

OCT 17 2016

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. AZ-16-1078-JuFL
)
 DOUGLAS R. COTTLE and KYLA) Bk. No. 2:09-bk-28307-GBN
 COTTLE,)
)
 Debtors.) Adv. No. 2:12-ap-00622-GBN
)
 DOUGLAS R. COTTLE; KYLA COTTLE,)
)
 Appellants,)
)
 v.) **MEMORANDUM¹**
)
 ARIZONA CORPORATION COMMISSION,)
)
 Appellee.)

Argued and Submitted on September 23, 2016
at Phoenix, Arizona

Filed - October 17, 2016

Appeal from the United States Bankruptcy Court for the
District of Arizona

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

Appearances: Appellants Douglas R. Cottle and Kyla Cottle
argued pro se; Matthew A. Silverman argued for
appellee Arizona Corporation Commission.

Before: JURY, FARIS, and LAFFERTY, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

1 Douglas R. Cottle and Kyla Cottle (collectively, Debtors)
2 filed an adversary proceeding against the Arizona Corporation
3 Commission (the ACC) post-discharge, alleging that the ACC had
4 violated the automatic stay by attempting to collect a
5 restitution debt and administrative penalty debt that Debtors
6 agreed to pay in a consent order but which Debtors asserted was
7 discharged. The ACC answered the complaint, asserting that its
8 collection action was excepted from the automatic stay under
9 § 362(a)(4)² and that the debts were nondischargeable under
10 § 523(a)(19).

11 The bankruptcy court found the restitution debt was
12 discharged and awarded Debtors attorneys' fees and costs. In
13 further proceedings, the court found the administrative penalty
14 was nondischargeable under § 523(a)(7) and entered an order on
15 April 29, 2015, reflecting that ruling. Debtors filed a motion
16 for reconsideration, which the bankruptcy court denied by order
17 entered on September 1, 2015.

18 Thereafter, the parties disputed (1) the appropriate
19 prejudgment interest rate that applied to the administrative
20 penalty and the time period pertinent to the prejudgment
21 interest and (2) whether the ACC was entitled to set off amounts
22 it owed to Debtors under the court's attorney fee award and for
23 the wrongfully garnished funds, both pertaining to the
24 restitution debt. After further briefing by the parties, the

25
26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and "Civil Rule" references are to the Federal Rules
of Civil Procedure.

1 bankruptcy court entered an order on March 10, 2016, ruling that
2 (1) prejudgment interest at the rate of ten percent would be
3 awarded on the administrative penalty amount of \$150,000 from
4 April 8, 2010, to May 13, 2015; (2) this amount would be reduced
5 by \$7,804.86, the amount the ACC had garnished on the
6 dischargeable restitution claim; (3) the amount would be further
7 reduced by \$33,105.79, this amount representing attorney fees,
8 costs, and interest awarded against the ACC in connection with
9 the restitution claim; and (4) the net sum after applying the
10 previous provisions would accrue postjudgment interest at the
11 rate set by 28 U.S.C. § 1961 from May 14, 2015, until fully
12 paid. On the same date, the bankruptcy court entered a final
13 judgment. This appeal followed.

14 The ACC moved to dismiss this appeal as untimely to the
15 extent Debtors sought review of the April 29, 2015 summary
16 judgment regarding dischargeability of the administrative
17 penalty payment and the September 1, 2015 order denying
18 reconsideration of the April 29 order. A Motions Panel agreed
19 and entered an order limiting the scope of this appeal to the
20 prejudgment interest and setoff issues as reflected in the
21 bankruptcy court's March 10, 2016 order (Scope Order). Debtors
22 appealed the Panel's Scope Order to the Ninth Circuit on
23 August 4, 2016.

24 For the reasons set forth below, we AFFIRM.

25 I. FACTS

26 In 2009, the ACC began to investigate Debtors for alleged
27 violations of Arizona Revised Statutes (A.R.S.) § 44-1991, which
28 prohibits fraud in the purchase or sale of securities.

1 On November 4, 2009, Debtors filed a chapter 7 petition.
2 On April 6, 2010, they received a standard discharge. Two days
3 later, Debtors entered into an Order to Cease and Desist; Order
4 for Restitution; Order for Administrative Penalties and Consent
5 to Same (Consent Order) with the ACC. The State of Arizona (the
6 State) approved the Consent Order on April 27, 2010. The
7 Consent Order was filed in the Maricopa County Superior Court,
8 which entered a judgment concerning the order on May 11, 2010.
9 The order imposed restitution payments of \$2,637,880 and an
10 administrative penalty of \$150,000 and provided that ten percent
11 interest would accrue on each amount until they were paid in
12 full.

