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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NOT FOR PUBLICATION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

In re:) BAP No. AZ-17-1216-LKuB
)
 EPICENTER PARTNERS L.L.C.;) Bk. No. 2:16-bk-05493-MCW
 GRAY MEYER FANNIN L.L.C.,)
)
 Debtors.)
 _____)
)
 EPICENTER PARTNERS, L.L.C.;)
 GRAY MEYER FANNIN L.L.C.,)
)
 Appellants,)
)
 v.) **MEMORANDUM***
)
 CPF VASEO ASSOCIATION, LLC,)
)
 Appellee.)
 _____)

Argued and Submitted on February 23, 2018
at Phoenix, Arizona

Filed - March 15, 2018

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

Honorable Madeleine Carmel Wanslee, Bankruptcy Judge, Presiding

Appearances: Michael McGrath of Mesch, Clark & Rothschild, P.C.
 argued for Appellants; Todd A. Burgess of
 Polsinelli PC argued for Appellee.

Before: LAFFERTY, KURTZ, and BRAND, Bankruptcy Judges.

*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 Beginning in 2009, Debtors and Ganymede Investments Limited
2 ("Ganymede") entered into agreements regarding Ganymede's
3 advancement of funds to Debtors' attorneys to cover litigation
4 costs related to Debtors' claims against Northeast Phoenix
5 Partners ("NPP") and Desert Ridge Community Association ("DRCA")
6 with respect to real property in Phoenix, Arizona. Those
7 agreements provided that Ganymede would be paid its payments and
8 costs advanced plus 40 percent of any litigation recovery. In
9 2013, after Debtors had settled with DRCA and obtained a judgment
10 against NPP, Debtors and Ganymede reached an agreement to resolve
11 Debtors' obligation to Ganymede.

12 As part of the agreement, Debtors executed a promissory note
13 for \$50,713,000 ("Ganymede Note"), which provided for no interest
14 until the maturity date of December 31, 2015, after which post-
15 maturity interest would accrue at the rate of 35 percent. The
16 Ganymede Note was secured by a deed of trust on Debtors'
17 leasehold interest in real property that Debtors had obtained in
18 satisfaction of its judgment against NPP. A separate agreement,
19 referenced in the note, set forth a payment schedule whereby
20 Debtors would receive a substantial discount if they paid the
21 principal amount early. Debtors did not pay the Ganymede Note by
22 the maturity date. In 2016 Ganymede commenced foreclosure
23 proceedings and shortly thereafter sold the underlying obligation
24 to Appellee CPF Vaseo Association L.L.C. ("CPF").

25 A few days later, Debtors filed for chapter 11¹ relief. CPF

26
27 ¹Unless specified otherwise, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
(continued...)

1 filed proofs of claim based on the Ganymede Note. Debtors
2 objected to those claims, arguing that the principal amount of
3 the claims was much less, that the \$50,713,000 obligation set
4 forth in the Ganymede Note reflected an impermissible penalty on
5 the "true debt," and that the 35 percent post-maturity interest
6 rate was an unenforceable default rate. The bankruptcy court
7 overruled Debtors' objections based on its interpretation of the
8 relevant agreements, and Debtors appealed. We AFFIRM.

9 **FACTS**

10 **A. Events giving rise to the Ganymede debt**

11 In 2008, Debtors Epicenter Partners, L.L.C. and Gray Meyer
12 Fannin, L.L.C. retained attorneys Simpson Thacher & Bartlett, LLP
13 ("STB") to pursue certain claims and defend others on Debtor's
14 behalf against NPP and DRCA relating to real property located in
15 Phoenix. About six months into the litigation, STB informed
16 Debtors that it would no longer represent Debtors unless they
17 arranged a means to fund the ongoing costs and expenses of the
18 litigation. Ganymede agreed to finance Debtors' litigation
19 against NPP and DRCA.

