FILED

JUN 21 2006

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. CC-05-1121-KPaB CC-05-1325-KPaB
COOL FUEL, INC.,	Bk. No. LA-96-46235
Debtor.	
COOL FUEL, INC.,	
Appellant,	
v.	**MEMORANDUM**[*]
CALIFORNIA STATE BOARD OF EQUALIZATION,	
Appellee.	

Argued and Submitted on May 18, 2006
at Pasadena, California

Filed - June 21, 2006

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

Honorable Barry Russell, Chief Bankruptcy Judge, Presiding.

Before: KLEIN, PAPPAS and BRANDT, Bankruptcy Judges.

[*]This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

The ultimate question in these two appeals is whether, on the second remand from the Ninth Circuit, the bankruptcy court correctly construed the effect of the Ninth Circuit's decision.

The underlying dispute involves the California State Board of Equalization's $2,606,570.40 tax claim based on retail sale of Cool Fuel's product by a faithless agent. In 2000, the Ninth Circuit, affirming the BAP's reversal of the bankruptcy court, ruled that the Board's claim was not time-barred.

In 2004, the Ninth Circuit reversed the district court's affirmance of summary judgment in favor of Cool Fuel and remanded with instructions to enter judgment in favor of the Board. Both of the instant appeals focus on the effect of that 2004 Ninth Circuit decision on a 2002 discovery sanctions order that lay dormant in the bankruptcy court pending the outcome of the second Ninth Circuit appeal.

Our No. 05-1121 is Cool Fuel's appeal from the judgment entered pursuant to the Ninth Circuit's 2004 mandate. Our No. 05-1325 is the appeal from denial of a Rule 60(b) motion premised on the discovery sanctions order. We AFFIRM on all counts.

FACTS

As laid out by the Ninth Circuit in its second encounter with the dispute:

> The material facts of this case are undisputed. In 1993, Bruce Hill, a vice president and salesman for Cool Fuel, sold 11 million gallons of diesel fuel to retailers. Under California Revenue & Taxation Code § 8736 (repealed by Stats. 1994, ch. 912, § 8, effective September 27, 1994, operative July 1, 1995), a sale of diesel fuel was a taxable "use" of the fuel that was due and payable upon the delivery of a wholesaler's fuel to a retailer. Hill led Cool Fuel to believe he was selling the fuel to Sunshine Western, a

> licensed wholesaler, in tax-free transactions, but instead sold the fuel under the name of High Desert, a shell corporation operated by himself and others, to service station retailers. It is undisputed that Hill paid Cool Fuel for the cost of the fuel and its profits, but kept the taxes instead of remitting them to the Board.
>
> Following an investigation by a Board auditor, the Board made an initial deficiency determination that Cool Fuel owed $2,514,284.22 in taxes and interest. Cool Fuel asked the Board for a redetermination, and then petitioned for Chapter 11 bankruptcy protection on November 1, 1996. On January 23, 1997, the Board filed a proof of claim for $2,606,570.40 in bankruptcy court for disputed outstanding taxes and interest. Litigation of the matter was treated as an adversary proceeding, and after extensive discovery, the parties filed cross-motions for summary judgment.

Bd. of Equalization v. Cool Fuel, Inc. (In re Cool Fuel, Inc.), 117 Fed. App'x 514 (9th Cir. 2004).

The procedural context of that second appeal is pertinent to the instant appeals. On remand following the 2000 decision, the bankruptcy court held a hearing on the cross-motions for summary judgment on February 19, 2002. That same day the court also held a hearing on appellant Cool Fuel's motion for sanctions against the Board. The court granted the sanctions motion and ruled, first, that the sanctions against the Board for its failure to obey the order to produce documents would be $1,000 per day for up to 30 days, beginning February 19, 2002, for each day that passed from the hearing until the Board fully produced the documents that previously had been ordered to be produced by the court's order dated June 29, 2001. Additionally, the court sanctioned the Board to pay $1,000 per day for up to 30 days, beginning February 19, 2002, for each day that passed from the hearing until the Board fully answered Interrogatory 11. If within 30 days of the hearing, the Board had not fully answered

Interrogatory 11 covering Requests for Admission, then certain facts would be deemed established.

The hearing on the cross-motions for summary judgment was continued from February 19 to February 27, 2002. At the continued hearing, the court granted summary judgment in favor of Cool Fuel, denied the Board's cross-motion, and disallowed the Board's claim for unpaid fuel use taxes.

