**UNITED STATES BANKRUPTCY APPELLATE PANEL**
**FOR THE FIRST CIRCUIT**

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BAP NO. MB 22-016

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Bankruptcy Case No. 19-12419-JEB

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ROWLEY SOLAR, LLC,
Debtor

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BONNIE BERKOWITZ, BARBARA BERKOWITZ, and
MAVEN REVOCABLE TRUST,
Appellants

v.

INVALEON TECHNOLOGIES CORPORATION,
Appellee

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On Appeal from a Decision
of the United States Bankruptcy
Court for the District of Massachusetts (Eastern Division)

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# BRIEF OF APPELLEE

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Joshua A. Burnett, Esq.
William J. Amann, Esq.
Amann Burnett, PLLC
757 Chestnut Street
Manchester, NH 03104
603-696-5401
jburnett@amburlaw.com

Counsel for the Appellee,
Invaleon Technologies Corporation

October 6, 2022

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## TABLE OF AUTHORITIES

### Cases Cited



### Statutes & Rules Cited



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## STATEMENT OF JURISDICTION

The Appellee agrees with and adopts the Appellants' statement with respect to the jurisdiction of this Court over the issues presented in this appeal.

## STANDARD OF APPELLATE REVIEW

The Appellee agrees with and adopts the Appellants' statement with respect to the standard of appellate review applicable to this appeal.

## STATEMENT OF ISSUES

The Appellee agrees with and adopts the Appellants' statement with respect to the issues that should be considered by the Court on this appeal.

## STATEMENT OF THE CASE

The Appellants, Bonni and Barbara Berkowitz (hereinafter collectively singularly or jointly "Berkowitz") and the Appellee, Invaleon Technologies Corporation (hereinafter "ITC"), entered into a Stipulation [*App at 427-434*] through which they intended to resolve all of the numerous disputes that had arisen between them related to various pre-petition and post-petition matters. The Appellants allege that they had entered into an oral agreement with Tom Wu, ITC's principal, that ITC was to never set foot on the property owned by Maven Trust where ITC had been constructing a solar field after a sale contemplated by the Stipulation. The Stipulation is silent as to any alleged agreement and only contains terms that ITC would not be permitted to bid at the sale [*App at 429*] and that the parties would agree to hire a third-party manager in the event that ITC became the owner by default [*App at 432*]. Berkowitz testified at an extensive evidentiary hearing, among other things, as to the alleged existence of this oral agreement [*App at 965, 1083*]

and further testified that she relied on ITC's alleged representations that it would never again enter upon the property [*App at 965*]. After the hearing, the Bankruptcy Court issued an Order in which it found, *inter alia*, that no such agreement had been made and that Berkowitz could not have reasonably relied on any representations from ITC, if any representations had been made [*App at 690-709*]. The Appellants now ask this Court to find that the Bankruptcy Court's findings as to the existence of the oral agreement and Berkowitz's reliance are clearly erroneous.

## SUMMARY OF THE ARGUMENT

The Bankruptcy Court (Bailey, J.) did not err in making its finding that there was no agreement or requirement that ITC not be present on the property after the closing of the contemplated sale. Although it is clear from the record that Berkowitz and ITC suffered a significant breakdown of their professional relationship, there are no express terms included in the Stipulation that evidence either an agreement or requirement that ITC would never set foot on the Property. The Stipulation merely mentions that ITC and Berkowitz would agree upon a third-party manager to handle the operation of the solar farm on a going forward basis and is silent as to the alleged agreement or that this manager would be operate the solar field at ITC's complete exclusion. Logic requires an inference that in the context of a sale to ITC, there are circumstances under which ITC, the owner in that scenario, would need to be present on the Property; and to infer that ITC, who would ultimately be responsible for the operation of the solar field as the owner, would agree to never set foot on the Property is illogical at best, if not completely unbelievable. The record is also devoid of evidence that any such agreement was implicit in the Stipulation other than Berkowitz's own testimony as to the existence of an alleged agreement. Significantly, the alleged agreement was never raised by counsel at the evidentiary hearing that gave rise to the Order from which this appeal was taken. Even if the Bankruptcy Court had found there to be some

evidence of such an agreement, Berkowitz, who was at all times represented by counsel, did not see fit to include an express term in the Stipulation that clearly set forth the terms of that agreement, and evidence of an alleged material term that was not included in a written contract is barred by the parol evidence rule.

