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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NOT FOR PUBLICATION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-15-1298-LJuF  
 )  
 6 RAMON CONCHA and ) Bk. No. 0:12-bk-17446-SHG  
 ISABEL CONCHA, )  
 7 )  
 Debtors. )  
 8 \_\_\_\_\_ )  
 )  
 9 IRENE DUARTE, )  
 )  
 10 Appellant, )  
 )  
 11 v. ) **MEMORANDUM\***  
 )  
 12 RAMON CONCHA; ISABEL CONCHA; )  
 JIMMIE D. SMITH, Chapter 7 )  
 13 Trustee )  
 )  
 14 Appellees. )  
 \_\_\_\_\_ )

Submitted Without Oral Argument  
On September 23, 2016

Filed - October 14

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

Honorable Scott H. Gan, Bankruptcy Judge, Presiding

Appearances: Appellant Irene Duarte, pro se, on brief; Appellee  
 Jimmie D. Smith, Chapter 7 Trustee, pro se on  
 brief.

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

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\* 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 **I. INTRODUCTION**

2 Irene Duarte appeals the bankruptcy court's denial of her  
3 motion to set aside the order requiring her to disgorge \$600  
4 inappropriately received from the debtors. Duarte argued in the  
5 bankruptcy court that she was not provided an adequate  
6 opportunity to present evidence at the hearing on the motion to  
7 disgorge and offered several documents that had not been  
8 previously introduced to the bankruptcy court. After an  
9 evidentiary hearing, the bankruptcy court denied Duarte's motion  
10 because the evidence presented was not "newly discovered" within  
11 the meaning of the governing rule. Accordingly, there was no  
12 basis for relief from the underlying order. Finding no error in  
13 the bankruptcy court's findings or conclusions, we AFFIRM.

14 **II. FACTUAL BACKGROUND<sup>1</sup>**

15 **A. The bankruptcy filing and the Trustee's Request to Disgorge**

16 Ramon Concha and Isabel Concha ("Debtors") filed a  
17 chapter 7<sup>2</sup> petition on August 3, 2012. On September 7, 2012,  
18 Appellee Jim D. Smith, the chapter 7 Standing Trustee (the  
19 "Trustee"), filed a Complaint to Disgorge Fees and Other Relief  
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23 <sup>1</sup> Duarte presents a limited record; we have exercised our  
24 discretion to review the bankruptcy court's docket, as  
25 appropriate. See Woods & Erickson, LLP v. Leonard (In re AVI,  
Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP 2008).

26 <sup>2</sup> Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037, and all "Civil Rule" references are  
to the Federal Rules of Civil Procedure, Rules 1-86.

1 (the "Request to Disgorge").<sup>3</sup> The Request to Disgorge alleged  
2 that Duarte, who is not a licensed attorney or a licensed  
3 document preparer, improperly received \$600 for assisting Debtors  
4 with their bankruptcy and requested that the payment be  
5 disgorged.

6 Duarte, acting in propria persona, filed a one-sentence  
7 response to the Request to Disgorge stating that she charged only  
8 for pre-bankruptcy services, such as filling out forms related to  
9 loan modifications, and for related administrative tasks (i.e.,  
10 faxing, copying, and notarizing). In support of Duarte's  
11 opposition, Debtors filed a one-sentence letter in which they  
12 stated that Duarte did not prepare bankruptcy documents on their  
13 behalf.<sup>4</sup> The Trustee filed a reply, attaching a copy of a  
14 receipt showing payment of \$600 from Debtors to Duarte on the  
15 petition date.

16 **B. The evidentiary hearing on the Trustee's Request to Disgorge**

17 On February 3, 2015, the bankruptcy court held an  
18 evidentiary hearing on the Request to Disgorge. After the  
19 Trustee stated his position, Duarte, through an interpreter,  
20 testified that the \$600 payment was for services related to three  
21 prepetition loan modifications--but Duarte did not provide copies  
22 of any of the loan modification applications or related  
23 documents. In addition, Duarte also indicated that she helped  
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25 <sup>3</sup> The Trustee's pleading was captioned as a "complaint,"  
26 even though there was no adversary proceeding. The bankruptcy  
27 court disposed of the Request to Disgorge as a contested matter.

28 <sup>4</sup> Although the letter filed by Debtors states "we declare,"  
the document was not signed under penalty of perjury.

1 Debtors with forms that the Trustee sent them. Despite her  
2 assertion that she provided notary services to Debtors, Duarte  
3 did not provide evidence of any notarized documents. The  
4 bankruptcy court took the matter under submission.

