

FEB 25 2016

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NV-15-1096-JuKiD
)
3.78 IRISH ACRES, LLC,) Bk. No. 15-10410-ABL
)
Debtor.)

3.78 IRISH ACRES, LLC,
Appellant,

v.

MEMORANDUM*

INLAND EMPIRE SERVICING)
COMPANY; YVETTE WEINSTEIN,)
Chapter 7 Trustee; SWEENEY)
GOURMET COFFEE, INC.; MARA)
ENTERPRISES; FIRST AMERICAN)
TITLE INSURANCE COMPANY; JAMES)
VAHEY, Trustee; KOLSAR &)
LEATHAM,)
Appellees.)

Argued and Submitted on February 18, 2016
at Las Vegas, Nevada

Filed - February 25, 2016

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

Honorable August B. Landis, Bankruptcy Judge, Presiding

Appearances: Steven J. Mack of Black & Lobello argued for
appellant 3.78 Irish Acres, LLC; Gary C. Milne of
Gerrard Cox & Larsen argued for appellee Inland
Empire Service Company.

* 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 Before: JURY, KIRSCHER, and DUNN, Bankruptcy Judges.
2

3 James W. Vahey (Vahey), as the sole trustee of the James W.
4 Vahey Revocable Family Trust (Vahey Trust), filed a chapter 7¹
5 case on behalf of 3.78 Irish Acres, LLC (Irish Acres) shortly
6 after the bankruptcy court dismissed the first case that he
7 filed on behalf of Irish Acres. Appellee, Inland Empire Service
8 Corporation (Inland), filed a motion to dismiss (MTD), asserting
9 that the Vahey Trust was precluded from filing the second
10 petition based on findings made by the bankruptcy court in
11 connection with its dismissal order in the first case.

12 In the first case, at issue was whether Vahey had authority
13 to file the bankruptcy case as a member or manager of Irish
14 Acres, or as the sole trustee of the Vahey Trust, which was a
15 member. Although Vahey made an offer of proof at a hearing on a
16 MTD in the first case that the Vahey Trust was a majority member
17 of Irish Acres with authority to file the bankruptcy petition,
18 the court denied his request to file a sur-reply and offer
19 evidence regarding that interest. In its later oral ruling, the
20 bankruptcy court found that, based on the record before it, the
21 Vahey Trust held a 50% membership interest in Irish Acres.
22 Therefore, because the Vahey Trust was not a majority member,
23 under Nevada limited liability law it did not have the authority
24 to file the bankruptcy petition without the consent of all the
25

26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 members. Vahey did not appeal that ruling and the dismissal
2 order became final.

3 In the second case, the bankruptcy court held that the
4 Vahey Trust was precluded from filing the case under the
5 doctrines of claim and issue preclusion and also found that the
6 case was filed in bad faith. The court entered an order
7 dismissing the case and this appeal followed. For the reasons
8 discussed below, we AFFIRM.

9 I. FACTS

10 A. Prepetition Events

11 Vahey, a medical doctor, associated with Mary Musso (Musso)
12 in making his real estate investments. According to Vahey,
13 under the investment plan, Musso identified parcels of vacant or
14 improved land, identified buyers, and then purchased the land to
15 resell it to the identified buyers at a premium over the
16 purchase price. Under this arrangement, Musso and Vahey were
17 required to put up money to purchase the properties and then
18 split the profits on the projects evenly. Vahey declared that
19 he advanced funds to Musso of approximately \$1,200,000 since
20 September 2007. Vahey described himself as a "passive" investor
21 with Musso taking care of the business, closings, and reviewing
22 deeds of trust. One of the parcels involved in the investment
23 plan was the 3.78 acre parcel of vacant land which was purchased
24 by Irish Acres.

25 1. Organization of Irish Acres

26 Musso formed Irish Acres as a limited liability company for
27 the purpose of purchasing the 3.78 acre parcel of vacant land.
28 On July 20, 2009, Irish Acres filed its Articles of Organization

1 with the Nevada Secretary of State. On the same day, Irish
2 Acres' Initial List of Manager or Managing Members and
3 Registered Agent was also filed with the Secretary of State,
4 naming Vahey and Mace J. Yampolsky² as Managers.

5 An operating agreement (OA) governs Irish Acres. The
6 agreement was executed by Vahey on behalf of the Vahey Trust and
7 by Musso on behalf of Sweeney's Gourmet Coffee (Sweeney's),³ the
8 two Members of Irish Acres as identified in OA § 2.3. Vahey and
9 Yampolsky were identified as Managers in OA § 5.2.