The actual sanctions order was not entered until April 8, 2002. The summary judgment order was not entered until April 9.

The sanctions order mirrored the initial ruling and added a new provision that the discovery sanctions would be treated as moot "as far as duty to pay [money] sanctions and duty to make further responses," unless and until the summary judgment in favor of Cool Fuel was reversed on appeal. In other words, it was a "springing" sanctions order that would lay dormant so long as the summary judgment remained in effect.

The Board timely appealed the bankruptcy court's summary judgment, sought leave to appeal the sanctions order, and elected to have the appeals resolved by the district court.

The district court affirmed the bankruptcy court's judgment on February 11, 2003, and held that the Board's motion for leave to appeal the interlocutory discovery order was moot.

A month later, the Board filed two separate notices of appeal to the Ninth Circuit, one addressed to the summary judgment and the other to the sanctions order.

The Ninth Circuit granted Cool Fuel's motion to dismiss the appeal of the sanctions order for lack of jurisdiction but stated in its order that the dismissal was without prejudice to

challenging the bankruptcy court's discovery order in the context of the appeal from the final judgment (9th Cir. No. 03-55473).

Thereafter, the Board filed a motion in the remaining appeal to allow it to file a brief on "Discovery Issues within the Context of This Appeal and to Utilize Excerpts of Record on Appeal in Companion Case and Declaration of Joseph M. O'Heron." Cool Fuel opposed the motion. The Ninth Circuit granted the Board's motion for leave to file a supplemental opening brief. Accordingly, the Board and Cool Fuel briefed the issues surrounding the sanctions order.

The Ninth Circuit ultimately reversed the summary judgment in favor of Cool Fuel in November 2004 and remanded with instructions to enter judgment in favor of the Board on its cross motion for summary judgment. 117 Fed. App'x 514. In a footnote, the Ninth Circuit stated: "In its brief and at oral argument, Cool Fuel indicated that there were no material factual issues in dispute." Although there was a discussion at oral argument regarding the discovery dispute and the sanctions order, the Ninth Circuit's memorandum did not mention the sanctions order.[1]

---

[1]The pertinent part of the colloquy regarding discovery and the sanctions order during the Ninth Circuit oral argument was:

> THE COURT: Suppose we find there is a fact question about whether the fuel was embezzled, who sold it, who didn't sell it. We send it back for trial to the Bankruptcy Judge. There's an outstanding order requiring you to answer some interrogatories and produce some documents, right?
>
> MR. O'HERON: Privileged documents, yes, which is the –
>
> THE COURT: Well, you say they're privileged, the judge said they're not. But, what about interrogatories, what excuse do you have for not answering the interrogatories?
>
> MR. O'HERON: It's not interrogatories, it's the

(continued...)

Cool Fuel filed a Petition for Rehearing, wherein it argued that the court of appeals judgment directing entry of summary judgment for the Board was inconsistent with the sanctions order the bankruptcy court imposed. The Ninth Circuit denied rehearing in a one-sentence order issued on December 17, 2004.

On remand to the bankruptcy court, the case was reassigned to Judge Barry Russell in light of the expiration of the term of the prior judge. Judge Russell conducted two hearings on the matter. At the first hearing, on March 15, 2005, Cool Fuel argued that the court should defer entry of judgment in favor of the Board pending enforcement of the sanctions against the Board pursuant to the sanctions order. Despite Cool Fuel's argument, the bankruptcy court entered judgment in favor of the Board in accordance with the mandate. The court left it to Cool Fuel to decide how it wanted to deal with the sanctions matter, noting that it appeared that at most $16,000 was implicated.

The bankruptcy court's judgment vacated the entry of summary judgment in favor of Cool Fuel and entered summary judgment in favor of the Board on its allowed priority secured tax claim against Cool Fuel in the amount of $2,606,570.40, plus simple

---

[1](...continued)
request for admissions.

THE COURT: Well, wasn't there – wasn't there an interrogatory 11?

MR. O'HERON: Interrogatory 11 is the one where a request for admission was turned into 235 interrogatories.

THE COURT: And Judge March said, "Fine. Answer it." Isn't that within her discretion to do so?

...

THE COURT: Well, it is here [the sanctions order] now because of the summary judgments.