20 On December 22, 2009, Debtors entered into a Forward
21 Purchase Agreement with Ganymede ("2009 FPA"). Pursuant to the
22 2009 FPA, Ganymede paid STB \$5,000,000 to continue the litigation
23 against NPP and DRCA. In exchange, Ganymede was to be repaid the
24 \$5,000,000 advanced plus a contingent fee on proceeds collected

25
26 ¹(...continued)

27 "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure, and all "Civil Rule" references are to the Federal
Rules of Civil Procedure.

1 from the litigation ("Resolution Amount").

2 In May 2010, Debtors reached a settlement with DRCA for \$6
3 million, and in October 2010, after a jury trial, Debtors were
4 awarded a \$110,658,800 judgment against NPP.

5 In January 2011, Debtors and Ganymede entered into a
6 Restated and Amended Forward Purchase Agreement ("2011 FPA").
7 The 2011 FPA recites that Debtors are "sophisticated and
8 experienced, represented by counsel and with full access to
9 [their] own legal advice." Under the 2011 FPA, Ganymede paid STB
10 an additional \$500,000; in exchange, Debtors agreed to pay, by
11 the "Expiration Date" (defined as December 31, 2011) a settlement
12 amount in cash or defined non-cash assets having a value equal to
13 the cash settlement amount. The 2011 FPA provided that the
14 "Resolution Amount" (calculated on the litigation recovery) would
15 not be determined until all non-cash assets were converted into
16 cash. The parties later executed a supplement to the 2011 FPA
17 ("2011 Supplement"), pursuant to which Ganymede paid STB another
18 \$175,000. The 2011 Supplement extended the Expiration Date to
19 December 31, 2012 and amended the calculation of the Resolution
20 Amount.

21 On May 31, 2012, Debtors and NPP entered into a global
22 settlement for payment of the judgment, under which NPP assigned
23 to Debtors its leasehold interest in 120 acres of land at Desert
24 Ridge in Phoenix (the "Lease Parcel"),² Master Developer rights,
25 and other non-cash assets. Upon reaching this settlement,

26
27 ²Debtors initially acquired a lease parcel of 120 acres; 20
28 acres were subsequently assigned to a related entity, and four
acres were sold, leaving 96 acres.

1 Ganymede demanded immediate cash payment of 40 percent of the
2 verdict amount, and STB refused to continue representing Debtors
3 unless Debtors and Ganymede settled their dispute.

4 From September 2012 through April 2013, Debtors, Ganymede,
5 and STB executed agreements and instruments relating to Debtors'
6 property interests at Desert Ridge and repayment of the debt owed
7 Ganymede. In December 2012, Debtors and Ganymede signed an
8 Outline of Terms ("Outline"), which included a provision that the
9 total amount owing to Ganymede was \$50,713,000 and a clause
10 giving Ganymede a first priority lien on all of Debtors'
11 property, including the Lease Parcel. The Outline provided that
12 Debtors would pay STB an additional \$2,956,703.66 and included
13 similar provisions securing the payment of this amount. Under
14 the Outline terms, the sums due Ganymede and STB would bear
15 interest compounded monthly at 35 percent and 6 percent,
16 respectively. The Outline also included a discount schedule to
17 incentivize early payment.

18 In April 2013, Debtors and Ganymede executed several
19 documents, including the Ganymede Note, a promissory note payable
20 to STB for \$2,956,703.66 ("STB Note"), deeds of trust securing
21 the notes, a Subordination and Intercreditor Agreement between
22 Debtors, Ganymede, and STB ("ICA"), and a Second Supplemental
23 Agreement Relating to Restated and Amended Forward Purchase
24 Agreement ("SSA"). Collectively, these documents memorialized
25 the terms of the Outline and granted Ganymede and STB liens on
26 the Lease Parcel and all of Debtors' personal property.