10 Other relevant sections of the OA include:

11 **3. Capital**

12 3.1 Initial Capital Contributions. The initial
13 capital contribution of the Member will be made by the
14 Member transferring to the Company the assets or cash
described on the attached Exhibit A.

15 3.2 Additional Contributions. Except as otherwise
16 provided in the Act, the Member is not required to
17 contribute additional capital to the Company. But the
Member may make additional contributions to the
company from time to time as the Member wishes.

18 **5. Administration of Company Business**

19 5.5 Authority. . . [E]ach Manager is an agent of the
20 Company and has authority to bind the Company in the
21 ordinary course of the Company's business. In
22 addition, the Manager has authority to engage in any
23 of the following acts.

24 5.5.1 To sell, lease, exchange, mortgage,
25 pledge or otherwise transfer or dispose of
26 all or substantially of the property or
27 assets of the Company.

28 5.7 Powers of Members. The Member, in his capacity

26 ² Yampolsky was evidently the attorney who assisted Musso in
forming Irish Acres.

27 ³ Sweeney's was an active corporation at the time of Irish
28 Acres' formation. Musso was its sole owner.

1 as a member of the Company, is authorized to act on
2 behalf of the Company.

3 **7. Dissolution and Winding up**

4 7.1 The Company will dissolve on the earlier of the
5 following events: (a) approval of dissolution by the
6 Member or (b) such time as the Company has no members.
Neither the dissolution nor bankruptcy of the Member
nor the assignment of the Member's entire membership
interest will dissolve the Company.

7 7.2 Following the dissolution of the Company, the
8 affairs of the Company must be wound up by the
9 Managers. If the affairs of the Company are to be
10 wound up, a full account must be taken of the assets
11 and liabilities of the Company, and the assets of the
12 Company must then be promptly liquidated. The
13 proceeds must first be paid to creditors of the
14 Company in satisfaction of all liabilities and
obligations of the Company, including, to the extent
permitted by law, liabilities and obligations owed to
the Member as a creditor. Any remaining proceeds may
then be distributed to the Member. Property of the
Company may be distributed in kind in the process of
winding up and liquidation with the consent of the
Member.

15 Exhibit A to the OA shows that each of the two members, the
16 Vahey Trust and Sweeney's, received a 50% membership interest in
17 Irish Acres in exchange for their capital contributions. It
18 also reflected that the purchase price for the 3.78 acre vacant
19 parcel was \$4,950,000, and showed that money deposits Vahey had
20 made for other investment properties in the amount of \$1,200,000
21 were transferred to the escrow through which Irish Acres
22 purchased the property.

23 **2. Deed of Trust Given to Sweeney's**

24 Yampolsky, acting in his capacity as a manager of Irish
25 Acres, executed a note (Note) secured by a deed of trust against
26 the 3.78 acre parcel, dated September 8, 2009, in the amount of
27 \$550,000 in favor of Sweeney's (Note). His signature on the
28 short form deed of trust and assignment of rents (Deed of Trust)

1 was notarized on October 6, 2009.⁴

2 Over a year later, Yampolsky resigned as a manager of Irish
3 Acres by executing a Certificate of Resignation of Officer,
4 Director, Manager, Member, General Partner, Trustee or
5 Subscriber, filed on October 15, 2010 with the Nevada Secretary
6 of State. Vahey was then the only manager of Irish Acres.

7 **3. 2011 Lawsuit**

8 On October 28, 2011, Vahey and Other Hand, LLC⁵ filed a
9 lawsuit in the Nevada state court (Case No. A-11-657496-C)
10 against various defendants, including Musso and Yampolsky,
11 alleging 19 causes of action (2011 Lawsuit). It appears that
12 the lawsuit related to alleged fraud committed by the defendants
13 in connection with Vahey's real estate investments, including
14 Irish Acres.

15 By reason of the 2011 Lawsuit and other litigation
16 involving Musso and/or her entities, Musso and Sweeney's agreed
17 to reimburse First American Title Insurance Company (First
18 American) for attorneys' fees and costs which it had incurred
19 due to the litigation. To satisfy some of this debt, Sweeney's
20 assigned the Note and Deed of Trust executed by Yampolsky as
21 manager for Irish Acres to First American. This assignment was
22 recorded on February 26, 2014. Subsequently, the Deed of Trust
23 was assigned to Inland. This assignment was recorded on
24 March 28, 2014.