13 After Debtors failed to begin making payments, the ACC
14 commenced collection actions. On February 22, 2012, Debtors
15 moved to reopen their bankruptcy case, alleging that the ACC had
16 violated the automatic stay and that the debts owed were
17 discharged. The bankruptcy court granted their motion to reopen
18 by order entered on February 23, 2012.

19 On April 3, 2012, Debtors filed an adversary proceeding
20 against the ACC, alleging violation of the automatic stay,
21 seeking release of the garnished funds, and requesting an order
22 that would prevent the ACC from collecting under the Consent
23 Order.

24 On cross motions for summary judgment, the bankruptcy court
25 found the restitution payment was discharged and awarded
26 attorneys' fees and costs in the amount of \$33,105.79 against
27 the ACC for the time and costs that Debtors incurred for
28 defending the dischargeability of the Consent Order's

1 restitution portion under § 523(a)(19). On May 13, 2015, the
2 bankruptcy court entered the order granting judgment in favor of
3 Debtors against the ACC and finding that there was no just
4 reason for delay of entry of the judgment as a final appealable
5 judgment under Civil Rule 54(b), made applicable to the
6 Bankruptcy Code by Rule 7054(a).

7 Subsequently, the ACC moved for summary judgment,
8 contending that the administrative penalty was nondischargeable
9 under § 523(a)(7). The bankruptcy court ruled on April 1, 2015,
10 that the administrative penalty was nondischargeable. On
11 April 28, 2015, Debtors moved for reconsideration of the court's
12 decision. On April 29, 2015, the bankruptcy court entered an
13 order granting the ACC's summary judgment motion and finding the
14 administrative penalty nondischargeable. The order contained a
15 Civil Rule 54(b) certification. The bankruptcy court also made
16 a notation on the top of the order which said, "[t]his court
17 does not consider this order to be a final order subject to
18 appeal until the court resolves the recently filed motion for
19 reconsideration." On September 1, 2015, the bankruptcy court
20 denied Debtors' motion for reconsideration.

21 The bankruptcy court later requested that the parties
22 provide further briefing on the prejudgment interest rate that
23 would apply to the administrative penalty. After hearing
24 arguments on prejudgment interest, the court ordered further
25 briefing on prejudgment interest and setoff.

26 On March 10, 2016, the bankruptcy court entered an order
27 ruling that (1) prejudgment interest at the rate of ten percent
28 would be awarded on the administrative penalty amount of

1 \$150,000 from April 8, 2010, to May 13, 2015; (2) this amount
2 would be reduced by \$7,804.86, the amount the ACC had garnished
3 on the dischargeable restitution claim; (3) the amount would be
4 further reduced by \$33,105.79, this amount representing
5 attorneys' fees, costs, and interest awarded against the ACC in
6 connection with the restitution claim; and (4) the net sum after
7 applying the previous provisions would accrue postjudgment
8 interest at the rate set by 28 U.S.C. § 1961 from May 14, 2015,
9 until fully paid. On the same date, the bankruptcy court
10 entered a final judgment. This appeal followed.

11 **II. JURISDICTION**

12 The bankruptcy court had jurisdiction over this proceeding
13 under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We consider our
14 jurisdiction in light of Debtors' appeal of the Scope Order.
15 It is well established that "a pending appeal divests a
16 bankruptcy court of jurisdiction to vacate or modify an order
17 which is on appeal." Marino v. Classic Auto Refinishing, Inc.
18 (In re Marino), 234 B.R. 767, 769 (9th Cir. BAP 1999); see also
19 Hill & Sandford, LLP v. Mirzai (In re Mirzai), 236 B.R. 8, 10
20 (9th Cir. BAP 1999) ("[I]f a district court would be forbidden
21 to act because of an appeal pending before the court of appeals,
22 then both the bankruptcy appellate panel and the bankruptcy
23 court would be similarly constrained."). "The rule divesting
24 lower courts of jurisdiction of aspects of a case involved in an
25 appeal 'is judge-made doctrine designed to avoid the confusion
26 and waste of time that might flow from putting the same issues
27 before two courts at the same time.'" Neary v. Padilla
28 (In re Padilla), 222 F.3d 1184, 1190 (9th Cir. 2000).