The Bankruptcy Court did not err in finding that Berkowitz did not reasonably rely on ITC's representations for precisely the reason the Bankruptcy Court stated in its Opinion - specifically that the lack of trust Berkowitz had in ITC cuts against any inference that Berkowitz relied on an alleged representation by ITC, especially when the alleged representation was, according to Berkowitz, such an integral and material term of the agreement, but was never expressly included in the Stipulation.

## ARGUMENT

### I. *No Agreement Existed that ITC was never to be present on the Property after the closing.*

The threshold issue in this appeal is whether Berkowitz and ITC had agreed that ITC would never be present on the Property after the sale. The record created by the testimony and the relevant pleadings is devoid of any such evidence as further described below.

A bankruptcy court's findings of fact are reviewed under the "clearly erroneous standard." Fed.R.Bankr.P. 8013; In re San Miguel Sandoval, 327 B.R. 493, 505 (1st Cir. B.A.P. 2005). Under that standard, the reviewing court should consider the entire record, including both oral testimony and documentary evidence that was before the Bankruptcy Court. Id.; see also Boroff v. Tully, 818 F.2d 106, 108 (1st Cir.1987). In the context of the standard of review, a finding of fact is considered clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Sandoval

at 505, quoting Watson v. Boyajian, 309 B.R. 652, 658 (1st Cir. B.A.P. 2004). Unlike a *de novo* review when considering whether the Bankruptcy Court made an error in applying the law whereby the reviewing court will review the evidence anew and make its own determination, a reviewing court applying the clearly erroneous standard may not reverse the Bankruptcy Court "[i]f the [Bankruptcy Court's] account of the evidence is plausible in light of the record reviewed in its entirety" and may not reverse "even if convinced that it would have weighed the evidence differently as a trier of fact" Sandoval at 505-506. In so doing the reviewing court must "give great deference to the bankruptcy court as the trier of fact," Id. at 506, quoting In re Fiffy, 293 B.R. 293 B.R. 550, 554 (1st Cir. B.A.P. 2003).

The evidence most relevant to this determination is the Stipulation between Berkowitz, ITC, and the Chapter 11 Debtor [*App at 427-434* [1]]. Despite the Appellants' numerous citations to testimony by Berkowitz at the hearing as to her alleged understanding that ITC would not be present on the property after the closing of the contemplated sale [*See Appellants' Statement of the Case under the subheading "The Stipulation" on pages 16-24*], the Stipulation itself does not contain any such term that expressly states that ITC would not be permitted to enter upon the property after the sale. The Appellants point to Paragraph 1 of the Stipulation [*App at 429*] which states that ITC shall not bid at the sale, and Paragraph 6 [*App at 432*] which states that Berkowitz and ITC would appointment a mutually agreeable third-party manager in the event that ITC might be the default buyer should the successful bidder and/or back up bidders fail to consummate the sale.

It is indisputable that Berkowitz and ITC suffered a significant breakdown of their professional relationship and no longer wished to do business together in any direct context. This

[1] Unless otherwise stated, all references to the record refer to the Bates stamped Appendix filed by the Appellants.

is most evident by the fact that Berkowitz sought a no trespass order against ITC and the fact that they agreed that ITC would not be permitted to bid at the sale. However, the Stipulation expressly contemplated circumstances under which ITC might be the buyer by default and included in Paragraph 5 of the Stipulation the following language:

> "In the event the "Successful Bidder" and "Back-up Bidder" both fail to close in accordance with the terms of the sale order entered in connection with the "Sale Hearing" (as such terms arc defined in the Sale and Bid Procedures) then ITC shall be deemed to be the Successful Bidder and authorized to close the sale"
>
> [*App at 431*]

In this scenario, the parties contemplated that ITC could end up owning the right to operate the solar field at great expense to ITC and with all of the attendant risks associated with that ownership, but, according to Berkowitz, would never be able to actually set foot on the premises, its operation being solely delegated to a third-party manager for all time. This idea is patently absurd and is not supported by the record with the exception of Berkowitz's testimony.