25 _____
26 ⁴ The record indicates that Vahey questioned the validity of
27 this Note and Deed of Trust.

28 ⁵ The record does not show the relationship, if any, between
Vahey and Other Hand, LLC.

1 **4. Trustee's Sale**

2 On May 13, 2014, Gerrard Cox Larsen, acting as Substituted
3 Trustee under the Deed of Trust, sent a letter to Irish Acres,
4 c/o James Vahey, M.D., notifying him of Irish Acres' default
5 under the terms of the Note and Deed of Trust. The letter was
6 followed by a Notice of Default and Election to Sell that was
7 recorded on May 20, 2014, and Notice of Trustee's Sale recorded
8 on October 1, 2014. The trustee's sale was set for October 23,
9 2014. Vahey filed a motion for temporary restraining order and
10 preliminary injunction in the Nevada state court, seeking to
11 stop the sale. The state court denied the motion. At the
12 hearing on this matter, the Panel was informed that a
13 foreclosure sale had taken place.

14 **5. Appointment of Receiver of Sweeney's**

15 In a separate lawsuit initiated by First American against
16 Sweeney's in the Nevada state court, First American moved for
17 the appointment of a receiver. The state court granted the
18 motion, finding that First American met the statutory
19 requirements for the appointment of a receiver and that, as a
20 judgment creditor of Sweeney's, was entitled to protect its
21 interest in Sweeney's sole asset, Irish Acres.

22 **B. Bankruptcy Events**

23 **1. The First Case**

24 On October 24, 2014, Vahey filed a voluntary chapter 7
25 bankruptcy petition on behalf of Irish Acres (First Case) after
26 the state court injunction was denied and to stop the
27 foreclosure sale, based upon his authority as the manager of the
28

1 company.⁶ The corporate ownership statement filed on
2 October 24, 2014, by Irish Acres with its voluntary petition
3 identifies Sweeney's as owning 10% or more of Irish Acres, but
4 an amended voluntary petition filed on November 8, 2014,
5 included a corporate ownership statement that omitted Sweeney's
6 interest. Therefore, Vahey represented that Sweeney's
7 membership interest was less than 10% despite Exhibit A to the
8 OA which showed that Sweeney's held a 50% membership interest in
9 Irish Acres.

10 On December 2, 2014, Inland filed the MTD challenging
11 Vahey's authority to commence Irish Acres' bankruptcy as a
12 manager. Inland argued that under OA § 7.1 and Nevada Revised
13 Statutes (NRS) 86.491 Vahey was not authorized to unilaterally
14 dissolve Irish Acres by filing a bankruptcy petition. That
15 statute, which pertains to the dissolution and winding up of
16 affairs of a limited liability company, states in relevant part:

17 1. A limited-liability company must be dissolved and
18 its affairs wound up:

19 (c) Unless otherwise provided in the
20 articles of organization or operating
21 agreement, upon the affirmative vote or
22 written agreement of all the members[.]

21 Inland further maintained that under OA § 5.5, as a manager,
22 Vahey only had authority to bind the company in the ordinary
23 course of the company's business and the filing of the

24
25 ⁶ In the schedules, Vahey listed the raw land owned by Irish
26 Acres with a value of \$1,520,000 and listed creditors, including
27 Inland, with secured claims against the property with \$0.00
28 value. The Statement of Financial Affairs showed that Irish
Acres had no income and Schedule F listed Vahey as having an
unsecured claim which was unliquidated in connection with a
pending state court action.

1 bankruptcy case was not in the ordinary course of business.
2 Therefore, since Vahey did not have the affirmative vote of all
3 the members to dissolve and wind up the affairs of Irish Acres
4 and, as manager, was not authorized to file the petition on
5 behalf of Irish Acres, dismissal was proper.