5 On March 18, 2015, the bankruptcy court issued its Order  
6 Disallowing Fee and Requiring Turnover (the "Order"), granting  
7 the relief sought by the Request to Disgorge pursuant to § 110  
8 and Rule 2090-2 of the Local Bankruptcy Rules for the District of  
9 Arizona.<sup>5</sup> In brief, the bankruptcy court disbelieved Duarte's  
10 statement that the \$600 fee paid by Debtors was paid for Duarte's  
11 assistance with prepetition loan modification applications  
12 because Duarte did not provide any evidence of such documents.  
13 Furthermore, although Duarte admitted at the February 3, 2015  
14 hearing that she charged Debtors for assistance with filling out  
15 forms sent to them by the Trustee, the bankruptcy court found  
16 that Duarte's testimony on this subject was inconsistent with the  
17 evidence showing that payment was received on the date of the  
18 petition (and therefore prior to the Trustee's appointment).  
19 Citing the inconsistent testimony from Duarte and the lack of  
20 evidence, the bankruptcy court found her testimony to be not  
21 credible.

### 22 **C. The Motion to Set Aside Judgment**

23 On May 6, 2015, nearly two months after the bankruptcy court  
24 issued the Order, Duarte filed a Motion to Set Aside Judgment and

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26 <sup>5</sup> That local rule authorizes the bankruptcy court to impose  
27 sanctions against any bankruptcy petition preparer who prepares a  
28 document for filing in the United States Bankruptcy Court for the  
District of Arizona and who is not a certified legal document  
preparer.

1 Motion for New Trial (the "Motion") requesting relief from the  
2 Order on grounds that she did not have an adequate opportunity to  
3 present evidence at the February 3 hearing. On August 21, 2015,  
4 the bankruptcy court held a hearing on the Motion. In support of  
5 the Motion, Duarte provided the following documentary evidence  
6 that had not been offered at the hearing on the Request to  
7 Disgorge: (a) a one-sentence letter from Debtor Isabel Concha  
8 stating that Duarte did not assist Debtors in the filing of the  
9 petition; (b) a letter that Duarte drafted on behalf of Debtors  
10 for the purpose of filing in the bankruptcy case; (c) a copy of a  
11 cruise ticket with a handwritten note indicating that Duarte was  
12 on a seven-day cruise from July 29, 2012 through August 5, 2012;  
13 and (d) three documents which were drafted by Duarte, on behalf  
14 of Debtors, for the purpose of responding to a request from the  
15 Trustee. At the August 21 hearing, Duarte introduced several  
16 additional documents, including: (a) a copy of her bank statement  
17 from August 2012 reflecting the \$600 payment from Debtors; (b) a  
18 copy of the itinerary for the cruise that Duarte allegedly was on  
19 the day that Debtors deposited the \$600 into her account; and  
20 (c) copies of pictures of her while on a cruise.

21 At the conclusion of the hearing on the Motion, the  
22 bankruptcy court orally ruled that Duarte had not established any  
23 basis for relief from the Order; in particular, the bankruptcy  
24 court determined that the evidence introduced in support of the  
25 Motion did not qualify as "newly discovered" evidence because  
26 Duarte had access to that information prior to the hearing.  
27 Thus, the bankruptcy court denied the Motion and confirmed its  
28 previous ruling regarding disgorgement of the \$600. Duarte

1 timely appealed.

### 2 **III. JURISDICTION**

3 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
4 §§ 1334 and 157(b) (2) (E). We have jurisdiction under 28 U.S.C.  
5 § 158.

### 6 **IV. ISSUE**

7 Whether the bankruptcy court abused its discretion in  
8 denying Duarte's Motion.

### 9 **V. STANDARD OF REVIEW**

10 We review denials of motions for relief under Civil  
11 Rule 60(b) for an abuse of discretion. See United States v.  
12 Stonehill, 660 F.3d 415, 443 (9th Cir. 2011). Accordingly, we  
13 reverse only where the bankruptcy court applied an incorrect  
14 legal rule or where its application of the law to the facts was  
15 illogical, implausible or without support in inferences that may  
16 be drawn from the record. Ahanchian v. Xenon Pictures, Inc.,  
17 624 F.3d 1253, 1258 (9th Cir. 2010) (citing United States v.  
18 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

19 An appeal from an order denying a Civil Rule 60 motion, when  
20 the motion was filed more than 14 days after the underlying order  
21 or judgment, raises only the merits of the order denying the  
22 motion and does not raise the merits of the underlying judgment  
23 or order. See Maraziti v. Thorpe, 52 F.3d 252, 254 (9th Cir.  
24 1995).

