

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NOT FOR PUBLICATION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**

6	In re:)	BAP Nos.	CC-05-1121-KPaB
)		CC-05-1325-KPaB
7	COOL FUEL, INC.,)		
)	Bk. No.	LA-96-46235
8	Debtor.)		
	_____)		
9)		
10	COOL FUEL, INC.,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM*	
)		
13	CALIFORNIA STATE BOARD OF)		
	EQUALIZATION,)		
14)		
	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.

1 licensed wholesaler, in tax-free transactions, but
2 instead sold the fuel under the name of High Desert, a
3 shell corporation operated by himself and others, to
4 service station retailers. It is undisputed that Hill
5 paid Cool Fuel for the cost of the fuel and its
6 profits, but kept the taxes instead of remitting them
7 to the Board.

8 Following an investigation by a Board auditor, the
9 Board made an initial deficiency determination that
10 Cool Fuel owed \$2,514,284.22 in taxes and interest.
11 Cool Fuel asked the Board for a redetermination, and
12 then petitioned for Chapter 11 bankruptcy protection on
13 November 1, 1996. On January 23, 1997, the Board filed
14 a proof of claim for \$2,606,570.40 in bankruptcy court
15 for disputed outstanding taxes and interest. Litigation
16 of the matter was treated as an adversary proceeding,
17 and after extensive discovery, the parties filed
18 cross-motions for summary judgment.

19 Bd. of Equalization v. Cool Fuel, Inc. (In re Cool Fuel, Inc.),
20 117 Fed. App'x 514 (9th Cir. 2004).

21 The procedural context of that second appeal is pertinent to
22 the instant appeals. On remand following the 2000 decision, the
23 bankruptcy court held a hearing on the cross-motions for summary
24 judgment on February 19, 2002. That same day the court also held
25 a hearing on appellant Cool Fuel's motion for sanctions against
26 the Board. The court granted the sanctions motion and ruled,
27 first, that the sanctions against the Board for its failure to
28 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

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

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

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

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

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

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

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

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

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

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

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

20 _____
21 ¹The pertinent part of the colloquy regarding discovery and
22 the sanctions order during the Ninth Circuit oral argument was:

23 THE COURT: Suppose we find there is a fact
24 question about whether the fuel was embezzled, who sold
25 it, who didn't sell it. We send it back for trial to
26 the Bankruptcy Judge. There's an outstanding order
27 requiring you to answer some interrogatories and
28 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...)

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

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

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

21
22 ¹(...continued)
request for admissions.

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

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

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

26 ...

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

28 Mr. O'HERON: That is correct.

9th Cir. Tr. at 11-15.

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

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

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

13 In its Rule 60(b) motion, Cool Fuel contended that the
14 portion of the sanctions order that deemed particular facts to be
15 established after 30 days of noncompliance disentitled the Board
16 to the judgment that the court of appeals had mandated.

17 Specifically, Cool Fuel's motion raised the following arguments:

18 (1) the Board's willful disobedience of the discovery order
19 constituted "misconduct" that entitled it to relief under Rule
20 60(b)(3); (2) the sanctions constitute "new evidence" within the
21 meaning of Rule 60(b)(2) and; (3) relief from judgment is proper
22 under Rule 60(b)'s catch-all provision.

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

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

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

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

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

28 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.

1 JURISDICTION

2 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334.
3 We have jurisdiction under 28 U.S.C. § 158(a)(1).
4

5 ISSUES

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

8 (2) Whether the court abused its discretion in denying the
9 Rule 60(b) motion.²
10

11 STANDARDS OF REVIEW

12 Application of law of the case doctrine is an issue of law
13 reviewed de novo. Am. Express Travel Related Serv. Co. v.
14 Fraschilla (In re Fraschilla), 235 B.R. 449, 453 (9th Cir. BAP
15 1999); AT&T Universal Card Servs. v. Black (In re Black), 222
16 B.R. 896 (9th Cir. BAP 1998). Decisions regarding relief
17 pursuant to Federal Rule of Civil Procedure 60 are reviewed for
18 abuse of discretion. Morris v. Peralta (In re Peralta), 317 B.R.
19 381, 384 (9th Cir. BAP 2004).
20

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

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

26 (2) Is relief from judgment warranted under Rule 60(b)
27 based on the Board's misconduct and resulting evidentiary
28 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?

1 DISCUSSION

2 Cool Fuel begins its argument by setting up a strawman with
3 the assertion that the bankruptcy court held that the mandate
4 from the court of appeals precluded consideration of the Rule
5 60(b) motion. However, a careful reading of the transcript, as
6 well as of the court's judgment, reveals that the court accepted
7 the proposition that it could, in principle, entertain a Rule
8 60(b) motion but that this particular Rule 60(b) motion did not
9 present an adequate case for relief because: (1) the underlying
10 discovery sanction order was known to, and necessarily taken into
11 account by, the Ninth Circuit when it elected to direct entry of
12 summary judgment in favor of the Board in a manner that
13 implicated the law of the case doctrine; and (2) even if not
14 constrained by the prior ruling of the court of appeals, there
15 was nothing new that would have warranted relief. In practical
16 effect, then, the bankruptcy court did entertain the motion.