1 Accordingly, although we are not bound by a Motions Panel's
2 decision under Couch v. Telescope Inc., 611 F.3d 629, 632 (9th
3 Cir. 2010), we cannot reconsider the Scope Order while it is on
4 appeal since the same issues would be before two courts at the
5 same time.³

6 However, Debtors' appeal of the Scope Order does not affect
7 our jurisdiction to decide the prejudgment interest and setoff
8 issues presented in this appeal. Those issues are ancillary to
9 the § 523(a)(7) judgment and there is no stay pending appeal of
10 the Scope Order. See In re Padilla, 222 F.3d at 1190. We have
11 jurisdiction to decide the prejudgment interest and setoff
12 issues under 28 U.S.C. § 158.

13 III. ISSUES

14 Did the bankruptcy court abuse its discretion in
15 determining that the appropriate prejudgment interest rate was
16 the ten percent the parties had agreed to in the Consent Order?

17 Did the bankruptcy court abuse its discretion in
18 determining that the prejudgment interest period commenced on
19 April 8, 2010, the date the Consent Order was executed?

20 Did the bankruptcy court abuse its discretion in permitting
21 the ACC to offset the amount of attorneys' fees, costs, and
22 interest that it owed Debtors against the administrative penalty
23 and the interest on that penalty that Debtors owed the State?

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28 ³ Since we are bound by the Scope Order, it is unnecessary
for us to rule on the ACC's motion to strike.

1 **IV. STANDARDS OF REVIEW**

2 Awards of prejudgment interest are reviewed for abuse of
3 discretion. Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 28
4 (9th Cir. BAP 2009); Gosney v. Law (In re Gosney), 205 B.R. 418,
5 420 (9th Cir. BAP 1996). We also review under the abuse of
6 discretion standard the bankruptcy court's decision to commence
7 prejudgment interest on a certain date. AMHS Ins. Co. v. Mut.
8 Ins. Co. of Ariz., 258 F.3d 1090, 1103 (9th Cir. 2001). The
9 abuse of discretion standard also applies to the bankruptcy
10 court's decision to allow an offset. Bank of L.A. v. Official
11 PACA Creditors' Comm. (In re Southland + Keystone), 132 B.R.
12 632, 637 (9th Cir. BAP 1991).

13 Review of a trial court's determination for an abuse of
14 discretion determination involves a two-pronged test; first, we
15 determine de novo whether the bankruptcy court identified the
16 correct legal rule for application. See United States v.
17 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). If
18 not, then the bankruptcy court necessarily abused its
19 discretion. Id. at 1262. Otherwise, we next review whether the
20 bankruptcy court's application of the correct legal rule was
21 clearly erroneous; we will affirm unless its findings were
22 illogical, implausible, or without support in inferences that
23 may be drawn from the facts in the record. Id.

1 V. DISCUSSION⁴

2 **A. The bankruptcy court correctly found that the prejudgment**
3 **interest rate was ten percent as agreed to by the parties**
4 **in the Consent Order.**

5 Section 523 contains no standard or generally applicable
6 interest rate for the allowance of prejudgment interest.
7 However, the award of prejudgment interest in
8 nondischargeability proceedings is authorized under Cohen v.
9 de la Cruz, 523 U.S. 213, 223 (1998), where the United States
10 Supreme Court concluded that the text of § 523(a)(2)(A)
11 “encompasses any liability arising from money, property, etc.,
12 that is fraudulently obtained, including treble damages,
13 attorney's fees and other relief that may exceed the value
14 obtained by the debtor.” This holding equally applies in the
15 context of § 523(a)(7).

16 It is settled that where a debt that is found to be
17 nondischargeable arose under state law, “the award of
18 prejudgment interest on that debt is also governed by state
19 law.” In re Weinberg, 410 B.R. at 37 (citing Otto v. Niles

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21 ⁴ Neither Debtors nor the ACC provided us with a full
22 transcript of the February 2, 2016 hearing where the bankruptcy
23 court placed its findings of fact and conclusions of law on the
24 record in connection with its decision on prejudgment interest
25 and setoff. Nonetheless, we exercise our discretion to resolve
26 this appeal on the merits because the court's actual ruling is
27 evident from remarks made in the February 2, 2016, partial
28 transcript provided and from the balance of the record which
includes partial transcripts from other hearings. See Kyle v.
Dye (In re Kyle), 317 B.R. 390, 393 (9th Cir. BAP 2004). To the
extent necessary, we take judicial notice of pleadings filed by
both parties in the adversary proceeding. Atwood v. Chase
Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th
Cir. BAP 2003).

