

JUN 30 2014

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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NOT FOR PUBLICATION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.	EC-13-1277-KuJuTa
)		
GREGORY FREDRICK WACKERMAN,)	Bk. No.	12-14331
)		
Debtor.)	Adv. No.	12-01142
)		
_____)		
GREGORY FREDRICK WACKERMAN,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
BANK OF AMERICA, N.A.; U.S.)		
BANK NATIONAL ASSOCIATION;)		
RECONTRUST COMPANY, N.A.,)		
)		
Appellees.)		
_____)		

Argued and Submitted on May 15, 2014
at Sacramento, California

Filed - June 30, 2014

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

Honorable Fredrick E. Clement, Bankruptcy Judge, Presiding

Appearances: Jerry R. Lowe argued for appellant; Matthew James
Brady of Reed Smith, LLP argued for appellees.

Before: KURTZ, JURY and TAYLOR, 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 8013-1.

1 **INTRODUCTION**

2 Debtor Gregory Fredrick Wackerman appeals from a summary
3 judgment ruling in favor of defendants Bank of America, N.A.,
4 U.S. Bank National Association and ReconTrust Company, N.A.
5 Wackerman also appeals from the denial of his motion for
6 reconsideration. In both instances, Wackerman's arguments on
7 appeal boil down to whether the bankruptcy court should have
8 given him further opportunities to obtain and present evidence to
9 support his positions.

10 In the first instance, Wackerman in essence argues that the
11 bankruptcy court should have continued the summary judgment
12 proceedings so that he could have a further opportunity to obtain
13 and present evidence on the dispositive issue: the timing of
14 defendants' foreclosure sale. But Wackerman never requested such
15 a continuance. We will not reverse the bankruptcy court for not
16 granting relief Wackerman never requested.

17 In the second instance, Wackerman argues that the bankruptcy
18 court should have given him a second chance to present sufficient
19 evidence to support his reconsideration motion. But Wackerman
20 did not ask for this second chance until the hearing on the
21 reconsideration motion was in progress, and after the court had
22 announced its tentative ruling to deny the reconsideration
23 motion. In denying Wackerman's request, the bankruptcy court
24 duly and properly exercised its discretion. Even though another
25 judge may have decided the matter differently, the bankruptcy
26 court applied the correct legal standard and did not make any
27 clearly erroneous findings of fact. Accordingly, we AFFIRM.

1 **FACTS**

2 The relevant facts are largely undisputed. On May 14, 2012,
3 somewhere between 10:00 a.m. and 10:30 a.m., defendants conducted
4 a nonjudicial foreclosure sale of Wackerman's residence located
5 in Mariposa, California. That same morning, at 10:11 a.m.,
6 Wackerman commenced his chapter 13¹ bankruptcy case. Wackerman
7 then filed an adversary complaint alleging that the sale violated
8 the automatic stay. The complaint sought a declaratory judgment
9 that the sale was void, as well as compensatory damages, punitive
10 damages and attorney's fees.

11 After defendants answered the complaint, the parties
12 submitted a joint discovery plan, which the court adopted as an
13 order of the court by order entered October 17, 2012.² That
14 order set a discovery cutoff date of January 15, 2013. On
15 January 31, 2013, after the close of discovery, defendants filed
16 their summary judgment motion. Defendants asserted that they
17 were entitled to summary judgment because the foreclosure sale
18 was completed before Wackerman filed his bankruptcy case, so the
19 automatic stay was not yet in effect at the time the sale

21 ¹Unless specified otherwise, all chapter and section
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
23 all Rule references are to the Federal Rules of Bankruptcy
24 Procedure. All Civil Rule references are to the Federal Rules of
Civil Procedure.

25 ²The parties did not provide us with copies of their joint
26 discovery plan or of the bankruptcy court's October 17, 2012
27 order. However, we were able to obtain copies of these and other
28 documents from the bankruptcy court's docket. We can take
judicial notice of items in the bankruptcy court record. See
O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
955, 957-58 (9th Cir. 1989).

1 occurred. As a result, defendants reasoned, none of Wackerman's
2 claims for relief had any merit, because they were all premised
3 on the allegation that the sale violated the automatic stay.