6 Vahey opposed, arguing that under the OA he had authority
7 to file the bankruptcy case on behalf of Irish Acres in at least
8 three ways: as a member, as a manager, and as the sole trustee
9 of the Vahey Trust. Relying on OA § 5.7 which states, "The
10 Member, in his capacity as a member of the Company, is
11 authorized to act on behalf of the Company," Vahey asserted that
12 as an individual holding a membership interest in Irish Acres,
13 he was authorized to act on its behalf without any restriction.
14 Since the use of the word "member" in this section was used in
15 the singular, Vahey argued that it should be construed as being
16 singular, citing TIG Specialty Insurance Co. v. Pinkmonkey.com
17 Inc., 373 F.3d 365, 375 (5th Cir. 2004). Vahey also asserted
18 that while "Inland disputes that Dr. Vahey is a Member of the
19 [Irish Acres], substantial evidence exists to the contrary.
20 Specifically, Dr. Vahey had contributed over \$1.2 million
21 dollars into [Irish Acres'] business."⁷

22 Next, because Vahey was designated as a manager of Irish
23 Acres under the OA, he maintained that he was authorized to bind
24 the company with respect to matters outside the ordinary course
25 of business as demonstrated by OA § 5.5.1. That section gave

26
27 ⁷ Recall that § 2.3 of the Operating Agreement clearly
28 stated that the Vahey Trust was a member and not Vahey in his
individual capacity.

1 managers authority to engage in any of the following: "To sell,
2 lease, exchange, mortgage, pledge or otherwise transfer or
3 dispose of all or substantially all of the property or assets of
4 the Company." Moreover, contrary to Inland's assertion, Vahey
5 argued that OA § 7.1 regarding the dissolution and winding up of
6 Irish Acres' business was not applicable.

7 Finally, Vahey argued that the Vahey Trust had authority to
8 institute the bankruptcy case as a member and reiterated his
9 position that OA § 5.7 evidenced an intent to vest powers in
10 each member individually. "In other words, rather than
11 unanimous consent under NRS 86.491(1)(c) (which related to
12 dissolution and winding-up), the [OA] vested authority in each
13 member to authorize bankruptcy filings rather than require
14 unanimous consent." Therefore, Vahey suggested that he could
15 amend the bankruptcy petition to conform to his authority by
16 signing it in his capacity as the sole trustee of the Vahey
17 Trust, an undisputed member.

18 In reply, Inland argued that Nevada law placed the
19 management of all actions of a limited liability company in the
20 hands of its members in proportion to their contribution to its
21 capital under NRS 86.291. NRS 86.291 provides in relevant part:

22 1. Except as otherwise provided in this section or in
23 the articles of organization or operating agreement,
24 management of a limited-liability company is vested in
25 its members in proportion to their contribution to its
capital, as adjusted from time to time to reflect
properly any additional contributions or withdrawals
by the members.

26 Relying on NRS 86.291, Inland argued that since the Vahey Trust
27 and Sweeney's each owned 50% of Irish Acres, the actions of
28 Irish Acres must be approved by each of the members. Inland

1 maintained that any authority not specifically provided to the
2 manager in the OA remained in the hands of the members under
3 NRS 86.291.

4 Inland acknowledged that the OA was ambiguous by the
5 interchangeable use of the terms "member" and "members," but
6 asserted that although the agreement used the term "member,"
7 this did not mean that only one member's consent was required to
8 take an action. Rather, Inland opined that "it was clear" that
9 both terms "member" and "members" referred to "all members of
10 the Company" because OA § 2.3 identified two members, the Vahey
11 Trust and Sweeney's. Inland pointed out other provisions in the
12 OA which confirmed a plural "members" construction and
13 interpretation:

14 1.6 Title to Assets . . . The Members⁸ do not have any
15 right to the assets of the Company;

16 4.1 Profits and Losses. The entire net profit or net
17 loss of the company for each fiscal year will be
18 allocated to the Members;

19 4.2 Distributions. Distributions shall be give to
20 members ;

21 5.3 Election and Term. The Members must elect a
22 successor Manager ;

23 5.4 Resignation and Removal. A Manager may resign at
24 any time by delivering a written resignation to the
25 Members.

26 In conclusion, Inland argued that the ambiguity caused by the
27 interchangeable use of the terms "member" and "members" simply
28 meant that there was no specific grant of authority in the OA to

⁸ Sometimes the words member or members is capitalized and
other times it is not.

1 file a bankruptcy.