The Bankruptcy Court addressed this directly and at great length in Paragraphs 24 and 26 through 30 in its Order [*App at 698-702*]:

> 24. In the Settlement, the parties recite that they "desire to settle all disputes between them." "The parties therefore enter into this Stipulation in order to resolve such disputes[.]"
>
> 26. Bonni and Barbara seek a finding that the terms of the Settlement included a requirement that Invaleon never set foot on the project site again and a promise by Invaleon never to set foot on the project site again. They bear the burden of proof on this issue and have not satisfied it. I make this finding for the following three reasons.
>
> 27. First, as is undisputed, no such term or promise appears in the writing that constitutes the Settlement. The Settlement did not include an integration clause, and therefore it is possible as a matter of law, that the term was agreed to but not included in the writing; however, the Settlement also required the approval of the Bankruptcy Court, and therefore this term and promise, had it been made, is one the parties would likely have seen fit to put in the writing that constituted the Settlement, of which approval was to be sought. The Berkowitzes contend that the failure to reduce this term and promise to writing was an oversight on the part of

the drafting attorneys, but I have no testimony to that effect from any of the attorneys involved in the negotiation and drafting of the Stipulation. The Berkowitzes also contend that as to this term, Bankruptcy Court approval was not required because it ran between two parties—the Berkowitzes on the one hand and Invaleon on the other—who were neither the Debtor nor the estate. This theory fails because, although the term and promise involved two entities who were neither the Debtor nor the estate, it had an effect on the estate and the Debtor, as the present controversy demonstrates: for breach of this alleged term and promise, the Berkowitzes contend that Invaleon is obligated to pay from the sale proceeds their claims against the estate; that is, it bears upon and affects the price paid by Invaleon to the Debtor for estate assets. In addition, as might easily have been foreseen, the Berkowitzes would ask the Bankruptcy Court to enforce this alleged term if Invaleon breached it. Also, the Berkowitzes contend that this was not just one term among many but their overriding concern. I find by a preponderance of the evidence that, had this term been negotiated and agreed upon, it would have appeared in writing in the Settlement. That it did not is strong evidence that Invaleon never made this promise or agreed to this term.

28. Second, the Berkowitzes had no need for the prohibition and promise in question because they already had the no trespass order. The term in question would have been redundant.

29. Third, and must fundamentally, there is simply no evidence that Wu, for Invaleon, agreed to this term or made this promise orally or in any manner. No such term was ever negotiated or agreed upon. To be sure, Wu, for Invaleon, understood that the Berkowitzes strongly desired that Invaleon never come onto the project site again; the Berkowitzes made clear to Wu that this desire was a priority in their negotiation of the Settlement. This desire clearly did inform how they and Invaleon dealt with the contingency of Invaleon's becoming the owner of the project. But the parties never dealt with the possibility that a third-party might become the owner and desire that Invaleon come onto the project site to help with the third party's operation, maintenance, or completion of the project, such as for transitional issues, after the sale. Nor did they address the possibility that Invaleon might want or need to come onto the property for any other reason. They simply did not address these possibilities. The fact that the Berkowitzes had made their position clear does not mean that Invaleon accepted it for all contingencies that the parties did not address, much less that Wu made a promise to honor it.

30. For these reasons I find that Invaleon made no promise not to come onto the property and that the Settlement included no such term: not expressly in the written Settlement and not orally or otherwise outside of the written Settlement.

Despite the Bankruptcy Court's lengthy and thoroughly supported reasoning, the Appellants ask this Court to find that the Bankruptcy Court made a clearly erroneous finding that Berkowitz and ITC never agreed that ITC would be prohibited from entering upon the property.

The Appellants argue that the Court's reasoning behind its finding in Paragraph 27 is flawed because a third-party bidder, PowerFund, eventually closed on the sale and the Appellants appear to focus on the consideration for the Stipulation. The Stipulation was (obviously) negotiated prior to the finalizing of any sale. At the time, it was unknown to any of the parties whether any prospective bidder would consummate the sale, and therefore, the parties contemplated a scenario in which ITC might ultimately end up as the successful buyer by default. The issue with respect to the Court's reasoning in this paragraph has nothing to do with whether "ITC paid nothing for the assets" [*Appellants' Brief p. 28*], but as Judge Bailey stated at the end of that paragraph, the issue was whether that term (the alleged agreement that ITC would never again enter upon the property) would have appeared in the Stipulation "had [it] been negotiated and agreed upon." In light of all of the evidence, he reasoned correctly that its omission from the Stipulation is strong evidence that ITC never agreed to such a term.