4 In support of their claim that the sale occurred before the
5 bankruptcy case was filed, defendants relied on the declaration
6 of Mary Lou McKeighan filed in support of the summary judgment
7 motion ("McKeighan MSJ Declaration"). McKeighan declared that
8 she served as auctioneer at the sale and that, at the conclusion
9 of the sale, she checked the time on her mobile phone and
10 recorded that time onto a sale log. According to McKeighan, she
11 routinely takes notes and records them onto a sale log
12 immediately after the conclusion of each sale she conducts. A
13 copy of the sale log from the sale of Wackerman's residence is
14 attached as an exhibit to the McKeighan MSJ Declaration and
15 indicates under the heading "sale results" that the residence was
16 sold "back to beneficiary" at "10:06". Based on her sale log
17 notes, McKeighan declared that the sale of Wackerman's residence
18 concluded at 10:06 a.m. on May 14, 2012.

19 Wackerman filed a half-page opposition to the summary
20 judgment motion. Wackerman claimed that the precise time of the
21 sale, and whether it concluded before or after the bankruptcy
22 filing, was a genuine issue of material fact. But Wackerman did
23 not submit any evidence in support of this claim. Instead,
24 Wackerman asserted that the bankruptcy court should deny the
25 summary judgment motion and reopen discovery because defendants
26 had not disclosed to Wackerman the precise information contained
27 in the McKeighan MSJ Declaration, nor had they disclosed the sale
28 log from the sale of Wackerman's residence.

1 In light of Wackerman's opposition, the bankruptcy court
2 entered an order continuing the summary judgment hearing from
3 February 28, 2013 to March 28, 2013. The order directed the
4 parties to file supplemental declarations explaining whether
5 defendants had made the requisite disclosures under Civil
6 Rule 26(a)(1) regarding McKeighan and regarding the sale log and,
7 if not, what were the proper remedies for the nondisclosure.

8 In accordance with the court's order, Wackerman's counsel
9 filed a declaration in which he admitted that defendants had
10 disclosed McKeighan's identity, her contact information and a
11 copy of a different declaration by McKeighan - her September 2012
12 declaration filed in the main bankruptcy case in support of
13 defendants' motion for relief from stay ("McKeighan MRS
14 Declaration").

15 Even so, Wackerman argued that defendants also should have
16 disclosed the sale log and the contents of the McKeighan MSJ
17 Declaration. According to Wackerman, the appropriate remedy for
18 this failure to disclose was denial of the summary judgment
19 motion and the reopening of discovery so that Wackerman could
20 take McKeighan's deposition.

21 In addition, Wackerman filed his own declaration in which he
22 stated that he had been diligently searching for a man he met on
23 the date of the sale outside the building where the sale
24 occurred. Even though Wackerman was not able to identify this
25 man by name and did not know precisely what the man would say if
26 asked, Wackerman believed the man would testify that the sale
27 occurred several minutes later than as declared by McKeighan. In
28 relevant part, Wackerman declared as follows:

1 Before the auction began, I spoke with a gentleman who
2 represented to me that he was attending the auction to
3 bid on my home. I told him that I was trying to file
4 bankruptcy to stop the sale. He went inside the
5 building where the auction was being conducted and I
6 stayed outside to discuss the status of the bankruptcy
7 filing with my attorney Jerry R. Lowe. I spoke with
8 the gentleman as he was leaving and I asked him whether
9 my house sold. He indicated to me that he did not bid
10 on it because I was filing bankruptcy, but that it had
11 sold. As a result of my conversation with him, I have
12 reason to believe that the sale of the home took place
13 closer to 10:30 a.m. I have been diligently attempting
14 to locate this gentleman again so that my attorney may
15 discuss the issue of when the sale actually happened.