2 On January 7, 2015, the bankruptcy court heard oral
3 argument. Inland repeated its arguments that under the OA
4 there was no clear authorization for a single member or the
5 manager to place Irish Acres in bankruptcy. Rather, the
6 authority would have to be granted by all the members of the LLC
7 prior to the commencement of the case under NRS 86.291. Vahey
8 argued that the OA was clear in its distinctions between a
9 member or members and that under OA § 5.7, the Vahey Trust, in
10 its capacity as a member of the company, was authorized to act
11 on behalf of the company without restrictions. He further
12 argued that under NRS 86.291, management power was vested in
13 proportion to membership interests. At that point, the
14 bankruptcy court inquired as to what level of interest the Vahey
15 Trust actually had in Irish Acres. Vahey's counsel responded
16 that he believed it was over 99%. He then explained that the
17 membership interests had changed over a year ago:

18 They keep citing 50/50, but the documents -- I didn't
19 think that was really relevant to this particular
20 issue, if you look at the [OA] under [§] 5.7 where it
21 says 'a member.' It's very specific that a member may
22 take any action, so we didn't really believe that the
23 percentage would be relevant, but we can get that to
24 your court. That was actually brought up for the
25 first time in the reply, Your Honor. If you need a
26 sur-reply or need additional information, we can
27 provide the exact percentage of ownership.

28 The court responded: "I have a different way I'll go at it, but
I appreciate the information, counsel."

Later in the hearing, Inland argued that there was no
evidence before the court that showed Irish Acres was owned
other than 50/50 by the Vahey Trust and Sweeney's. Inland

1 further asserted: (1) Sweeney's had never given up any of its
2 interest and (2) there was no authority under the OA to take
3 away a membership interest or to dilute a membership interest.
4 The bankruptcy court took the matter under submission.⁹

5 On January 26, 2015, the bankruptcy court announced its
6 oral ruling. The court first found that Vahey lacked the
7 authority to file the case as "the manager" of Irish Acres.
8 The court found that under OA § 5.5.1, as a manager, Vahey only
9 had the authority to bind the company in the ordinary course of
10 its business and filing a bankruptcy petition was outside the
11 ordinary course of business. In re Avalon Hotel Partners, LLC,
12 302 B.R. 377, 380 (Bankr. Or. 2003) (the filing of a chapter 11
13 petition by an LLC's manager, without member approval, was not
14 authorized by Oregon law or the LLC's Operating Agreement as
15 "[a] decision to file for bankruptcy protection is a decision
16 outside the ordinary course of business, even for an entity in
17 dissolution."). The bankruptcy court further found that no
18 authority for filing the petition existed under the provisions
19 of OA §§ 7.1 and 7.2 relating to the dissolution or winding up
20 of the company.

21 Next, the court found that Vahey did not have the authority
22 to file the bankruptcy case as an individual member and without
23 the full approval of all the members despite the ambiguity of
24 the OA. In this regard, the bankruptcy court noted that Vahey
25

26 ⁹ The court made clear that the only thing that would happen
27 at the later hearing is that the court would issue an oral ruling
28 and that there would not be any additional evidence or discussion
between the court and the parties other than appearances.

1 did not sign any of the papers authorizing the bankruptcy filing
2 in his capacity as a member. The court further found that
3 Exhibit A to the OA identified not one, but two members that had
4 made equal capital contributions and thus Sweeney's and the
5 Vahey Trust each owned 50% as stated in Exhibit A. Therefore,
6 the court specifically made a factual finding regarding the
7 50/50 membership interests of the two members "based on the
8 record" before it.

9 In addition, the bankruptcy court found that Vahey's
10 citation to OA § 5.7 to suggest that either member had the
11 unilateral power to file a bankruptcy case was "inconsistent
12 with logic" since one member could exercise that power and the
13 other one would have the same power to immediately dismiss the
14 case.

15 Finally, since there was no specific grant of authority
16 under the OA for a member or manager to place Irish Acres in
17 bankruptcy, the court applied the statutory default rule in
18 NRS 86.291, which required that both members of Irish Acres,
19 having 50/50 interests, would have to approve any action of the
20 company outside the ordinary course of business, including the
21 filing of the bankruptcy case.

22 The bankruptcy court denied Vahey's request to file an
23 amended corporate resolution substituting the Vahey Trust as
24 authorizing the petition. The court found that the proposed
25 amendment would be futile because modifying the terms of the
26 resolution would not change the underlying facts; i.e., Vahey,
27 as the sole trustee of the Vahey Trust, would still not have the
28 authority as a manager or member to commence the bankruptcy case

1 on behalf of Irish Acres for the reasons stated.

2 The bankruptcy court entered the order dismissing Irish
3 Acres' case on January 27, 2015. Vahey did not request
4 reconsideration or seek to amend the bankruptcy court's findings
5 of fact or conclusions of law nor did he file an appeal from
6 that ruling. The dismissal order in the First Case is a final
7 order.