Mr. O'HERON: That is correct.

9th Cir. Tr. at 11-15.

interest at 8.5 percent from the effective date of the confirmed Amended Plan of Reorganization.

Cool Fuel appealed the court's judgment to the BAP (9th Cir. BAP No. CC-05-1121) on March 25, 2005. The sole issue was "[w]hether the Bankruptcy court failed to consider and enforce, before entry of the judgment, discovery sanctions imposed against the State Board of Equalization."

During the pendency of the BAP appeal, Cool Fuel filed a motion in the bankruptcy court under Federal Rule of Civil Procedure 60(b) seeking to have the judgment revised. The BAP remanded the appeal to the bankruptcy court to allow the court to consider and resolve the Rule 60(b) motion.

In its Rule 60(b) motion, Cool Fuel contended that the portion of the sanctions order that deemed particular facts to be established after 30 days of noncompliance disentitled the Board to the judgment that the court of appeals had mandated. Specifically, Cool Fuel's motion raised the following arguments: (1) the Board's willful disobedience of the discovery order constituted "misconduct" that entitled it to relief under Rule 60(b)(3); (2) the sanctions constitute "new evidence" within the meaning of Rule 60(b)(2) and; (3) relief from judgment is proper under Rule 60(b)'s catch-all provision.

The court held a hearing on Cool Fuel's motion for relief from judgment on July 6, 2005. Throughout the hearing, the court made clear that it believed the Ninth Circuit considered the sanctions issue on appeal. Because the Ninth Circuit held that there were no material issues of fact, the court reasoned that the Ninth Circuit was basically saying that the discovery was

irrelevant. "If there was any possibility that this discovery would have come forward with relevant evidence to the contrary, the circuit would never have granted summary judgment, period."

The bankruptcy court concluded that Rule 60 did not apply. Inquiring into the court's finding, Cool Fuel stated that it understood the court to be saying that it was not deciding or reaching the question of whether any of the Rule 60(b) thresholds were met. The court disagreed and clarified that it was saying that Rule 60(b) did not apply because there was nothing new and nothing extraordinary. When Cool Fuel made further inquiry, the court responded: "Well, I'll just say what I've said and any higher court will have to decide."

On July 25, 2005, the court denied Cool Fuel's motion for relief from judgment pursuant to Rule 60(b). The order provided:

> After considering the moving and opposing papers, the records and files in this proceeding and having heard the oral arguments and having denied the Motion for the reasons set forth on the record, including there being no new evidence, no extraordinary circumstances, and nothing else having been presented in Cool Fuel, Inc.'s Motion which meets the requirements for relief under Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(b), good cause appearing: IT IS HEREBY ORDERED that Cool Fuel, Inc.'s Motion for Relief from Judgment pursuant to Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(b), is denied.

Order, 7/25/05.

On August 3, 2005, Cool Fuel filed the appeal that is the second of the two present appeals (9th Cir. BAP No. 05-1325).

We required joint briefing of the appeals.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334. We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUES

(1) Whether the law of the case doctrine precluded the particular relief requested in Cool Fuel's Rule 60(b) motion.

(2) Whether the court abused its discretion in denying the Rule 60(b) motion.[2]

STANDARDS OF REVIEW

Application of law of the case doctrine is an issue of law reviewed de novo. Am. Express Travel Related Serv. Co. v. Fraschilla (In re Fraschilla), 235 B.R. 449, 453 (9th Cir. BAP 1999); AT&T Universal Card Servs. v. Black (In re Black), 222 B.R. 896 (9th Cir. BAP 1998). Decisions regarding relief pursuant to Federal Rule of Civil Procedure 60 are reviewed for abuse of discretion. Morris v. Peralta (In re Peralta), 317 B.R. 381, 384 (9th Cir. BAP 2004).

---

[2]Cool Fuel designated three issues on appeal, one of which we restate and one of which was waived by silence in the briefs:

(1) Did the Ninth Circuit's mandate reversing the grant of summary judgment for Cool Fuel and directing the Bankruptcy Court to enter judgment for the Board preclude Cool Fuel's Rule 60(b) motion for relief from judgment?

(2) Is relief from judgment warranted under Rule 60(b) based on the Board's misconduct and resulting evidentiary sanctions that only became effective upon reversal of the judgment for Cool Fuel?