16 Wackerman Declaration (March 14, 2013) at ¶ 2.

17 Meanwhile, defendants' counsel filed a declaration in which
18 he claimed that any omission in defendants' initial disclosure
19 was harmless because Wackerman's counsel had admitted to him that
20 he was aware of the McKeighan MRS Declaration in which McKeighan
21 had similarly testified that the sale occurred at 10:06 a.m. on
22 May 14, 2012. As for the sale log, defendants' counsel testified
23 that he was not aware of its existence until two days before he
24 filed the summary judgment motion. Based on these facts,
25 defendants contended (1) that Wackerman knew from the contents of
26 the McKeighan MRS Declaration that McKeighan would testify that
27 the sale occurred at 10:06 a.m. on May 14, 2012, (2) that
28 Wackerman had ample opportunity before the discovery cutoff to
take McKeighan's deposition but chose not to do so, and (3) that
discovery should not be reopened and the summary judgment motion
should be granted.

The bankruptcy court held a hearing on the summary judgment

1 motion on March 28, 2013.³ Defendant's counsel appeared at the
2 hearing, but no one appeared on behalf of Wackerman. At the
3 hearing, the court adopted its tentative ruling as its final
4 ruling. As set forth in that ruling, the bankruptcy court agreed
5 with all of defendants' contentions. It further ruled that
6 defendants had adequately disclosed McKeighan's identity and
7 contact information and that Civil Rule 26(a) did not require
8 defendants to disclose the contents of McKeighan's anticipated
9 summary judgment declaration testimony.

10 As for the sale log, the court credited the declaration
11 testimony of defendants' counsel indicating that defendants were
12 unaware of the sale log until a couple of days before the filing
13 of the summary judgment motion. According to the court, prior to
14 filing their summary judgment motion, defendants did not have
15 possession, custody or control of the sale log, so they were not
16 obligated to provide Wackerman with a copy of it as part of their
17 initial disclosures or as part of their continuing duty to update
18 their disclosures. Based on McKeighan's testimony regarding the
19 nature of the sale log, the nature of her role in the sale, and
20 the nature of her affiliation with LPS Agency Sales & Posting,
21 Inc., the company that conducted the sale, the court concluded
22 that the sale log was an internal document that McKeighan kept
23 for her own records and that the relationship between McKeighan
24 and defendants was too attenuated for the court to conclude that

25
26
27 ³The parties have not provided us with a copy of the
28 transcript from the March 28, 2013 hearing. However, we were
able to obtain a copy of this transcript from the bankruptcy
court's docket. See In re E.R. Fegert, Inc., 887 F.2d at 957-58.

1 defendants had control over the document for disclosure purposes.

2 With respect to Wackerman's declaration, the court
3 determined that the portions of the declaration which arguably
4 could support Wackerman's allegation that the sale occurred after
5 his bankruptcy filing were all inadmissible hearsay or were based
6 on Wackerman's lack of personal knowledge. Therefore, the court
7 explained, Wackerman had failed to present any admissible
8 evidence to counter defendants' evidence demonstrating that the
9 sale concluded before the bankruptcy filing. Hence, the
10 bankruptcy court concluded that defendants had met their summary
11 judgment burden, Wackerman had not met his summary judgment
12 burden, and defendants were entitled to summary judgment.

13 On April 16, 2013, the day after the court entered summary
14 judgment in favor of defendants, Wackerman filed a motion for
15 reconsideration based on his receipt of newly discovered
16 evidence. This newly discovered evidence consisted of the
17 declaration testimony of Daniel McMonegal. Contrary to
18 McKeighan's testimony that the sale concluded at 10:06 a.m.,
19 McMonegal declared that the sale concluded at approximately
20 10:20 a.m. According to McMonegal, he attended the sale of
21 Wackerman's residence because he was interested in potentially
22 bidding for the property. McMonegal indicated that, while he was
23 at the sale, he was very conscious of the time because he was
24 scheduled to pick up his girlfriend at 10:30 a.m., and he did not
25 want to be late. As McMonegal put it, it was roughly a five
26 minute drive to the place where he was supposed to pick up his
27 girlfriend, and he left the building where the sale was taking
28 place as soon as the sale concluded. McMonegal further declared

1 that the sale did not begin promptly at 10:00 a.m. as scheduled
2 but rather was slightly delayed. Consequently, he stated, he was
3 checking his phone regularly to ensure he would be on time to
4 pick up his girlfriend.