27 The Ganymede Note, dated April 22, 2013, is for \$50,713,000
28 and provides for no interest until the "Maturity Date" (defined

1 in the SSA as December 31, 2015), at which time interest would
2 accrue at the rate of 35 percent per annum. The Ganymede Note
3 references the SSA. The SSA, which amends and supplements the
4 2011 FPA, recites: "The parties have agreed that the Resolution
5 Amount owing from [Debtors] to [Ganymede] under the [2011 FPA],
6 inclusive of all fees, costs and interest, as of September 30,
7 2012, was \$50,713,000 ("Liquidated Sum")." This amount is again
8 referenced in paragraph 3.1 of the SSA, which provides: "The
9 parties hereby reconfirm and restate their agreement that the
10 total amount owing under the [2011 FPA] as of September 30, 2012,
11 and the total amount of the Liquidated Sum herein, is
12 \$50,713,000." Paragraph 3.3 of the SSA further provides that the
13 Liquidated Sum is fixed and noncontingent and shall not be
14 affected by any bankruptcy filing.

15 Attached as Exhibit A to the SSA is a discounted payment
16 schedule showing the amounts required to satisfy the Liquidated
17 Sum if paid earlier than the Maturity Date, divided into
18 Tranche 1, Tranche 2, and Tranche 3 amounts which, when added
19 together, result in the "Total Amount" required to satisfy the
20 obligation if paid by a particular date. According to the
21 discounted payment schedule, if paid by September 30, 2012, the
22 Total Amount due would have been \$15,500,000, and if paid by
23 December 31, 2015, the Total Amount due would have been
24 \$37,612,000.

25 The SSA also provides, at paragraph 3.6, that Debtors'
26 failure to pay the "Total Amount" by December 31, 2015 shall
27 constitute an immediate default, in which case, "the Total Amount
28 shall thereafter bear interest at the rate of 35% per annum,

1 compounded monthly, until paid.”³

2 On September 26, 2013, Debtors and Ganymede executed a
3 letter agreement that provided for the sale and release of a
4 portion of the Lease Parcel with payment of the proceeds to
5 Ganymede (“2013 Letter Agreement”). The 2013 Letter Agreement
6 replaced the discount scheme table with a new Exhibit A-2 and a
7 new Tranche 4 Amount to be included in the Total Amount. The new
8 Discount Scheme Table again listed the Total Amount due on
9 September 30, 2012 as \$15,500,000, but reduced the Total Amount
10 due on December 31, 2015 from \$37,612,000 to \$35,514,955.⁴

11 Debtors did not pay the Total Amount or the Liquidated Sum
12 by December 31, 2015. On January 14, 2016, Ganymede filed a
13 notice of trustee’s sale pursuant to the 2013 Agreements. On
14 March 23, 2016 and May 5, 2016, Ganymede sold and assigned its
15 interest in the 2013 Agreements to Appellee CPF Vaseo Associates,
16 LLC (“CPF”).

17 **B. Bankruptcy Events**

18 Debtors filed for chapter 11 relief on May 16, 2016, and the
19 bankruptcy court ordered the cases jointly administered. On
20 September 30, 2016, CPF filed identical proofs of claim in each
21 case in the amount of \$58,527,469.03, of which \$54,853,149.17 was

22
23 ³The provision in the SSA that in the event of default, the
24 “Total Amount” (\$37,612,000) would bear interest at 35 percent
25 appears to conflict with the terms of the Ganymede Note, which
26 implicitly provides that interest is to be calculated on the
27 principal balance of the note.

28 ⁴The 2013 Letter Agreement states that it will terminate if
the closing of the sale does not occur before December 31, 2013.
The record does not reflect whether or when the contemplated sale
occurred.

1 attributable to the Ganymede Note, and \$3,675,319.86 to the STB
2 Note.⁵

3 Debtors filed identical objections to CPF's claims in each
4 bankruptcy case. Debtors objected to the portion of CPF's claim
5 attributable to the Ganymede Note, arguing that the total amount
6 due on maturity was \$35,514,955, based on Schedule A-2 to the
7 2013 Letter Agreement. Debtors also objected to allowance of
8 postpetition default interest at the rate of 35 percent. CPF
9 filed a response, and Debtors filed a reply. At hearing, the
10 bankruptcy court requested supplemental briefing on the issue of
11 whether the increase in the interest rate on the maturity date or
12 the discounted payments were punitive.