(3) Whether the bankruptcy court improperly failed to consider and enforce, before entry of judgment, discovery sanctions imposed against the State Board of Equalization?

DISCUSSION

Cool Fuel begins its argument by setting up a strawman with the assertion that the bankruptcy court held that the mandate from the court of appeals precluded consideration of the Rule 60(b) motion. However, a careful reading of the transcript, as well as of the court's judgment, reveals that the court accepted the proposition that it could, in principle, entertain a Rule 60(b) motion but that this particular Rule 60(b) motion did not present an adequate case for relief because: (1) the underlying discovery sanction order was known to, and necessarily taken into account by, the Ninth Circuit when it elected to direct entry of summary judgment in favor of the Board in a manner that implicated the law of the case doctrine; and (2) even if not constrained by the prior ruling of the court of appeals, there was nothing new that would have warranted relief. In practical effect, then, the bankruptcy court did entertain the motion.

I

Under the relevant aspect of the law of the case doctrine, a decision by an appellate court on an issue must be followed by the trial court in all subsequent proceedings in the same case. Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 281 (9th Cir. 1996); Herrington v. County of Sonoma, 12 F.3d 901, 904 (9th Cir. 1993); Maag v. Wessler, 993 F.2d 718, 720 n.2 (9th Cir. 1993); Fraschilla, 235 B.R. at 454. The law of the case doctrine applies to issues that have actually been decided either explicitly or by necessary implication. 18 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 134.20 (3d ed. 1988).

Here, the sanctions order and the discovery issues therein were decided by the Ninth Circuit by necessary implication. The Circuit concluded that there were no genuine issues of material fact and remanded with directions to enter summary judgment in favor of the Board. The Circuit necessarily concluded that the outcome of the discovery dispute – the existence of which had been addressed in the briefs, during oral argument, and in the petition for rehearing — could not effect the entitlement of the Board to summary judgment.

Moreover, it would have been inconsistent with the Circuit's mandate for the bankruptcy court to enter summary judgment in favor of the Board and also to sanction the Board because of an old discovery dispute that had been briefed to the Circuit.[3] Such a sanction would also intermeddle with the mandate, rather than to settle so much as had been remanded. United States v. Kellington, 217 F.3d 1084, 1093 (9th Cir. 2000), citing In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (when acting

[3]Cool Fuel argues that although the parties filed separate briefs in the Circuit regarding the sanctions order, those briefs focused on whether the discovery orders underlying the sanctions order were correct. Although now urging that "neither party addressed the effect of the facts established by the Sanctions Order on the propriety of summary judgment in its briefing to the Ninth Circuit," it concedes that it addressed the facts established by the sanctions order in its Petition for Rehearing, the denial of which it says we should ignore as lacking legal significance because the Circuit did not explain itself.

A comparison of the facts that were nominally deemed established by the sanctions order with the analysis in the Ninth Circuit decision, suggests that those facts were not material to the basis on which the Circuit decided that the Board was entitled to summary judgment. From this it follows that even if Judge Russell had deemed those facts to have been established, it was not an adequate basis for relief.

under an appellate court's mandate, an inferior court "cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided upon appeal; or intermeddle with it, further than to settle so much as has been remanded.").

Needless to say, it would also have been consistent with the Circuit's mandate for the bankruptcy court to have vacated the sanctions order. Commercial Paper Holders v. R.W. Hine, 752 F.2d 1334, 1337 (9th Cir. 1984) (when a case has been decided by an appellate court and remanded, the court to which it is remanded must act in accordance with the mandate and such law of the case as was established by the appellate court).

Cool Fuel argues that the Circuit's finding that there were no genuine issues of material fact should not be read as a concession by Cool Fuel or a finding by the Circuit that there are no factual disputes "in the universe" or that the facts established by the Sanctions order are irrelevant. Cool Fuel contends that, while there were no material factual disputes on the summary judgment record presented to the bankruptcy court, there were factual disputes concerning, among other things, the identity of the entity who purchased the fuel from Cool Fuel.

A key problem with Cool Fuel's argument is that it treats the summary judgment motion granted in favor of the Board as if it had been partial summary judgment as to a particular issue. To the contrary, the entry of judgment pursuant to the grant of summary judgment in favor of the Board was a final adjudication of the entire action that disposed of all the claims between the parties. 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal

PRACTICE & PROCEDURE § 2712 (3d ed. 1998). Final adjudication through summary judgment is what Cool Fuel sought. As it stated in its last sentence of its summary motion: "Summary judgment should be granted now to end this eight-year ordeal... ."