1 (In re Niles), 106 F.3d 1456, 1463 (9th Cir. 1997)). The record
2 shows that the Consent Order and the subsequent state court
3 judgment resulted from an action that the ACC brought before an
4 Arizona administrative tribunal based upon alleged violations of
5 Arizona securities laws. The administrative penalty debt, which
6 was found to be nondischargeable, thus arose under Arizona law.⁵
7 Cf. Keeton v. Flanagan (In re Flanagan), 2014 WL 764371 (9th
8 Cir. BAP Feb. 26, 2014) (finding that federal law governed
9 prejudgment interest award where creditor did not obtain state
10 court judgment before seeking a nondischargeability
11 determination and failed to prove any of the claims based on
12 alleged violations of Alaska law), aff'd, 642 F. App'x. 784 (9th
13 Cir. 2016).

14 Arizona law holds that prejudgment interest on a liquidated
15 claim is a matter of right. L.M. White Contracting Co. v.
16 St. Joseph Structural Steel Co., 488 P.2d 196, 201 (Ariz. Ct.
17 App. 1971); Fleming v. Pima Cnty., 685 P.2d 1301, 1308 (Ariz.
18 1984). The parties may also specify the prejudgment interest
19 rate by agreement. A.R.S. § 44-1201(A) provides:

21
22 ⁵ At an October 21, 2015 hearing on the prejudgment interest
23 issue, the bankruptcy court found that state law controlled the
24 rate for prejudgment interest. The court emphasized that it had
25 consulted the statutory authority for the ACC to issue the
26 Consent Order and it had considered whether or not state law
27 would determine the \$150,000 identified in the Consent Order to
28 be a penalty. The court also noted that it had consulted state
law to determine that someone must violate a provision of state
law or any rule or order of the ACC in order to be the subject of
an administrative penalty. We adopt the bankruptcy court's
reasoning and conclusion that state law controlled on the issue
of prejudgment interest.

1 Interest on any loan, indebtedness or other obligation
2 shall be at the rate of ten per cent per annum, unless
3 a different rate is contracted for in writing, in
4 which event any rate of interest may be agreed to.
5 Interest on any judgment that is based on a written
6 agreement evidencing a loan, indebtedness or
7 obligation that bears a rate of interest not in excess
8 of the maximum permitted by law shall be at the rate
9 of interest provided in the agreement and shall be
10 specified in the judgment.

11 In the Consent Order, Debtors agreed to pay the now
12 nondischargeable administrative penalty debt in the amount of
13 \$150,000, and agreed that "[a]ny amount outstanding shall accrue
14 interest at the rate of 10 percent per annum from the date of
15 this Order until paid in full." This agreement evidences an
16 "obligation" as that term is used in A.R.S. § 44-1201(A). See
17 Black's Law Dictionary (10th ed. 2014) (an "obligation" includes
18 "[a] formal, binding agreement or acknowledgment of a liability
19 to pay a certain amount or to do a certain thing for a
20 particular person or set of persons; esp., a duty arising by
21 contract."); see also State ex. rel Ariz. Structural Pest
22 Control Comm'n v. Taylor, 224 P.3d 983, 985-86 (Ariz. Ct. App.
23 2010) (noting "obligation" includes binding agreements
24 enforceable by law).

25 Since Debtors agreed to the ten percent rate of interest in
26 the Consent Order, the contract establishes that rate. See
27 Beaulieu Grp. LLC v. Inman, 2011 WL 4971701, at *4 (D. Ariz.
28 Oct. 19, 2011) (where the parties have agreed to a specific
interest rate in writing, the Judgment Creditor is entitled to
prejudgment interest at that rate). Accordingly, we discern no
abuse of discretion in setting the prejudgment interest at the
rate of ten percent.

1 **B. The bankruptcy court correctly found that the prejudgment**
2 **interest period commenced on April 8, 2010 and ran through**
3 **May 13, 2015.**

4 Debtors argue that the bankruptcy court erred in awarding
5 prejudgment interest from April 8, 2010 (the date the Consent
6 Order was issued) until May 13, 2015. Debtors maintain that
7 the prejudgment interest period ran only for the twenty-eight
8 days between the time that the Consent Order was executed on
9 April 8, 2010, and the time that the ACC obtained the state-
10 court judgment concerning the Consent Order on May 11, 2010. In
11 support of their argument, Debtors contend that the bankruptcy
12 court found that the state court judgment was the judgment in
13 this case.