13 The parties provided the supplemental briefing, and the
14 bankruptcy court thereafter entered its oral ruling on the record
15 and a minute entry overruling Debtors' objections. The
16 bankruptcy court determined that the \$50,713,000 Liquidated Sum
17 was not a penalty because it was the negotiated amount the
18 parties agreed was owed to Ganymede, and it bore a direct
19 relationship to the amount owed. The court found that this
20 conclusion was not affected by the fact that the Liquidated Sum
21 was subject to a discounted payment scheme. The bankruptcy court
22 also ruled that the 35 percent interest rate to be applied after
23 the Maturity Date was not an impermissible default rate because
24 the parties, who were sophisticated, had agreed that no interest
25 would accrue before the Maturity Date, a period of several years.

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27
28 ⁵The portion of CPF's claims attributable to the STB Note is
not at issue in this appeal.

1 The court concluded that the 35 percent rate was an agreed amount
2 that was meant to compensate Ganymede for risking that Debtors
3 would fail to pay. Finally, the court rejected Debtors' argument
4 that CPF was not entitled to postpetition pendency interest,
5 finding, based on its previous valuation of the Lease Parcel,
6 that CPF was an oversecured creditor entitled to pendency
7 interest and any fees and costs allowed by the notes. The
8 bankruptcy court's Minute Entry provided:

9 THE COURT PLACES ITS FINDINGS AND ORAL RULING ON THE
10 RECORD. IT IS ORDERED OVERRULING THE DEBTORS' OBJECTION
11 IN ITS ENTIRETY. IT IS FURTHER ORDERED THAT CPF VASEO
12 IS ENTITLED TO POST PETITION INTEREST, FEES, AND COSTS
13 AS ALLOWED BY THE NOTES AND AT THE RATE IDENTIFIED BY
14 EACH OF THE INDIVIDUAL NOTES.

15 On June 29, 2017, Debtors filed a motion for clarification
16 or reconsideration under Rules 9023 and 3008, asking the court to
17 clarify whether the June 23 minute entry order was intended to be
18 a final order given that the amounts of CPF's claims had not yet
19 been determined ("Clarification Motion"). The bankruptcy court
20 issued an order on July 10, 2017, stating that the court had not
21 intended to determine the amounts, but rather

22 the intent of the Court was to resolve the issues
23 Debtors raised in their objections to the proofs of
24 claim: the "true" principal amount owed under the
25 Promissory Note, whether CPF Vaseo is entitled to post-
26 maturity interest at the rate stated in the Note, and
27 whether CPF is entitled to pendency (post-petition)
28 interest, and, if so, whether it should be the contract
29 rate, or some other amount. . . . As far as the Court
30 is concerned, the issues raised by Debtors' objections
31 have been finally decided.

32 Order Clarifying the Court's Previous Oral Ruling Concerning
33 Debtors' Objection to Claims; and Order Granting Rule 54(b)
34 Relief ("Clarifying Order"). The bankruptcy court also

1 determined that the issues decided by it in overruling Debtors'
2 claim objections were final under Civil Rule 54(b), made an
3 express finding that there was no just reason for delay, and
4 directed entry of a final order.

5 Debtors timely appealed from the Clarifying Order.

6 **JURISDICTION**

7 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
8 §§ 1334 and 157(b)(2)(B). Subject to our discussion below, we
9 have jurisdiction under 28 U.S.C. § 158.

10 **ISSUES**

11 Whether we have jurisdiction over this appeal.

12 Whether the bankruptcy court erred in overruling Debtors'
13 objections to CPF's claim.

14 **STANDARDS OF REVIEW**

15 We have an independent duty to determine whether we have
16 jurisdiction over an appeal, and we review such jurisdictional
17 questions de novo. Belli v. Temkin (In re Belli), 268 B.R. 851,
18 853-54 (9th Cir. BAP 2001).

19 Claims objection appeals can involve both legal and factual
20 issues. We review the legal issues de novo and the factual
21 issues for clear error. See Veal v. Am. Home Mortg. Servicing,
22 Inc. (In re Veal), 450 B.R. 897, 918 (9th Cir. BAP 2011).