It follows that the 2004 Ninth Circuit decision established law of the case in a manner fatal to the sanctions order.

II

The next issue is whether the bankruptcy court abused its discretion in denying Rule 60(b) relief to any extent that the motion stretched beyond the confines of the law of the case. Contrary to Cool Fuel's contention, the court did not rule that the Rule 60(b) motion was precluded by the Ninth Circuit mandate. Rather, based upon our reading of the record, we understand the bankruptcy court's ruling to have been that, while it could consider a Rule 60(b) motion in principle, Cool Fuel's Rule 60(b) motion in this instance contained nothing that warranted relief.

Cool Fuel sought relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(2), (3), and (6):

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ... (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. Pro. 60(b), incorporated by Fed. R. Bankr. P. 9024.

In summarizing the basis for its ruling, the court explained that it was denying the motion: "there being no new evidence, no

extraordinary circumstances, and nothing else having been presented in Cool Fuel, Inc.'s motion which meets the requirements for relief under Federal Rule of Bankruptcy Procedure 9024 and Federal Rule of Civil Procedure 60(b)." This is not a refusal to entertain the possibility of Rule 60(b) relief; rather, it is a refusal to grant relief based on the record presented in connection with the Rule 60(b) motion.

A. Rule 60(b)(2)

To obtain relief under Rule 60(b)(2), one must show that the "new" evidence: (1) existed at the time of the trial; (2) could not have been discovered through due diligence; and (3) was "of such magnitude that production of it earlier would have been likely to change the disposition of the case." Jones v. Aero/Chem Corp., 921 F.2d 875, 878 (9th Cir. 1990).

Cool Fuel argues that the undisputed facts established by the sanctions order constitute "new evidence" necessitating relief from judgment under Rule 60(b)(2). It contends that the Ninth Circuit would have reached a different result if it had focused on the facts that the then-contingent sanctions order deemed to be established.

The biggest obstacle to Cool Fuel's argument is that the sanctions dispute was well-known to the Circuit, by virtue of the separate briefing and discussion during oral argument. Nevertheless, the court of appeals, operating with knowledge of the discovery issue, concluded that there were no genuine issues of material fact preventing summary judgment in favor of the Board and then denied rehearing.

There are other conceptual difficulties. The sanctions order was contingent upon the fulfillment of a condition subsequent that presumed that discovery remained open and was not preempted by the mandate to enter summary judgment. It is counterintuitive to regard discovery as remaining open in the face of an appellate mandate to enter summary judgment.

We also think that Cool Fuel's argument regarding allegedly new facts that warrant a contrary result proves too much. By way of example, Cool Fuel contends that it is now deemed admitted per the "springing" sanctions order that Hill, acting with others, purchased the fuel from Cool Fuel. It contends that had the "purchase" of the fuel been an undisputed fact before the Circuit, the result would have been different.[4]

---

[4]More specifically, the sanctions order provided that, if within 30 days of the hearing, the Board had not fully answered Interrogatory 11, then any Request for Admission for which Interrogatory 11 was not fully answered would be deemed admitted. That interrogatory (to which the Board objected as burdensome and as offending the 25 interrogatory limit in Federal Rule of Civil Procedure 33(a)) required statement of all facts on which the Board relied to support any response denying an admission in whole or in part. Cool Fuel's Request for Admission No. 44 provided that Bruce Hill and others purchased from Cool Fuel the fuel on which the Board's claim was based. The Board denied this, but admitted that Hill and others were involved in the sale of fuel.

Cool Fuel urges that the condition subsequent occurred after remand and was not preempted by the mandate directing entry of summary judgment in the Board's favor. Proceeding on the theory that the Board did not, after remand, fully answer Interrogatory 11 and Request for Admission No. 44 and that the latter is now deemed admitted pursuant to the sanctions order, Cool Fuel contends that it is now undisputed that Hill, acting with others, purchased the fuel from Cool Fuel.

According to Cool Fuel, this undisputed fact establishes that Hill was not acting within the scope of his employment and
(continued...)