17
18 I

19 Under the relevant aspect of the law of the case doctrine, a
20 decision by an appellate court on an issue must be followed by
21 the trial court in all subsequent proceedings in the same case.
22 Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.),
23 77 F.3d 278, 281 (9th Cir. 1996); Herrington v. County of
24 Sonoma, 12 F.3d 901, 904 (9th Cir. 1993); Maag v. Wessler, 993
25 F.2d 718, 720 n.2 (9th Cir. 1993); Fraschilla, 235 B.R. at 454.
26 The law of the case doctrine applies to issues that have actually
27 been decided either explicitly or by necessary implication. 18
28 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 134.20 (3d ed. 1988).

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

10 Moreover, it would have been inconsistent with the Circuit's
11 mandate for the bankruptcy court to enter summary judgment in
12 favor of the Board and also to sanction the Board because of an
13 old discovery dispute that had been briefed to the Circuit.³
14 Such a sanction would also intermeddle with the mandate, rather
15 than to settle so much as had been remanded. United States v.
16 Kellington, 217 F.3d 1084, 1093 (9th Cir. 2000), citing In re
17 Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (when acting
18

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

25 A comparison of the facts that were nominally deemed
26 established by the sanctions order with the analysis in the Ninth
27 Circuit decision, suggests that those facts were not material to
28 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.

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

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

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

22 A key problem with Cool Fuel's argument is that it treats
23 the summary judgment motion granted in favor of the Board as if
24 it had been partial summary judgment as to a particular issue.
25 To the contrary, the entry of judgment pursuant to the grant of
26 summary judgment in favor of the Board was a final adjudication
27 of the entire action that disposed of all the claims between the
28 parties. 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL

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

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

7
8 II

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

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

20 (b) **Mistakes; Inadvertence; Excusable Neglect; Newly**
21 **Discovered Evidence; Fraud, Etc.** On motion and upon such
22 terms as are just, the court may relieve a party or a
23 party's legal representative from a final judgment, order,
24 or proceeding for the following reasons: ... (2) newly
25 discovered evidence which by due diligence could not have
26 been discovered in time to move for a new trial under Rule
27 59(b); (3) fraud (whether heretofore denominated intrinsic
28 or extrinsic), misrepresentation, or other misconduct of an
adverse party; ... (6) any other reason justifying relief
from the operation of the judgment.

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

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

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

8
9 A. Rule 60(b)(2)

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

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

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

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

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

14
15 ⁴More specifically, the sanctions order provided that, if
16 within 30 days of the hearing, the Board had not fully answered
17 Interrogatory 11, then any Request for Admission for which
18 Interrogatory 11 was not fully answered would be deemed admitted.
19 That interrogatory (to which the Board objected as burdensome and
20 as offending the 25 interrogatory limit in Federal Rule of Civil
21 Procedure 33(a)) required statement of all facts on which the
22 Board relied to support any response denying an admission in
23 whole or in part. Cool Fuel's Request for Admission No. 44
24 provided that Bruce Hill and others purchased from Cool Fuel the
25 fuel on which the Board's claim was based. The Board denied
26 this, but admitted that Hill and others were involved in the sale
27 of fuel.

28 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...)

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

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

13
14 (...continued)
15 instead was acting as an "independent purchaser" of fuel. Cool
16 Fuel contends that this was not an undisputed fact before the
17 Circuit. It points out that the Circuit rejected the bankruptcy
18 court's conclusion that the Board's responses to Requests for
19 Admission established that Cool Fuel did not sell fuel to
20 retailers, holding that those admissions at most established that
21 Hill deceived parties at both ends of the fuel transactions as to
22 the identity of the buyers and seller involved. Bd. of
23 Equalization, 117 Fed. App'x at 515.

24 ⁵Moreover, assuming that certain facts (including
25 "purchase") are now deemed admitted pursuant to the springing
26 sanctions order, those facts do not make a difference and do not
27 constitute "new evidence" requiring relief from judgment. The
28 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.

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

6
7 B. Rule 60(b)(3)

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

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

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

24
25 C. Rule 60(b)(6)

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

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

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

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

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

21 The reality is that a strategy of cross motions for summary
22 judgment brings with it the unextraordinary risk that a court
23 will accept at face value the cross-movants' mutual assertions
24 that there are no genuine issues of material fact and will not
25 put a particularly fine point on its analysis. When that occurs,
26 a summary judgment movant may be hoist on its own petard and find
27 it difficult to persuade a court to grant relief on a theory of
28 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.

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

3
4 CONCLUSION

5 For the foregoing reasons, we AFFIRM.
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