23 The bankruptcy court's interpretation of contract terms is
24 subject to de novo review unless extrinsic evidence was
25 introduced on issues such as intent, in which event the pertinent
26 factual findings are reviewed for clear error. Captain Blythers,
27 Inc. v. Thompson (In re Captain Blythers, Inc.), 311 B.R. 530,
28 534 (9th Cir. BAP 2004), aff'd, 182 F. App'x 708 (9th Cir. 2006).

1 Cir. 2001). CPF argues, however, that the Motion for
2 Clarification could not be construed as a motion under Civil Rule
3 59(e), applicable via Rule 9023, because, although Debtors cited
4 Rule 9023, they did not request any substantive relief, ask the
5 court to amend its findings, or to reconsider, alter, or amend
6 the June 23 minute entry order.

7 CPF correctly points out that courts are to look at the
8 substance of a motion rather than its name to determine whether
9 it is a tolling motion. Sea Ranch Ass'n v. Cal. Coastal Zone
10 Conservation Comm'ns, 537 F.2d 1058, 1061 (9th Cir. 1976). There
11 is also authority to support the proposition that to constitute a
12 motion under Civil Rule 59(e), the movant must seek substantive
13 relief. See Miller v. Transamerican Press, Inc., 709 F.2d 524
14 (9th Cir. 1983) ("The history of Rule 59(e) shows that 'alter or
15 amend' means a substantive change of mind by the court."). But
16 other Ninth Circuit cases suggest a more flexible application of
17 Civil Rule 59(e). For example, in Iascone, the order at issue
18 granted the defendants' motion to dismiss but did not state
19 whether the dismissal was on jurisdictional grounds or whether
20 the dismissal was with prejudice. The Ninth Circuit Court of
21 Appeals construed the plaintiffs' subsequent motion for
22 clarification as one to alter or amend the judgment under Civil
23 Rule 59(e), even though the plaintiffs had not invoked that rule.
24 Iascone, 15 F. App'x at 402-03. Similarly, in Barry v. Bowen,
25 825 F.2d 1324, 1328 (9th Cir. 1987), the Court of Appeals
26 construed a motion for clarification of an order disposing of
27 summary judgment motions which asked whether further proceedings
28 were to be conducted as a motion to alter or amend under Civil

1 Rule 59(e)).

2 As noted, the Motion for Clarification requested that the
3 court clarify whether its ruling was intended to be final. Based
4 on the foregoing authorities, the Motion for Clarification may
5 fairly be construed as a motion to alter or amend the judgment
6 under Rule 9023. Alternatively, the motion may be construed as
7 one under Rule 9024. See Miller, 709 F.2d at 527 (a court's
8 failure to memorialize part of its decision is a clerical error,
9 and the power to correct clerical errors of omission derives from
10 Civil Rule 60).

11 Accordingly, whether the Motion for Clarification is
12 construed as one brought under Rule 9023 or 9024, it tolled the
13 appeal period, and Debtors filed the notice of appeal within
14 14 days of entry of the Clarifying Order. We have jurisdiction
15 over the appeal.

16 **B. Applicable Law**

17 The 2011 FPA and the SSA both state that they are governed
18 by the laws of England and provide for mandatory arbitration of
19 disputes arising out of the agreements under the Arbitration
20 Rules of the London Court of International Arbitration. The
21 Ganymede Note and deed of trust, however, provide that they are
22 governed by the laws of the State of Arizona. Although the
23 parties did not address this issue in their briefs, at oral
24 argument the parties appeared to agree that Arizona law applies
25 to the issues in this appeal.