5 Wackerman also filed with his reconsideration motion his own
6 declaration. In his declaration, he attempted to establish that
7 he was diligent in seeking this newly discovered evidence, by
8 declaring as follows:

9 Prior to the hearing on the motion for summary
10 judgment, I made diligent efforts to locate a witness
11 who was present at the May 14, 2012, foreclosure
12 hearing. My efforts included, but were not limited to,
13 asking people I knew, and other persons who I believed
14 lived in Mariposa, California, if they were present at
the foreclosure auction or knew of anyone who was
present at the foreclosure auction. On or about
April 6, 2013, Daniel McMonegal, came forward, and
informed me that he was present at the foreclosure
sale.

15 Wackerman Decl. (April 30, 2013) at ¶ 2.

16 The bankruptcy court held a hearing on the reconsideration
17 motion on May 31, 2013. In the court's tentative ruling, which
18 it adopted as its final ruling, the court acknowledged that
19 Wackerman's newly discovered evidence, if timely presented to the
20 court in conjunction with Wackerman's opposition to the summary
21 judgment motion, might have supported Wackerman's factual
22 position regarding the time of sale sufficient to establish the
23 time of sale as a genuine issue of material fact that would have
24 prevented the court from entering summary judgment in favor of
25 defendants. However, the court was not persuaded that Wackerman
26 had adequately established that he had exercised reasonable
27 diligence in locating McMonegal and obtaining his declaration
28 testimony.

1 At the hearing, Wackerman orally requested that the court
2 give him the opportunity to present additional testimony
3 regarding his diligence, but the court declined to do so.
4 According to the court, Wackerman had already been given ample
5 opportunity to make his case on the diligence issue, and the
6 court was not going to reopen the record to permit him to attempt
7 to cure the insufficiency of his evidence regarding diligence.

8 In the bankruptcy court's own words:

9 The problem here is this came up for summary
10 judgment, and you knew that was coming, and then there
11 was a motion to [reconsider] that, so - you've known
12 all along, so we're not going to take supplemental
13 testimony. You've had a couple of bites at this apple.

14 You need to make the argument on the record you've
15 got 'cause I'm not going to add - I'm not going to
16 supplement the record. This would be the third time
17 we've come around to this.

18 Hr'g Trans. (May 31, 2013) at 4:5-13.

19 On June 3, 2013, the bankruptcy court entered an order
20 denying Wackerman's reconsideration motion, and on June 11, 2013,
21 Wackerman timely filed a notice of appeal seeking review of the
22 denial of the reconsideration motion as well as the court's
23 April 16, 2013 summary judgment in favor of defendants.

24 **JURISDICTION**

25 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
26 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
27 § 158.

28 **ISSUES**

1. Did the bankruptcy court correctly determine that
defendants were entitled to summary judgment?

2. Did the bankruptcy court abuse its discretion by

1 granting summary judgment without giving Wackerman more time to
2 identify and locate a third party witness to the sale?

3 3. Was the bankruptcy court's finding regarding defendants'
4 lack of control over the sale log clearly erroneous?

5 4. Did the bankruptcy court abuse its discretion by denying
6 Wackerman's reconsideration motion?

7 5. Did the bankruptcy court abuse its discretion by not
8 giving Wackerman another opportunity to establish that he was
9 reasonably diligent in seeking and obtaining his newly discovered
10 evidence?

11 **STANDARDS OF REVIEW**

12 We review the bankruptcy court's grant of summary judgment
13 de novo. Boyajian v. New Falls Corp. (In re Boyajian), 564 F.3d
14 1088, 1090 (9th Cir. 2009); Lopez v. Emergency Serv. Restoration,
15 Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP 2007).

16 We review the bankruptcy court's denial of an extension of
17 time to respond to a summary judgment motion for an abuse of
18 discretion. Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253,
19 1258 (9th Cir. 2010). We similarly review for an abuse of
20 discretion the bankruptcy court's denial of a reconsideration
21 motion. First Ave. W. Bldg. LLC v. James (In re OneCast Media,
22 Inc.), 439 F.3d 558, 561 (9th Cir. 2006); Heritage Pac. Fin., LLC
23 v. Montano (In re Montano), 501 B.R. 96, 105 (9th Cir. BAP 2013).