The Appellants argue that the Court's reasoning behind its finding in Paragraph 28 is flawed because the record indicates that the parties had discussed ITC staying off the property. It is noteworthy that any testimony regarding this upon which the Appellants rely is from Berkowitz and Berkowitz only. The Appellants also argue that the Stipulation "was negotiated with provisions that ITC would never set foot in the property again," citing only to the Stipulation itself [*Appellants' Brief p. 29*]. This is a mischaracterization of the relevant terms of the Stipulation that only state that ITC would not bid at the sale and would hire a third-party manager should it end up as the default buyer. Nowhere in the Stipulation does it contain terms that state that "ITC would never set foot in the property again." The Appellants argue that this term was a serious point of discussion. The Bankruptcy Court acknowledged this fact in Paragraph 29 of the Order [*App at 702*] when Judge Bailey stated that Tom Wu, ITC's principal, "understood that the Berkowitzes strongly desired that Invaleon never come onto the project site again." Judge Bailey went on to

reason that this understanding clearly worked its way into the terms of the Stipulation as the agreement that the parties would hire a third-party manager should ITC become the owner. He went on to point out that the Stipulation did not contemplate other scenarios whereby ITC may have to enter upon the property at the behest or requirement of a third-party owner, the underlying logic being that they would have included terms to address those contingencies if they had agreed that ITC was prohibited from entering upon the property, just as they had done in the context of ITC being the owner.

The Appellants take exception to the Bankruptcy Court's statements in Paragraph 29 that there was no evidence that Tom WU, for ITC, agreed to that ITC would never again enter upon the property and that the finding that no such term was ever negotiated or agreed upon, arguing that the Court's statements in Paragraph 29 seem to belie the finding that this alleged term was not discussed during the negotiations. A more precise reading of this paragraph makes it clear that the Bankruptcy Court found that Tom Wu was aware that Berkowitz "strongly desired" that ITC not come onto the property, but nothing in the Court's findings in this paragraph contradict the findings in the other relevant paragraphs that there was never any agreement that ITC would not come onto the property under any circumstances.

In summary, nothing in the relevant paragraphs cited above and in the Appellants' Brief indicate any clearly erroneous interpretation of the record and the Appellants have not pointed to any testimony or document that may have been ignored or overlooked by the Bankruptcy Court that, if considered, would fundamentally contravene the nature of its findings. The Appellants have failed to meet their burden.

## II. *Even if there were evidence of an oral agreement that ITC would never be present on the Property after the sale, the inclusion of such an oral agreement as a material term is barred by the parol evidence rule.*

Even if the Bankruptcy Court had credited Berkowitz's testimony about the supposed oral agreement that ITC would never again enter upon the property, any such agreement would be barred by the parol evidence rule.

The parol evidence rule "precludes evidence of earlier or contemporaneous discussions that would modify the provisions of a later integrated agreement which the proponent of the agreement seeks to enforce." Bank v. Int'l Bus. Machs. Corp., 145 F.3d 420, 424 (1st Cir.1998). Generally, if a contract is unambiguous, it should be enforced according to its express terms. Pride Hyundai, Inc. v. Chrysler Fin. Co., L.L.C., 369 F.3d 603, 615 (1st Cir.2004). The rule is not an absolute bar to extrinsic evidence but renders inoperative prior oral and written agreements. It applies only where the parties have created a partially or fully integrated document. Restatement (Second) of Contracts § 213 comments a & b. "Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression." Coll v. PB Diagnostic Sys., Inc., 50 F.3d 1115, 1123 (1st Cir.1995).

Here, the Stipulation is at least partially integrated if not fully integrated. Although there is no so-called integration clause in the Stipulation, the parties stated that the Stipulation was intended to settle all disputes between them [*App at 429*]. Furthermore, the parties included extensive and detailed terms that contemplated a sale with various contingencies based on the ultimate identity of the successful buyer, including a contingency that contemplated a scenario whereby ITC might be the buyer by default [*App at 432*]. All of these factors appear to indicate that Berkowitz and ITC intended the Stipulation to be a complete and integrated agreement that

was to address and resolve any and all disputes, and by providing in advance for various contingencies, the terms were intended to be (and are) unambiguous.

As such, the alleged oral agreement that ITC was not to enter upon the property, even if supported by the record, which ITC denies, would be barred from enforcement as a prior oral agreement that was not integrated with the terms of the Stipulation.