26 **C. The bankruptcy court did not err in overruling Debtors'
27 objections to CPF's claims.**

28 A proof of claim filed in bankruptcy is deemed allowed

1 unless a party in interest objects. § 502(a). A proof of claim
2 executed and filed in accordance with the bankruptcy rules
3 constitutes prima facie evidence of the validity and amount of
4 the claim. Rule 3001(f). The objecting party must produce
5 evidence tending to defeat the claim that is of a probative force
6 equal to that of the creditor's proof of claim. Ashford v.
7 Consol. Pioneer Mortg. (In re Consol. Pioneer Mortg.), 178 B.R.
8 222, 226 (9th Cir. BAP 1995), aff'd sub nom. In re Consol.
9 Pioneer Mortg. Entities, 91 F.3d 151 (9th Cir. 1996). Here, the
10 Debtors' objections did not require factual findings but turned
11 on the interpretation of the agreements and related documents.
12 We thus treat the issue as one of contract interpretation. Under
13 Arizona law, a court interpreting a contract must apply a
14 standard of reasonableness to contract language and construe the
15 contract in its entirety and in such a way that every part is
16 given effect. Goddard v. R.J. Reynolds Tobacco Co., 75 P.3d
17 1075, 1078 (Ariz. Ct. App. 2003).

18 Debtors contend that (1) the discount scheme operated as a
19 disguised penalty that is unenforceable under Arizona law; and
20 (2) the 35 percent interest rate provided for by the Ganymede
21 note was an impermissible default rate.

- 22 **1. The bankruptcy court correctly concluded that the**
23 **principal amount of the debt to Ganymede was the**
"Liquidated Sum" amount of \$50,713,000.

24 The bankruptcy court found that the "Resolution Amount" or
25 "Liquidated Sum" of \$50,713,000 owed as of September 30, 2012, as
26 defined in paragraph 1.5 of the SSA, was the principal amount of
27 the debt. The record supports the bankruptcy court's conclusion.
28 The Outline, the Ganymede Note, and the SSA all state that the

1 negotiated principal amount due as of December 31, 2015 was
2 \$50,713,000. Moreover, as determined by the bankruptcy court,
3 that amount bears a reasonable relationship to the amount
4 Ganymede was owed. Debtors do not dispute that Ganymede was owed
5 \$2,775,000 in litigation costs advanced plus a contingency fee of
6 40 percent of the litigation recovery. Under the settlement with
7 NPP, that recovery was the Leasehold Parcel, which was later
8 valued by the bankruptcy court at \$121,000,000. As pointed out
9 by the bankruptcy court, the SSA changed the right to 40 percent
10 of the Lease Parcel into a promise by the Debtors to pay a
11 liquidated amount of \$50,713,000, which is fixed, noncontingent,
12 and secured by the Leasehold Parcel.

13 Debtors dispute the bankruptcy court's conclusion that the
14 Liquidation Sum bore a direct relationship to the amount owed,
15 arguing that this conclusion is not supported by the 2011 FPA.
16 Under the 2011 FPA, conversion of non-cash assets was to take
17 place before the Resolution Amount was determined, and the
18 conversion did not occur before September 2012. According to
19 Debtors, Ganymede agreed to a debt of \$15,500,000 as of September
20 2012 rather than waiting an indeterminate amount of time to
21 receive 40 percent of the net proceeds of the litigation.
22 Debtors also contend that Ganymede never treated the Ganymede
23 Note as the true debt and instead referred to the Total Amount in
24 the discount table to determine what was owed.

25 These arguments are not persuasive. The bankruptcy court
26 properly reached its conclusions based solely on the relevant
27 agreements; no evidence was presented as to Ganymede's intent.
28 Moreover, given that the debt was not paid before the Maturity

1 Date, it makes no sense to look to the discount table to
2 determine the amount owed.

3 Debtors also point out that the total amounts on the
4 discount table were not calculated by discounting from
5 \$50,713,000 but were built up from the sums of Tranches 1, 2,
6 and, if necessary, 3 and 4. Debtors contend that the Total
7 Amounts were "directly derived from the true debt of \$15,500,000,
8 agreed to by the parties as of September 30, 2012." But this
9 argument is belied by the terms of the Outline, the Ganymede
10 Note, and the SSA, which all state that the negotiated principal
11 amount due as of December 31, 2015 was \$50,713,000.