24 Under the abuse of discretion standard of review, we apply a
25 two-part test. First, we "determine de novo whether the
26 [bankruptcy] court identified the correct legal rule to apply to
27 the relief requested." United States v. Hinkson, 585 F.3d 1247,
28 1262 (9th Cir. 2009) (en banc). And, second, if the bankruptcy

1 court identified the correct legal rule, we then determine under
2 the clearly erroneous standard whether its factual findings and
3 its application of the facts to the relevant law were:

4 "(1) illogical, (2) implausible, or (3) without support in
5 inferences that may be drawn from the facts in the record." Id.
6 (internal quotation marks omitted).

7 Whether the sale log was in defendants' control for
8 discovery and disclosure purposes was a question of fact. See,
9 e.g., Nosal v. Granite Park LLC, 269 F.R.D. 284, 290-91 (S.D.N.Y.
10 2010); DL v. District of Columbia, 251 F.R.D. 38, 46 (D.D.C.
11 2008). We review the bankruptcy court's control finding, and all
12 other factual findings, under the clearly erroneous standard,
13 which requires us to consider whether those findings were
14 "illogical, implausible, or without support in the record." See
15 Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

16 **DISCUSSION**

17 Summary judgment is appropriate when there are no genuine
18 issues of material fact and when viewing the evidence most
19 favorably to the non-moving party, the movant is entitled to
20 prevail as a matter of law. Civil Rule 56 (made applicable in
21 adversary proceedings by Rule 7056); Celotex Corp. v. Catrett,
22 477 U.S. 317, 322-23 (1986). Material facts that would preclude
23 summary judgment are those which, under applicable substantive
24 law, may affect the outcome of the case. The substantive law
25 determines which facts are material. Anderson v. Liberty Lobby,
26 Inc., 477 U.S. 242, 248 (1986).

27 Civil Rule 56 "mandates" summary judgment when, after
28 adequate opportunity for discovery, the adverse party fails to

1 present evidence in response to a summary judgment motion
2 sufficient to establish the existence of an essential element of
3 that party's case, on which that party would bear the burden of
4 proof at trial. Celotex Corp., 477 U.S. at 322. As the Supreme
5 Court explained, "In such a situation, there can be 'no genuine
6 issue as to any material fact,' since a complete failure of proof
7 concerning an essential element of the nonmoving party's case
8 necessarily renders all other facts immaterial." Id. at 322-23.

9 Here, Wackerman as the plaintiff would have the burden of
10 proof at trial to establish all of the elements supporting his
11 claim that defendants violated the automatic stay. See Fernandez
12 v. G.E. Capital Mortg. Servs. (In re Fernandez), 227 B.R. 174,
13 180-81 (9th Cir. BAP 1998). This burden would require Wackerman
14 to present evidence at trial that the sale occurred after
15 Wackerman filed his bankruptcy case. Before the bankruptcy case
16 was filed, there was no automatic stay to violate. See Hillis
17 Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 585
18 (9th Cir. 1993) (stating that automatic stay arises upon the
19 commencement of the bankruptcy case); Pierce v. Carson
20 (In re Rader), 488 B.R. 406, 411 (9th Cir. BAP 2013) (same).

21 Wackerman has not disputed that the critical event in terms
22 of the foreclosure was the completion of the auction sale on
23 May 14, 2012. Under California law, the recordation of the
24 trustee's deed of sale relates back to the date the auction sale
25 actually occurred so long as the deed is recorded within fifteen
26 days of the sale. See Cal. Civ. Code § 2924h(c); Bebensee-Wong
27 v. Fed. Nat'l Mortg. Ass'n (In re Bebensee-Wong), 248 B.R. 820,
28 822-823 (9th Cir. BAP 2000). Wackerman also has not disputed

1 that ReconTrust recorded the trustee's deed on May 29, 2012,
2 within fifteen days of the sale.

