain, 317 B.R. at 809, n.7. We also do not rest
28 our decision on "the equities". However, given Bouma's
sophistication and purely financial motives for engaging in this
inherently risky quasi-banking arrangement with its feed supplier,
it is doubtful that we could be persuaded that Bouma should be
spared its loss in preference to Coast Grain's other creditors.

1 Contract obligates Bouma to make purchases from Coast Grain, in
2 describing his intentions at the time he tendered the \$1.63
3 million prepayment to Coast Grain, Mr. Schoenveld makes no special
4 mention of the Rolled Corn Contract. On the contrary, he stated
5 that, after paying off the accumulated account balance, any
6 remaining prepayment credits were for "feed" to be delivered in
7 the future. The Coast Grain accounting records show that
8 deliveries of rolled corn to Bouma were treated in the same manner
9 as any other product purchased by Bouma during 2001: an invoice
10 was created on or near the delivery date and was paid by debiting
11 the prepayment balance. As noted above, there is no evidence
12 that, had Bouma asked Coast Grain to do so, all amounts in the
13 prepayment account could be debited to pay non-Rolled Corn
14 Contract invoices or to make third party payments, without regard
15 to the status of the Rolled Corn Contract.

16 Although the existence of a written contract between the
17 parties is one factor the bankruptcy court could consider in
18 deciding whether transactions are logically related for purposes
19 of application of the recoupment doctrine, we think the bankruptcy
20 court assigned far too much weight to the existence of the Rolled
21 Corn Contract. Contrary to Bouma's argument, the facts in Jensen,
22 as compared with those here, are very different. The business
23 relationship between Coast Grain and Jensen was almost completely
24 based on the terms of written contracts. The remaining value of
25 the Jensen contracts was almost exactly equal to the full amount
26 of the prepayment deposit Jensen provided to Coast Grain less
27 amounts due. Jensen did not ask Coast Grain to make third party
28 payments from its account.

1 In this case, the Rolled Corn Contract comprised a relatively
2 small portion of the amount of purchases executed on Bouma's
3 account. Bouma had made substantial purchases from Coast Grain
4 under the Rolled Corn Contract before the December, 2000,
5 prepayment deposit was made. There was nothing in the Contract
6 tying Bouma's performance to the existence of the prepayment
7 deposit. Bouma also made significant purchases of goods from
8 Coast Grain on open account. In addition, Bouma directed that the
9 bulk of the prepayment account be disbursed to third parties.

10 We find little support in the record to show that Bouma's
11 obligations to Coast Grain under the Rolled Corn Contract were in
12 any way "logically related" to the existence and operation of the
13 2001 prepayment account. Absent factors other than the mere
14 existence of the written contract, application of the recoupment
15 doctrine is inappropriate. The bankruptcy court's decision to
16 apply a partial recoupment in Bouma's favor must be reversed and
17 this action must be remanded to the bankruptcy court for
18 recalculation of the award to Braun under the Twelfth Claim of the
19 Amended Complaint.

20 **CONCLUSION**

21 The decision of the bankruptcy court granting Braun's request
22 to disallow and recover setoffs made from Bouma's prepayment
23 account during the 90 days before Coast Grain's bankruptcy filing,
24 and thereafter, and denying Bouma's recoupment defense, are
25 **AFFIRMED**. The bankruptcy court's allowance of a partial
26 recoupment to Bouma for the Rolled Corn Contract is **REVERSED** and
27 the adversary proceeding is **REMANDED** to the bankruptcy court for
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1 recalculation of the award to Braun and entry of a judgment
2 consistent with this decision.

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