8 **2. The Second Case**

9 Two days later, on January 29, 2015, Vahey filed a second
10 petition for Irish Acres. The petition indicated that Irish
11 Acres had not filed a bankruptcy petition within the past eight
12 years, which was not accurate.¹⁰ This time, the Resolution of
13 Members Authorizing Bankruptcy Filing 3.78 Irish Acres, LLC,
14 stated that Vahey and the Vahey Trust "are the majority members"
15 of 3.78 Irish Acres and thus, under NRS 86.291, their majority
16 interest authorized them to commence the bankruptcy case on
17 behalf of Irish Acres. The Corporate Ownership Statement
18 accompanying the petition stated that no entity directly or
19 indirectly owned 10% or more of the equity.¹¹

20 Shortly after, Inland filed its MTD the second case and
21 request for sanctions. Inland argued that the doctrines of
22 claim preclusion and issue preclusion applied for purposes of
23 dismissal and that all elements for each doctrine had been met.

24
25 ¹⁰ The record does not make clear the reason Vahey failed to
disclose the prior case.

26
27 ¹¹ Since the case was assigned to another judge, Inland
filed a notice of related case and request for reassignment of
28 the case to Judge Landis pursuant to Local Bankruptcy Rule 1015.
The case was then reassigned to Judge Landis.

1 Inland further asserted that sanctions were appropriate pursuant
2 to the bankruptcy court's inherent powers or under § 105(a) and
3 it requested sanctions in the amount of \$5,000. Inland moved
4 for an order shortening time on the MTD, which Vahey and the
5 appointed chapter 7 trustee opposed. The bankruptcy court
6 granted the shortened time motion.

7 In opposition to the MTD, Vahey argued that the bankruptcy
8 court ruled that he lacked authority as a manager of Irish Acres
9 to file the bankruptcy petition and nothing more. Although
10 Vahey acknowledged that the bankruptcy court had found that the
11 two members of Irish Acres were Sweeney's and the Vahey Trust,
12 each holding a 50% membership interest based upon Exhibit A to
13 the OA, he argued that the court did not have the benefit of the
14 minutes of a meeting conducted in 2013 which changed the
15 ownership interests. According to Vahey, the notice of the
16 meeting was mailed out on June 28, 2013, approximately 90 days
17 prior to the scheduled meeting to be held on September 27,
18 2013,¹² and Sweeney's did not attend. Vahey maintained that, as
19 the minutes of that meeting reflected, OA § 2.2 authorized him,
20 as the sole manager of Irish Acres, to approve and provide for
21 the issuance of additional fractional units to the Vahey Trust,
22 as a result of additional monies provided to Irish Acres for the
23 payment of various expenses. According to the minutes, twenty-
24 six additional ownership units were issued to the Vahey Trust at
25 the meeting for the payment of \$2,560 to the Nevada Secretary of

26
27 ¹² Vahey's opposition erroneously referred to the meeting as
28 taking place on January 27, 2013, which would have been before
the notice of the meeting was sent out.

1 State to maintain Irish Acres' valid status.

2 Vahey further argued that the bankruptcy court in its
3 previous ruling found that the OA was ambiguous as to whether a
4 single member alone could file a bankruptcy case and further
5 found that holders of a majority interest in a limited liability
6 company had authority to file a bankruptcy under NRS 86.291.
7 Thus, Vahey asserted that the authorization to file the second
8 petition was "clearly distinguishable" from the prior case
9 "based upon the court's own ruling." That is, the Vahey Trust
10 as owner of 96.3% of Irish Acres had the authority to file the
11 bankruptcy petition on its behalf.

12 Attached to the opposition was the declaration of Vahey
13 attesting to these facts, a copy of the Notice of Meeting of
14 Managers and Members, and the minutes of that meeting where
15 Vahey, as the sole trustee of the Vahey Trust, was the only
16 member in attendance and whereby he changed the ownership
17 percentages such that the Vahey Trust owned twenty-six units
18 (96.3%) and Sweeney's owned one unit (3.7%]. Also attached was
19 a copy of an invoice showing that \$2,560 had been paid to the
20 Nevada Secretary of State on September 26, 2013.

21 In reply, Inland argued, among other things, that the Vahey
22 Trust had no authority to dilute Sweeney's membership under the
23 OA or Nevada law.