3 Instead, Wackerman contends that the time of the actual sale
4 was a genuine issue of material fact. According to Wackerman,
5 his declaration in opposition to the summary judgment motion was
6 sufficient to demonstrate the existence of a genuine issue of
7 material fact concerning the time of the sale. We disagree. For
8 summary judgment purposes, "[a]n issue is 'genuine' only if there
9 is sufficient evidence for a reasonable fact finder to find for
10 the non-moving party." Far Out Productions, Inc. v. Oskar,
11 247 F.3d 986, 992 (9th Cir. 2001). The bankruptcy court here
12 determined that all of the statements in Wackerman's declaration
13 regarding the time of sale were inadmissible. Wackerman has not
14 challenged on appeal this evidentiary ruling, nor does there
15 appear to be any legitimate basis for doing so. On their face,
16 Wackerman's statements regarding what a third party told him
17 about the time of sale are hearsay. Moreover, Wackerman
18 effectively conceded that he had no personal knowledge as to the
19 precise time of sale because he admitted that he did not witness
20 the sale.

21 Consequently, Wackerman presented no admissible evidence
22 regarding the time of sale. In contrast, defendants presented
23 admissible evidence on this issue in the form of the McKeighan
24 MSJ Declaration, in which McKeighan declared that the sale
25 occurred at 10:06 a.m. Given this uncontroverted evidence
26 regarding the time of sale, no trier of fact reasonably could
27 have found in Wackerman's favor on the sale timing issue. As a
28 result, we reject as meritless Wackerman's argument that the sale

1 timing issue was a genuine issue of material fact that should
2 have prevented the court from granting summary judgment.

3 Alternately, Wackerman argues on appeal that the bankruptcy
4 court should have given him more time to obtain admissible
5 evidence in support of his position on the timing issue. But
6 there is a fatal flaw in this argument. Wackerman never
7 requested, either orally or in writing, a continuance of the
8 summary judgment proceedings in order to afford him additional
9 time to find his unidentified third-party witness regarding the
10 sale timing issue.

11 We have carefully reviewed all of Wackerman's submissions
12 prior to the time the court ruled on defendants' summary judgment
13 motion, and he simply did not ask for any such continuance. We
14 do not need to consider issues raised for the first time on
15 appeal, where the trial court had no opportunity to consider
16 them. See United Student Aid Funds, Inc. v. Espinosa, 559 U.S.
17 260, 270 n.9 (2010) ("We need not settle that question, however,
18 because the parties did not raise it in the courts below.");
19 Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir.
20 2001) (stating court will not consider issue raised for the first
21 time on appeal absent exceptional circumstances). Wackerman has
22 not demonstrated the existence of any exceptional circumstances
23 that would justify our consideration of this issue in the first
24 instance.

25 Even if we were to consider the merits of Wackerman's
26 argument regarding a continuance of the summary judgment
27 proceedings, we would not reverse. Absent a request for
28 continuance of the proceedings from Wackerman, it would be

1 inappropriate for us to hold that the bankruptcy court abused its
2 discretion by not granting such a continuance. See Johnson v.
3 Reilly, 349 F.3d 1149, 1156 (9th Cir. 2003).

4 Although Wackerman did not ask for a continuance of the
5 summary judgment proceedings, Wackerman did argue in the
6 bankruptcy court that defendants did not fully comply with the
7 disclosure requirements set forth in Civil Rule 26(a)(1) and (e)
8 (made applicable in adversary proceedings by Rule 7026). Because
9 defendants did not fully comply with these requirements,
10 Wackerman asserted, denial of the summary judgment motion and the
11 reopening of discovery was appropriate.

12 On appeal, Wackerman has renewed this argument, focusing on
13 the fact that defendants did not disclose the sale log before
14 they filed their summary judgment motion. According to
15 Wackerman, the court erred when it found that defendants did not
16 have "possession, custody or control" of the sale log for
17 disclosure purposes. See Civil Rule 26(a)(1)(a)(ii) (requiring
18 parties to disclose all documents within their "possession,
19 custody or control" which they may use to support their claims or
20 defenses). As Wackerman puts it, the evidence presented in the
21 summary judgment proceedings established that McKeighan and LPS
22 were defendants' agents and, consequently, defendants effectively
23 controlled the sale log for disclosure and discovery purposes.
24 See United States v. Int'l Union of Petrol. & Indus. Workers,
25 870 F.2d 1450, 1452 (9th Cir. 1989) ("Control is defined as the
26 legal right to obtain documents upon demand.").