14 At the October 15, 2015 hearing, the bankruptcy court did
15 say that prejudgment interest ran until the state court judgment
16 was entered. However, the court correctly did not rely on that
17 statement when entering its order. Here, the term prejudgment
18 interest can have two meanings, depending upon the event that
19 concludes the time period. It can mean the time period between
20 the date on which the debt was incurred and the date of entry of
21 the initial judgment. Or it can mean the time period between
22 the date the debt was incurred and the date of entry of the
23 federal judgment of nondischargeability. Here, it means the
24 latter.⁶

25 ⁶ Even if we followed Debtors' argument that prejudgment
26 interest meant only prior to the entry of the state court
27 judgment, the economic result here would be the same. The
28 applicable Arizona rate of interest post judgment is the same ten
percent rate found in the underlying contract. A.R.S.

(continued...)

1 Therefore, as found by the bankruptcy court, prejudgment
2 interest at the rate of ten percent started to accrue on
3 April 8, 2010, the date the Consent Order was issued. The
4 prejudgment interest period ran at the ten percent rate until
5 the time the judgment finding the penalty debt nondischargeable
6 became final. After that, postjudgment interest accrued at the
7 federal rate.

8 On this record, it is unclear why the bankruptcy court
9 decided that the prejudgment interest period ran through May 13,
10 2015. That date was the date the court entered the order
11 granting judgment in favor of Debtors on the restitution debt
12 and has nothing to do with the prejudgment period on the penalty
13 debt. The bankruptcy court found the administrative penalty
14 debt nondischargeable by an order entered on April 29, 2015, and
15 fourteen days later on May 13, 2015, the order would have been
16 final but for Debtors' timely filed motion for reconsideration.
17 Actually, the bankruptcy court made a notation on the April 29,
18 2015 order that it did not consider it final until the court
19 resolved the motion for reconsideration. The bankruptcy court
20 denied Debtors' motion for reconsideration on September 1, 2015.
21 In the end, any error in using May 13, 2015 as the ending date
22 for prejudgment interest enured to Debtors' benefit.
23 Accordingly, we discern no error.

24
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26 ⁶(...continued)
27 § 44-1201(A). Therefore, the Arizona judgment would have borne
28 interest at the same rate as the consent agreement rate until the
bankruptcy court entered its judgment, setting a lower
prospective rate to the benefit of Debtors.

1 **C. The bankruptcy court did not abuse its discretion in**
2 **permitting the ACC to offset amounts it owed to Debtors**
3 **against amounts Debtors owed to the ACC.**

4 In the final judgment, the bankruptcy court reduced the
5 nondischargeable administrative penalty of \$150,000 plus pre-
6 and postjudgment interest by \$33,105.79, the amount of
7 attorneys' fees, costs, and interest that had been awarded
8 against the ACC in connection with the restitution debt
9 dischargeability ruling.⁷ Debtors maintain that the bankruptcy
10 court erred in allowing the ACC to offset the attorneys' fees,
11 costs and interest amounts against the administrative penalty
12 plus interest they owe the State. According to Debtors,
13 mutuality is lacking because their obligation for payment of the
14 penalty was owed to the State and not to the ACC. They assert
15 that the State and the ACC are distinctly different entities and
16 charged with different powers from the people of Arizona.

17 Arizona recognizes the right to offset, or setoff, by
18 permitting parties owing each other money to apply their mutual
19 debts against each other. Urias v. PCS Health Sys., Inc.,
20 118 P.3d 29, 29-30 (Ariz. Ct. App. 2005) (statutory offset);
21 Langerman Law Offices, P.A. v. Glen Eagles at the Princess
22 Resort, LLC, 204 P.3d 1101, 1106 (Ariz. Ct. App. 2009)
23 (nonstatutory offset). This avoids "the absurdity of making A
24 pay B when B owes A." Urias, 118 P.3d at 33 (citing Citizens
25 Bank v. Strumpf, 516 U.S. 16, 18 (1995)). "To be mutual, the

26 ⁷ The amount was also reduced by the amount the ACC
27 wrongfully garnished in connection with the restitution award.
28 That setoff does not appear to be at issue in this appeal.
However, even if it was at issue the same analysis would apply.

1 debts must be due to and from the same person in the same
2 capacity.” Urias, 118 P.3d at 33.