24 On March 12, 2015, the bankruptcy court heard and ruled on
25 the MTD. The court found that in the context of the first MTD,
26 it decided that Vahey as an individual or as sole trustee of the
27 Vahey Trust did not have the authority to file the bankruptcy
28 case as a manager nor did the Vahey Trust have the authority to

1 file it as a single member. The court further found that the
2 issue regarding the Vahey's Trust authority to file the
3 bankruptcy case as a single member was "in no way . . . an issue
4 that was raised only in the reply" (as argued by Vahey). The
5 court found that this issue was squarely before the court and
6 the parties and was argued. "And to the extent there was
7 information that could have had some bearing on that question,
8 it was not presented by way of evidence in the record before the
9 Court in connection with the dismissal order entered in the
10 first case."

11 The court noted that the evidence should have been
12 presented in the First Case and there was no request to either
13 enlarge or amend the findings of fact or conclusions of law that
14 resulted in the dismissal of the First Case nor was there a
15 request for relief from the judgment or an appeal. The
16 bankruptcy court considered Vahey's "belated information"
17 regarding his majority ownership "little more . . . than an
18 effort to collaterally attac[k] the prior dismissal order."
19 After making these findings, the bankruptcy court decided that
20 all elements for claim and issue preclusion were met.

21 In addition, the court found that dismissal was proper on
22 bad faith grounds. Considering the factors¹³ set forth in Little

24 ¹³ These factors include: (1) the debtor has one asset,
25 such as a tract of undeveloped or developed real property;
26 (2) the secured creditors' liens encumber this tract; (3) there
27 are generally no employees except for the principals; (4) the
28 debtor has little or no cash flow and there are no available
sources of income to sustain a plan of reorganization; (5) there
are only a few, if any, unsecured creditors whose claims are
(continued...)

1 Creek Development Co. v. Commonwealth Mortgage Corp. (Matter of
2 Little Creek Development Co.), 779 F.2d 1068, 72, 73 (5th Cir.
3 1986), as adopted by the Ninth Circuit in State of Idaho, Dept.
4 of Lands v. Arnold (In re Arnold), 806 F.2d 937 (9th Cir. 1986),
5 the court found all factors were met. Relying on the factors in
6 total, the bankruptcy court found bad faith and that this
7 constituted "cause" for dismissal under § 1112(b)(1).¹⁴ In the
8 end, the court analyzed whether conversion or dismissal was in
9 the best interests of the creditors and the estate and concluded
10 that dismissal better met those criteria since there were no
11 unsecured creditors and dismissal would allow Inland to pursue
12 its collection rights. In the exercise of its discretion, the
13 bankruptcy court declined to issue sanctions under § 105(a) or
14 its inherent powers.

15 On March 13, 2015, the bankruptcy court entered the order
16 dismissing the Second Case. On the same date, the order was
17 amended to correct the citation from § 1112(b)(1) to § 707(a)(1)
18 – the applicable dismissal standard in chapter 7 cases. The
19 substance of the court's legal and factual analysis remained

20 ¹³(...continued)
21 relatively small; (6) the property has usually been posted for
22 foreclosure because of arrearages on the debt and the debtor has
23 been unsuccessful in defending actions against the foreclosure in
24 state court; (7) alternatively, the debtor and one creditor may
25 have proceeded to a stand-still in state court litigation, and
26 the debtor has lost or has been required to post a bond which it
cannot afford; (8) bankruptcy offers the only possibility of
forestalling loss of the property and (9) there are sometimes
allegations of wrongdoing by the debtor or its principals.

27 ¹⁴ As indicated below, the bankruptcy court amended its
28 order to cite § 707(a)(1), the applicable dismissal statute in
chapter 7 cases.

1 unchanged. Vahey filed a timely notice of appeal.

2 **II. JURISDICTION**

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

6 **III. ISSUE**

7 Did the bankruptcy court err in dismissing Irish Acres'
8 Second Case?

9 **IV. STANDARDS OF REVIEW**

10 We review rulings regarding the availability of res
11 judicata doctrines, including claim and issue preclusion, de
12 novo as mixed questions of law and fact in which legal questions
13 predominate. Robi v. Five Platters, Inc., 838 F.2d 318, 321
14 (9th Cir. 1988); Alary Corp. v. Sims (In re Assoc'd Vintage
15 Group, Inc.), 283 B.R. 549, 554 (9th Cir. BAP 2002).