### 25 **VI. DISCUSSION**

26 Although Duarte's Motion did not specify the legal authority  
27 for the relief she was requesting, the bankruptcy court  
28 appropriately interpreted the Motion to be brought pursuant to

1 Rule 9024, which incorporates Civil Rule 60(b).<sup>6</sup>

2 In disposing of the Motion, the bankruptcy court considered  
3 three of the enumerated subsections of Civil Rule 60(b). The  
4 bankruptcy court considered Civil Rule 60(b)(1) (mistake,  
5 inadvertence, surprise, or excusable neglect) and Civil  
6 Rule 60(b)(3) (fraud). The bankruptcy court provided Duarte with  
7 examples of what circumstances would constitute grounds for  
8 relief under these sections but indicated that neither ground was  
9 applicable under the facts asserted by Duarte.

10 The bankruptcy court then considered Civil Rule 60(b)(2),  
11 which allows for relief from a court order when the movant can  
12 provide "newly discovered evidence that, with reasonable  
13 diligence, could not have been discovered in time to move for a  
14 new trial under Rule 59(b)." Where a motion for relief from  
15 judgment is based on allegedly newly discovered evidence, relief  
16 is warranted if:

17 (1) the moving party can show the evidence relied on in

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19 <sup>6</sup> Civil Rule 60 authorizes relief from judgment on grounds  
20 of

21 (1) mistake, inadvertence, surprise, or excusable  
neglect;

22 (2) newly discovered evidence that, with reasonable  
23 diligence, could not have been discovered in time to  
move for a new trial under Rule 59(b);

24 (3) fraud (whether previously called intrinsic or  
extrinsic), misrepresentation, or misconduct by an  
opposing party;

25 (4) the judgment is void;

26 (5) the judgment has been satisfied, released or  
27 discharged; it is based on an earlier judgment that has  
been reversed or vacated; or applying it prospectively  
is no longer equitable; or

28 (6) any other reason justifying relief.

1 fact constitutes "newly discovered evidence" within the  
2 meaning of Rule 60(b); (2) the moving party exercised  
3 due diligence to discover the evidence; and (3) the  
4 newly discovered evidence is of "such magnitude that  
production of it earlier would have been likely to  
change the disposition of the case."

5 Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th  
6 Cir. 2003) (quoting Coastal Transfer Co. v. Toyota Motor Sales,  
7 U.S.A., Inc., 833 F.2d 208, 211 (9th Cir. 1987)).

8 At the evidentiary hearing on the Motion, the bankruptcy  
9 court asked Duarte why she had not offered the newly presented  
10 documents at the hearing on the Request to Disgorge. Duarte's  
11 response was that she "felt that [she] didn't need to maybe  
12 present as much evidence." Duarte also admitted to the  
13 bankruptcy court that the documents, although not in her  
14 possession at the first hearing, could have been retrieved and  
15 presented as evidence.

16 The bankruptcy court found that the documents introduced by  
17 Duarte--specifically, the cruise tickets, pictures, and deposit  
18 slip--were not "newly discovered evidence" because these  
19 documents were at Duarte's disposal and she could have obtained  
20 and presented the evidence at the hearing on the Trustee's  
21 Request to Disgorge had she been diligent enough to do so. Civil  
22 Rule 60(b)(2); Feature Realty, 331 F.3d at 1093. The bankruptcy  
23 court found that Duarte fully understood the risk that she could  
24 be required to give back the \$600 payment if she did not meet her  
25 burden at the hearing. Therefore, the documents were not  
26 documents that could not have been discovered prior to the  
27 hearing on the Request to Disgorge, but rather documents that  
28 were available and that Duarte did not think were necessary to

1 support her case. We discern no error in this finding.

2 The bankruptcy court also analyzed the probative value of  
3 the documents and commented that the documents did not establish  
4 that Duarte had not received the \$600 in exchange for preparing  
5 bankruptcy documents. Therefore, even had these documents been  
6 considered, they would not have justified relief from the Order.

7 On appeal, Duarte reargues the facts she asserted at the  
8 hearing on the Motion, but she has not demonstrated that the  
9 bankruptcy court erred in ruling that the standard for relief  
10 under Civil Rule 60 had not been met.

11 **VII. CONCLUSION**

12 Because the bankruptcy court did not abuse its discretion in  
13 denying Duarte's Motion, we AFFIRM.

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