3 The same party requirement of mutuality may be satisfied if
4 the ACC and the State are treated as a single entity under the
5 unitary creditor doctrine.⁸ Arizona has not addressed whether
6 the unitary creditor doctrine applies to the State or its
7 agencies. Where a state has not addressed a particular issue, a
8 federal court must use its best judgment to predict how the
9 highest state court would resolve it. Vernon v. L.A., 27 F.3d
10 1385, 1391 (9th Cir. 1994). In doing so, we may look to federal
11 law and the unitary creditor line of cases. Strother v. S. Cal.
12 Permanente Med. Grp., 79 F.3d 859, 865 (9th Cir. 1996) (A
13 federal court must use its best judgment to predict how the
14 highest state court would resolve an issue not yet decided by
15 “using intermediate appellate court decisions, decisions from
16 other jurisdictions, statutes, treatises, and restatements as
17 guidance.”); see also L.A. Cty. Emps. Ret. Ass’n v. Towers,
18 Perris, Forster, & Crosby, Inc., 2002 WL 32919576, at *10-11
19 (C.D. Cal. June 20, 2002).

20 Where general setoff rights are concerned under § 553(a),
21 courts, analogizing the federal government’s right to setoff
22 outside of bankruptcy, treat agencies and departments of the
23 federal government, “except those acting in some distinctive

24
25 ⁸ Debtors claim in their reply brief that the ACC did not
26 argue the unitary creditor issue in the bankruptcy court and
27 therefore it has been waived. We disagree. The bankruptcy court
28 discussed the unitary creditor doctrine at the February 2, 2016
hearing as reflected in the partial transcript provided by the
ACC. Therefore, this issue was directly before the bankruptcy
court and considered.

1 private capacity," as a single "governmental unit." See Cherry
2 Cotton Mills v. United States, 327 U.S. 536 (1946) (recognizing
3 federal government's right to interagency setoff); HAL, Inc. v.
4 United States (In re HAL, Inc.), 196 B.R. 159, 165 (9th Cir. BAP
5 1996), aff'd, 122 F.3d 851, 853 (9th Cir. 1997).

6 In In re HAL, Inc., the Ninth Circuit acknowledged that the
7 United States Supreme Court "clearly adopted" the unitary setoff
8 rule for government agencies in the nonbankruptcy context in
9 Cherry Cotton Mills. In Cherry Cotton Mills, the court
10 permitted money owed to a debtor in back taxes by the Department
11 of the Treasury to be used to offset a defaulted loan owed by
12 the debtor to the Reconstruction Finance Corporation (RFC). The
13 Supreme Court upheld the Court of Claims' jurisdiction to hear
14 the government's counterclaim asserting the right of setoff
15 because the RFC was a government agency with the following
16 characteristics: (1) its directors were appointed by the
17 President; (2) its directors were confirmed by the Senate;
18 (3) its activities were all aimed at accomplishing a public
19 purpose; (4) all of its money came from the government; (5) its
20 profits, if any, went to the government; and (6) the government
21 had to bear its losses. 327 U.S. at 539. The Supreme Court
22 emphasized: "That Congress chose to call [RTC] a corporation
23 does not alter its characteristics so as to make it something
24 other than what it actually is, an agency selected by Government
25 to accomplish purely Governmental purposes." Id.

26 Other courts have found that a state is a single entity for
27 purposes of sovereign immunity and setoff. See Ossen v. State
28 of Conn., Dep't of Soc. Servs., (In re Charter Oak Assocs.),

1 203 B.R. 17, 22 (Bankr. D. Conn. 1996) (concluding that all the
2 publicly acting agencies of the state are a single governmental
3 unit for purposes of Eleventh Amendment immunity and setoff
4 under §§ 106(a) and (b)) (following rationale of Doe v. United
5 States., 58 F.3d 494 (9th Cir. 1995)); Wallach v. N.Y. State
6 Dep't of Taxation and Fin. (In re Bison Heating & Equip., Inc.),
7 177 B.R. 785 (Bankr. W.D.N.Y. 1995) (New York Department of
8 Labor and Department of Taxation and Finance treated as a
9 "single entity" for purposes of offset under waiver of sovereign
10 immunity provision); In re W. Auto Pool & Trans., Inc., 2010 WL
11 9475475, at *5-7 (Bankr. E.D. Cal. 2010) (applying unitary
12 creditor theory to California State Board of Equalization and
13 state Controller).