27 The bankruptcy court disagreed with Wackerman. It
28 specifically found, based on McKeighan's declaration testimony,

1 that she kept the sale log for her own internal records and that
2 her business relationship with defendants was too attenuated for
3 the court to find that defendants had the legal right to require
4 McKeighan to turn over the sale log. Wackerman has not persuaded
5 us that these findings were illogical, implausible or without
6 support in the record. Thus, they were not clearly erroneous.
7 See In re Retz, 606 F.3d at 1196. Because Wackerman has failed
8 to demonstrate reversible error in the bankruptcy court's
9 determination that defendants complied with Civil Rule 26(a)(1)
10 and (e), we must reject Wackerman's argument regarding
11 defendants' disclosures.

12 Wackerman also challenges on appeal the bankruptcy court's
13 denial of his reconsideration motion. When, as here, the party
14 seeking relief from a judgment or order files a reconsideration
15 motion within fourteen days of entry of that judgment or order,
16 we review the reconsideration motion as a motion for relief from
17 judgment under Rule 9023. See In re Montano, 501 B.R. at 112.
18 Rule 9023 incorporates Civil Rule 59(e), and the same standards
19 apply to both rules. Id. In order to justify relief under
20 Rule 9023, the movant must show: "(a) newly discovered evidence,
21 (b) the court committed clear error or made an initial decision
22 that was manifestly unjust, or (c) an intervening change in
23 controlling law." Id. (citing Duarte v. Bardales, 526 F.3d 563,
24 567 (9th Cir. 2008)).

25 In this case, Wackerman sought to present newly discovered
26 evidence to the court. To support its request for relief based
27 on newly discovered evidence, Wackerman needed to establish:
28 "that [he] discovered the evidence after [the summary judgment

1 proceedings], that [he] could not have discovered the evidence
2 sooner through the exercise of reasonable diligence, and that the
3 new evidence is of such magnitude that it would likely have
4 changed the outcome of the case.” Far Out Productions, Inc.,
5 247 F.3d at 998 (citing Defenders of Wildlife v. Bernal, 204 F.3d
6 920, 929 (9th Cir. 2000)).

7 The bankruptcy court held that Wackerman had satisfied the
8 first and third elements for relief from judgment based on newly
9 discovered evidence. As the bankruptcy court found, McMonegal’s
10 declaration testimony, obtained by Wackerman shortly after the
11 conclusion of the summary judgment proceedings, likely would have
12 caused the court to conclude that a genuine issue of material
13 fact existed regarding the time of sale, had Wackerman timely
14 presented McMonegal’s declaration testimony while the summary
15 judgment proceedings were still pending.

16 However, the bankruptcy court also found that Wackerman had
17 failed to establish the second element for relief based on newly
18 discovered evidence: that he had exercised reasonable diligence
19 in finding McMonegal and obtaining his testimony. Wackerman has
20 not offered any real explanation why this finding was illogical,
21 implausible or without support in the record. Even though
22 Wackerman knew from the outset of his adversary proceeding, an
23 adversary proceeding he commenced in August 2012, that he would
24 need to prove that the sale concluded after the bankruptcy case
25 was filed, and even though he knew there were third party
26 witnesses to the sale but did not know their names, all he was
27 able to muster in the way of proof of his diligence in attempting
28 to identify and locate witnesses before the April 2013 conclusion

1 of the summary judgment proceedings was the following three-
2 sentence statement:

3 Prior to the hearing on the motion for summary
4 judgment, I made diligent efforts to locate a witness
5 who was present at the May 14, 2012, foreclosure
6 hearing. My efforts included, but were not limited to,
7 asking people I knew, and other persons who I believed
8 lived in Mariposa, California, if they were present at
the foreclosure auction or knew of anyone who was
present at the foreclosure auction. On or about
April 6, 2013, Daniel McMonegal, came forward, and
informed me that he was present at the foreclosure
sale.