The word "purchase" has potentially ambiguous connotations of fact and of legal conclusion. A "purchase" in the dictionary sense is neither necessarily a "purchase" in the California tax law sense that matters here, nor necessarily incompatible with the legal concept of agency.[5]

It is not plausible to regard facts supposedly established by the springing sanctions order as "newly discovered" in light of the entry of the sanctions order before the entry of the summary judgment that was reversed by the Ninth Circuit. The "springing" sanctions order was brought to the attention of the court of appeals. Hence, there is not "newly discovered" evidence worthy of Rule 60(b) relief.

(...continued)
instead was acting as an "independent purchaser" of fuel. Cool Fuel contends that this was not an undisputed fact before the Circuit. It points out that the Circuit rejected the bankruptcy court's conclusion that the Board's responses to Requests for Admission established that Cool Fuel did not sell fuel to retailers, holding that those admissions at most established that Hill deceived parties at both ends of the fuel transactions as to the identity of the buyers and seller involved. Bd. of Equalization, 117 Fed. App'x at 515.

[5]Moreover, assuming that certain facts (including "purchase") are now deemed admitted pursuant to the springing sanctions order, those facts do not make a difference and do not constitute "new evidence" requiring relief from judgment. The significance of Hill purchasing fuel from Cool Fuel is minimized by the Circuit's decision which states that "Hill paid Cool Fuel for the diesel fuel." The Circuit knew he purchased fuel from Cool Fuel and did not decide that it meant he was acting outside his employment merely as an "independent purchaser."

The essential point is still that Cool Fuel is liable for the transactions of its agent and that in this case Cool Fuel is subject to liability because it put Hill, its agent, in a position that enabled Hill to commit fraud upon third persons. Bd. of Equalization, 117 Fed. App'x at 515. We likewise reject Cool Fuel's other arguments that there are other undisputed facts that somehow make a difference.

It follows that the bankruptcy court did not err by concluding that the facts supposedly established by the springing sanctions order did not constitute "new evidence" of such magnitude that its earlier production would have been likely to have changed the outcome.

B. Rule 60(b)(3)

Under Rule 60(b)(3), a party must establish: (1) by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct; and (2) that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense. Jones, 921 F.2d at 878.

Cool Fuel argues that the bankruptcy court abused its discretion by failing to consider whether the Board's repeated failure to respond to discovery prevented Cool Fuel from fully or fairly presenting its case. We disagree.

Simply put, Cool Fuel's ability to obtain summary judgment and thereafter affirmance by the district court demonstrates that Cool Fuel was not prevented from fully and fairly presenting its case. That the court of appeals was persuaded to reach the contrary result does not change that equation. Moreover, as law of the case, the Board's alleged misconduct was not a level of misconduct that disentitled the Board to summary judgment.

C. Rule 60(b)(6)

The Rule 60(b)(6) catch-all provision is used sparingly as an equitable remedy to prevent manifest injustice and should be utilized only where extraordinary circumstances prevented a party

from taking timely action to prevent or correct an erroneous judgment. United States v. Washington, 394 F.3d 1152, 1157 (9th Cir. 2005). As such, under Rule 60(b)(6), a party seeking to reopen a case must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion. Id.

Cool Fuel's argues for Rule 60(b)(6) relief by a plea to fairness:

> It would be fundamentally unfair to allow the Board to benefit from a judgment that, as demonstrated above, could not have been obtained absent the Board's refusal to comply with the discovery rules and with the express orders of the Bankruptcy Court. Unless Cool Fuel is relieved from the judgment, the Board will have successfully succeeded in withholding critical information, willfully violating two court orders, and avoiding sanctions for its disobedience of those orders.

We are persuaded that the situation does not present extraordinary circumstances within the province of Rule 60(b)(6).

The reality is that a strategy of cross motions for summary judgment brings with it the unextraordinary risk that a court will accept at face value the cross-movants' mutual assertions that there are no genuine issues of material fact and will not put a particularly fine point on its analysis. When that occurs, a summary judgment movant may be hoist on its own petard and find it difficult to persuade a court to grant relief on a theory of Rule 60(b)(6) extraordinary circumstances where the unhappy result was a known risk of a chosen procedural strategy.

The bankruptcy court was not persuaded that extraordinary circumstances deserving of relief were present. We perceive no error in that conclusion.

In sum, the bankruptcy court did not abuse its discretion by refusing to act under any of the Rule 60(b) theories advanced.

CONCLUSION

For the foregoing reasons, we AFFIRM.