14 Taken together, these authorities support the bankruptcy
15 court's decision to treat the ACC and the State as a unitary
16 creditor for purposes of setoff and the mutuality requirement.
17 The ACC is not acting in a private capacity, but is a
18 governmental entity performing governmental functions, which are
19 all aimed at accomplishing a public purpose. As demonstrated by
20 the ACC, all its money comes from the Arizona Legislature, and
21 its "profits," if any, are public funds that are subject to the
22 Legislature's control. See Towers, 2002 WL 32919576, at *10-16.

23 The ACC was created by Arizona's Constitution, and the
24 language used in establishing the ACC's powers is broad.

25 Article 15, section 3 provides:

26 The Corporation Commission shall have full power to,
27 and shall, prescribe just and reasonable
28 classifications to be used and just and reasonable
rates and charges to be made and collected, by public
service corporations within the State for service

1 rendered therein, and make reasonable rules,
2 regulations, and orders, by which such corporations
3 shall be governed in the transaction of business
4 within the State, and may prescribe the forms of
5 contracts and the systems of keeping accounts to be
6 used by such corporations in transacting such
7 business, and make and enforce reasonable rules,
8 regulations, and orders for the convenience, comfort,
9 and safety, and the preservation of the health, of the
10 employees and patrons of such corporations; Provided,
11 that incorporated cities and towns may be authorized
12 by law to exercise supervision over public service
13 corporations doing business therein, including the
14 regulation of rates and charges to be made and
15 collected by such corporations; Provided further, that
16 classifications, rates, charges, rules, regulations,
17 orders, and forms or systems prescribed or made by
18 said Corporation Commission may from time to time be
19 amended or repealed by such Commission.

11 Ariz. Corp. Comm'n v. State ex rel. Woods, 830 P.2d 807, 812
12 (Ariz. 1992). The Woods court recognized that the ACC "has
13 judicial, executive, and legislative powers." It also
14 recognized that the Constitution gives the ACC "a strong role in
15 protecting the public interest" through its regulation of public
16 service corporations. Id. at 811.

17 Under A.R.S. 44-2036(A), the ACC may impose administrative
18 penalties against a person found to have violated the Arizona
19 Securities Act, such as it did here. Under subsection (B) of
20 that statute, any penalties collected shall be deposited in the
21 state general fund. The Arizona Legislature also created a
22 securities regulatory and enforcement fund that the ACC
23 administers and into which certain fees that the ACC collects
24 are to be placed, in part to fund the Securities Division's
25 educational, regulatory, investigative, and enforcement
26 operations. See A.R.S. § 44-2039(A)-(C). The Legislature has
27 provided that the monies in the fund are subject to being
28 appropriated by the Legislature and that certain portions of the

1 fund are subject to being transferred to the general fund each
2 year. See A.R.S. § 44-2039(B)-(D). Plainly, the State benefits
3 from the ACC's "profits."

4 The ACC also points out that the State bears some of its
5 losses since the Attorney General, the chief legal officer,
6 represents the Securities Division as well as the ACC in matters
7 that arise out of the Securities Division's activities. See
8 A.R.S. § 40-106(A). In addition, the ACC has discretion to
9 permit attorneys whom the Securities Division hires to represent
10 the ACC in administrative or civil matters that arise out of the
11 statutory provisions governing securities sales. See A.R.S.
12 § 40-106(A). The Legislature has also authorized the ACC to
13 employ attorneys to represent itself and each commissioner in
14 matters involving its other powers and duties. See A.R.S. § 40-
15 106(B).

16 Given this background, we conclude that the ACC exists in
17 the state government rather than separate or apart from it.
18 There are substantial interrelationships and interdependence
19 between the ACC and other state departments or agencies. As
20 noted by the bankruptcy court, the ACC functioned more like a
21 department within the State than like an independent subsidiary.

22 Finally, although we recognize that some state governments
23 may operate differently than the federal government, we find no
24 relevant distinctions here. Like most states, Arizona acts
25 through its departments, agencies and commissions. Indeed, in
26 adopting the public entity immunity statutes, the state
27 Legislature made clear that the state and its agencies, boards,
28 commissions or departments are the same. See A.R.S. § 12-820(8)

1 ("State' means this state and any state agency, board,
2 commission or department.").