## III. *Any alleged reliance by Berkowitz on alleged representations made by ITC is not reasonable.*

With respect to the question of Berkowitz's reliance on the alleged representation by ITC that it would not enter upon the property, this Court need look no further than the Bankruptcy Court's Order to determine that any alleged reliance was not and could not have been reasonably relied upon.

In Paragraph 38 of his Order, Judge Bailey wrote:

> 38. Bonni, however, did not testify that she relied on these representations in deciding to enter into the Settlement. (Barbara did not testify at all.) Nor did Bonni explain how such reliance might have been reasonable in light of the strong belief she had by then long held that Wu and Invaleon were not to be trusted in any respect. On the strength of evidence adduced by the Berkowitzes themselves, I find it highly unlikely that they would have relied on these or any representations by Wu in entering into the Settlement. The Berkowitzes have not proven that they in fact relied on these representations by Wu in entering into the Settlement.

[*App at 704*]

The Appellants rely on legal precedent that states that a party need not state specifically that it relied on a statement and that such reliance can be inferred from the evidence [*Appellant's Brief p. 32*]. The Appellee does not dispute this legal principle, but avers that that is irrelevant to this Court's determination of whether the Bankruptcy Court's findings were clearly erroneous because Judge Bailey clearly stated in his Order that, regardless of Berkowitz's testimony or lack thereof, he did make inferences from the aggregate of the evidence regarding Berkowitz's well-

established dislike and distrust of Tom Wu and ITC and found that that distrust rendered it unlikely that Berkowitz would have relied on anything that was not otherwise included in the Stipulation.

As with the question of whether the parties had agreed that ITC would not enter upon the property, the Appellants have also failed to identify any specific evidence regarding any alleged reliance that, if considered, would have changed the Court's findings.

## CONCLUSION

For the reasons stated above, the Appellee, Invaleon Technologies Corporation, requests that this Honorable Court affirm the order of the Bankruptcy Court and deny the relief sought by the Appellants in this appeal.

Respectfully submitted,
Invaleon technologies Corporation,
By counsel,

October 6, 2022

/s/ Joshua A. Burnett, Esq.
Joshua A. Burnett, Esq. (677792)
Amann Burnett, PLLC
757 Chestnut Street
Manchester, NH 03104
603-696-5401
jburnett@amburlaw.com

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## STATEMENT REGARDING RELATED CASES

The undersigned certifies, pursuant to 1sr Cir. BAP L.R. 8014-1(a)(2)(A), that he knowns of no related cases or appeals.

Respectfully submitted,
Invaleon technologies Corporation,
By counsel,

October 6, 2022

/s/ Joshua A. Burnett, Esq.
Joshua A. Burnett, Esq. (677792)
Amann Burnett, PLLC
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## STATEMENT REGARDING INTERESTED PARTIES

The undersigned certifies, pursuant to 1sr Cir. BAP L.R. 8014-1(a)(3)(A), that he knows of no other parties who may be interested parties in this matter.

Respectfully submitted,
Invaleon technologies Corporation,
By counsel,

October 6, 2022

/s/ Joshua A. Burnett, Esq.
Joshua A. Burnett, Esq. (677792)
Amann Burnett, PLLC
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jburnett@amburlaw.com

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. Bankr. P. 8012 and 1st Cir. BAP L.R. 8012-1, the Appellee, Invaleon Technologies Corporation states as follows: There is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

Respectfully submitted,
Invaleon Technologies Corporation,
By counsel,

October 6, 2022

/s/ Joshua A. Burnett, Esq.
Joshua A. Burnett, Esq. (677792)
William J. Amann, Esq. (648511)
Amann Burnett, PLLC
757 Chestnut Street
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603-696-5401
jburnett@amburlaw.com

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**CERTIFICATE OF SERVICE**

I, Joshua A. Burnett, do hereby certify that I have this day served the within document by email and by the Court's CM/ECF system to the following parties, and by email as indicated below:

Michael B. Feinman, Esq., counsel for Appellant - mbf@feinmanlaw.com

Alan L. Braunstein, Esq., counsel for the Debtor - abraunstein@riemerlaw.com

Eric K. Bradford, Esq., Office of the United States Trustee - eric.k.bradford@usdoj.gov

October 6, 2022

/s/ Joshua A. Burnett
Joshua A. Burnett, Esq.