16 Once we determine that the doctrines are available to be
17 applied, the actual decision to apply them is left to the trial
18 court's discretion. Robi, 838 F.2d at 321. Review for abuse of
19 discretion has two parts. First, "we determine de novo whether
20 the bankruptcy court identified the correct legal rule to apply
21 to the relief requested." U.S. v. Hinkson, 585 F.3d 1247,
22 1261-62 (9th Cir. 2009) (en banc). If so, we then determine
23 under the clearly erroneous standard whether the bankruptcy
24 court's factual findings and its application of the facts to the
25 relevant law were "(1) illogical; (2) implausible; or
26 (3) without support in inferences that may be drawn from the
27 facts in the record." Id. at 1262.

28 Because we may affirm on any ground supported by the

1 record, Shanks v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008),
2 we need not discuss every reason supporting the bankruptcy
3 court's dismissal order.

4 **V. DISCUSSION**

5 On appeal, Vahey asserts that the doctrines of claim and
6 issue preclusion do not apply since the first dismissal order
7 was based upon the lack of authority by the manager and the
8 Second Case was filed based upon the authority of the Vahey
9 Trust, the member holding a majority of the membership interest.
10 To support his position, Vahey contends that the bankruptcy
11 court erred by ruling that the evidence regarding Vahey's
12 majority interest should have been presented in the First Case
13 because such evidence was proffered and rejected by the court.
14 He further points out that the issue regarding the percentage of
15 membership interests was raised in Inland's reply brief. For
16 these reasons, Vahey asserts that the bankruptcy court
17 improperly used the record before it to determine the 50/50
18 membership interests of the Vahey Trust and Sweeney's in the
19 First Case despite being apprised that the Vahey Trust held a
20 majority position. We are not persuaded by these arguments as
21 to issue preclusion.

22 "The doctrine of issue preclusion prevents relitigation of
23 all 'issues of fact or law that were actually litigated and
24 necessarily decided' in a prior proceeding. . . . The issue
25 must have been 'actually decided' after a 'full and fair
26 opportunity' for litigation." Robi, 838 F.2d at 322. Under
27 federal law, issue preclusion applies only where it is
28 established that (1) the issue necessarily decided at the

1 previous proceeding is identical to the one which is sought to
2 be relitigated; (2) the first proceeding ended with a final
3 judgment on the merits; and (3) the party against whom issue
4 preclusion is asserted was a party or in privity with a party at
5 the first proceeding. Hydranautics v. Filtec Corp., 204 F.3d
6 880, 885 (9th Cir. 2000).

7 Here, the issue of Vahey's or the Vahey Trust's authority
8 to file the bankruptcy case on behalf of Irish Acres was
9 necessarily decided in the First Case. The issue regarding that
10 authority is identical to the one which Vahey sought to
11 relitigate in the Second Case. The suggestion that Vahey did
12 not have a full and fair opportunity to litigate the issue
13 because the bankruptcy court denied his request to supplement
14 the evidence is without merit. The Vahey Trust's authority to
15 file the bankruptcy case as a majority member was clearly
16 relevant to the issues litigated and adjudicated in the First
17 Case.

18 Further, Vahey had an opportunity to present the merits of
19 that argument even after the ruling. As noted by the bankruptcy
20 court, Vahey did not seek reconsideration nor did he seek to
21 amend or obtain relief from the court's ruling regarding its
22 finding on the 50/50 membership interest. Instead, he allowed
23 the dismissal order in the First Case to become final. It makes
24 no difference that the dismissal order was based on an erroneous
25 factual finding or understanding of the law, or both. Issue
26 preclusion is concerned with whether the issue was necessarily
27 decided in the first proceeding and whether there is a final
28 judgment.

1 As to the third element for issue preclusion, there is no
2 question that Vahey was a party in the First Case. Accordingly,
3 the bankruptcy court's prior determination that Vahey or the
4 Vahey Trust did not have the authority to file the bankruptcy is
5 conclusive.

6 In sum, the bankruptcy court did not err in ruling that the
7 doctrine of issue preclusion applied to Vahey's asserted defense
8 to the MTD in the Second Case; i.e., that the Vahey Trust had
9 authority to file the bankruptcy petition on behalf of Irish
10 Acres due to its majority membership interest. Therefore,
11 dismissal of the Second Case was proper. There is nothing in
12 the record that shows the bankruptcy court abused its discretion
13 in applying issue preclusion under these circumstances. Because
14 the doctrine of issue preclusion suffices to dispose of this
15 appeal, we do not consider the bankruptcy court's other reasons
16 for dismissing the Second Case. See Shanks v. Dressel, 540 F.3d
17 at 1082.

18 **VI. CONCLUSION**

19 For the reasons stated, we AFFIRM.
20
21
22
23
24
25
26
27
28