3 In sum, the bankruptcy court correctly determined that the
4 ACC and the State should be treated as a unitary creditor.
5 Accordingly, the mutuality requirement has been satisfied and
6 offset of the attorneys' fees, costs and interest amounts that
7 the ACC owes Debtors were proper.⁹

8 **D. Debtors' Motion to Strike**

9 On September 2, 2016, Debtors filed a motion to strike
10 under Civil Rule 12(f) with the Panel. There, Debtors argue
11 that the ACC intentionally misrepresented itself to this Panel
12 as two different creditors - both the ACC and the State.
13 Debtors assert that only the ACC was a party to these
14 proceedings and the State has never been a party, never filed a
15 request for determination of discharge of any of their debts,
16 never filed a judgment lien, never garnished wages from Debtors,
17 and never received a determination that its debt was
18 nondischargeable. Debtors point out that in the ACC's motion to
19 strike brief filed on July 22, 2016, the ACC intentionally
20 represented itself as the "State" multiple times. "Each and
21 every instance should be stricken from the record." In
22 addition, Debtors complain about the same type of statements
23 made in the ACC's July 6, 2016 answering brief.

24
25 ⁹ We mention that § 553 authorizes setoff when the
26 creditor's claim against the debtor arose before the commencement
27 of the case. The statute is inapplicable here because the
28 attorneys' fee award to Debtors arose postpetition. Further,
§ 553 does not create offset rights itself - it only confirms how
nonbankruptcy offset rights apply in bankruptcy.

1 Besides moving to strike these allegedly false statements,
2 Debtors take the opportunity to provide additional arguments as
3 to why the ACC is not a creditor vis-a-vis the administrative
4 penalty debt and why the debt was no longer collectible by the
5 State or the ACC. According to Debtors, the ACC's judgment lien
6 listed only the ACC as the creditor of the restitution debt and
7 the administrative penalty debt. Debtors argue that the ACC had
8 no authority to list the penalty debt within its judgment lien.
9 They further assert that the ACC's judgment lien was effective
10 for only five years. They contend the ACC's re-recording was on
11 May 8, 2016, but the date of entry of the original judgment was
12 May 6, 2010, so the re-recording was too late. They also note
13 again that the State was not listed as a judgment creditor in
14 the re-recording and thus the renewal is ineffective as to the
15 State. They complain of other discrepancies as well.

16 Debtors rely on Civil Rule 12(f) as the basis for their
17 motion to strike. Under Civil Rule 12(f), a court may strike a
18 pleading or any portion of a pleading that is "redundant,
19 immaterial, impertinent, or scandalous." By its terms, Civil
20 Rule 12(f) applies only to pleadings. The targets of Debtors'
21 motion to strike are statements made in the ACC's motion to
22 strike and its answering brief. Neither a motion nor a brief is
23 a pleading. See Civil Rule 7(a) (listing the types of pleadings
24 that may be filed in federal court); Sidney-Vinsein v. A.H.
25 Robins Co., 697 F.2d 880, 885 (9th Cir. 1983). Therefore, the
26 requested relief is not available under Civil Rule 12(f).

27 Liberally construing the motion to strike, Debtors may also
28 be suggesting that this Panel should exercise its authority

1 under some other provision of law or under its inherent
2 authority. However, Debtors' motion is deficient and
3 procedurally improper. We have reviewed Debtors' allegations
4 pertaining to the ACC's renewal of the judgment and the
5 re-recording discrepancies in the context of the record. Those
6 arguments, which Debtors also presented at oral argument in this
7 case, were raised for the first time on appeal. We do not
8 consider issues raised for the first time on appeal. Golden
9 Gate Hotel Ass'n v. City & Cty. of S.F., 18 F.3d 1482, 1487 (9th
10 Cir. 1994). In addition, the disputed statements that Debtors
11 complain about do not amount to scandalous or impertinent
12 matters. Rather, whether the State and the ACC are unitary
13 creditors has a bearing on the subject matter of this appeal.
14 See Wolk v. Green, 516 F. Supp. 2d 1121, 1133-1134 (N.D. Cal.
15 2007) (the remedy of striking a pleading should generally be
16 granted only to avoid prejudice to the moving party or when "it
17 is clear that the matter sought to be stricken could have no
18 possible bearing on the subject matter of the litigation").
19 Finally, Debtors improperly use their motion to strike as an
20 opportunity to provide arguments not addressed in their briefs.
21 Using a motion to strike for that purpose is improper. For
22 these reasons, Debtors' motion to strike is denied.

23 VI. CONCLUSION

24 For the reasons stated above, we AFFIRM.
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