9 Wackerman Dec. (April 30, 2013) at ¶ 2. As the bankruptcy court
10 found, this evidence was conclusory and raised more questions
11 than it answered regarding Wackerman's diligence. For instance,
12 the bankruptcy court explained, Wackerman's testimony did not
13 demonstrate when Wackerman began looking for witnesses, nor did
14 Wackerman specify how or when he communicated with others
15 regarding his inquiry. At bottom, the court was left with no
16 real idea of the extent and timing of Wackerman's efforts to
17 identify and locate witnesses. Under these circumstances, we
18 cannot hold as clearly erroneous the bankruptcy court's finding
19 that Wackerman failed to satisfy the reasonable diligence element
20 for presenting newly discovered evidence.

21 Wackerman alternately argues that the bankruptcy court
22 should have granted his request for another chance to present
23 evidence regarding his diligence, a request he orally made at the
24 time of the reconsideration motion hearing, after the bankruptcy
25 court had announced its tentative ruling that it was prepared to
26 deny the reconsideration motion because Wackerman had not
27 demonstrated reasonable diligence.

28 Neither in the bankruptcy court nor on appeal has Wackerman

1 cited any legal authority supporting his claim that the
2 bankruptcy court should have granted him another chance to
3 present evidence. Wackerman merely opines that too much was at
4 stake for the bankruptcy court to deny him this additional
5 opportunity.

6 The record supports the bankruptcy court's decision to not
7 give Wackerman another chance to present evidence. The extent of
8 Wackerman's diligence was an issue where the evidence was readily
9 available to Wackerman without the need to seek out information
10 or documents from third parties. And yet in support of his
11 diligence, Wackerman only was able to muster three conclusory
12 sentences, as set forth in his April 30, 2013 declaration. Only
13 after the court indicated that it was prepared to rule against
14 him on this issue did Wackerman for the first time ask for
15 another chance to submit evidence of diligence. And yet he gave
16 no indication why he could not and did not provide more evidence
17 in his April 30, 2013 declaration.

18 Federal courts have inherent authority and broad discretion
19 to manage cases taking place before them and to structure
20 proceedings in a manner that is consistent with the fair,
21 efficient and expedient administration of justice. See U.S. v.
22 W.R. Grace, 526 F.3d 499, 509-10 (9th Cir. 2008) (en banc);
23 S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 807 (9th Cir. 2002).
24 Here, the bankruptcy court in essence found that Wackerman knew
25 and understood that his diligence was at issue for purposes of
26 his reconsideration motion and that Wackerman already had been
27 given sufficient opportunity to present evidence on this point.
28 We cannot say that this finding was illogical, implausible or

1 without support in the record.⁴ Nor can we say that the court
2 abused its discretion in denying Wackerman another chance to
3 present evidence on the diligence issue.

4 **CONCLUSION**

5 For the reasons set forth above, we AFFIRM the bankruptcy
6 court's grant of summary judgment in favor of defendants and its
7 denial of Wackerman's reconsideration motion.

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⁴At first blush, the bankruptcy court appears to have
16 mis-spoken when it commented on Wackerman's prior opportunities
17 to address the issue of his diligence. The bankruptcy court
18 commented that Wackerman had been given two prior opportunities
19 to address this issue. Strictly speaking, Wackerman only had one
20 true opportunity to address this issue: in his April 30, 2013
reconsideration motion, his diligence in identifying and locating
McMonegal was not at issue.

21 Nonetheless, when the court's comments are given a fair
22 reading in the context of the entire record, we think all the
23 court really was trying to say was the following: (1) that
24 Wackerman filed two declarations during the combined course of
the summary judgment motion proceedings and the reconsideration
25 motion proceedings, both of which discussed Wackerman's efforts
to identify and locate third-party witnesses to the sale;
26 (2) neither of these declarations gave the court any real insight
into the extent of Wackerman's efforts; and (3) after having
27 announced its intention to rule against Wackerman's
reconsideration motion based on his inadequate demonstration of
28 reasonable diligence, the court was not obliged to give Wackerman
another chance to present evidence regarding his diligence.