12 In summary, Debtors' assertion that the "true debt" was
13 \$15,500,000 is entirely implausible under the circumstances.
14 Given the risks inherent in the litigation itself and in
15 accepting non-cash assets in satisfaction of the debt, it is
16 illogical to conclude that Ganymede would have been willing to
17 accept less than a third of the amount owed if that amount were
18 not paid in accordance with the discount schedule, as happened
19 here.

20 **2. The bankruptcy court correctly determined that the**
21 **discount scheme did not constitute an unenforceable**
22 **penalty.**

23 Debtors contend that the discount scheme results in a
24 disguised penalty that is unenforceable under Arizona law. To
25 support this contention, Debtors note that Ariz. Rev. Stat.
26 § 44-1201(A) limits the legal interest rate on indebtedness to
27 ten percent per annum unless the parties contract for a different
28 rate. Debtors then argue that because the interest rate cannot
be calculated from the discount table, the interest rate is

1 limited to ten percent. Debtors characterize the discount scheme
2 as punitive because the amounts to be paid bear no relation to
3 anticipated losses caused by late payment. Debtors also point
4 out that if they had paid the total amount due under the discount
5 table attached to the 2013 Letter Agreement as of December 31,
6 2015, they could have paid \$35,514,955 on the maturity date,
7 whereas if they paid one day later, they would owe the full
8 \$50,713,000. They contend that the \$12,563,924 increase in the
9 amount due is an unenforceable penalty.

10 But Debtors cite no cases (nor have we found any) where a
11 discount scheme such as the one at issue here constituted a
12 penalty. Given that the parties agreed that the Liquidated Sum
13 was \$50,713,000, the discount scheme can only be interpreted as
14 providing an incentive to reward Debtors for early payment and
15 not a punishment for late payment. We agree with the bankruptcy
16 court that the discount scheme was not an unenforceable penalty.

17 **3. The bankruptcy court did not err in allowing 35 percent**
18 **postpetition pendency interest.**

19 Oversecured creditors are entitled to interest at the
20 contractual rate so long as that rate is enforceable under
21 nonbankruptcy law. Wells Fargo Bank, N.A. v. Beltway One Dev.
22 Grp., LLC (In re Beltway One Devel. Grp., LLC), 547 B.R. 819, 830
23 (9th Cir. BAP 2016). Debtors do not dispute that CPF is an
24 oversecured creditor entitled to postpetition pendency interest.
25 They argue, however, that the 35 percent rate is an unreasonable
26 rate that is unenforceable under Arizona law.

27 The bankruptcy court determined that the rate was not
28 unreasonable because the contracting parties were sophisticated,

1 and because Ganymede had agreed not to charge interest for
2 several years. The court found that the 35 percent rate was a
3 reflection of the risk for nonpayment and was a negotiated rate
4 that was meant to compensate Ganymede for that risk.⁶ Debtors
5 argue that these reasons are "immaterial" to the determination of
6 whether the rate is reasonable but cite no authority in support
7 of that argument. Debtors also argue that there was never any
8 risk of nonpayment because the parties intended the payment to be
9 made from sales and assignments of the Lease Parcel such that the
10 note holder was protected by a large equity cushion. But Debtors
11 presented no evidence to the bankruptcy court on this point, and
12 the bankruptcy court made no such finding. Finally, Debtors
13 argue that the bankruptcy court failed to evaluate equitable
14 considerations as required under In re Beltway One Development
15 Group, 547 B.R. at 830, but the bankruptcy court's ruling made
16 clear that it took into account all of the facts and
17 circumstances. We agree with the bankruptcy court's conclusion
18 that, under the facts presented, including the uncertainty
19 inherent in relying on the liquidation of non-cash assets to
20 satisfy a debt, the 35 percent rate was reasonable.

21 **CONCLUSION**

22 For the reasons explained above, we AFFIRM.
23
24

25
26 ⁶The bankruptcy court also noted that, in arguing that the
27 35 percent rate was unreasonable, the Debtors were asking the
28 court "to ignore the long somewhat tortured history between these
parties[,] the original litigation financing agreement[,] . . .
and the positive successful result of that litigation."