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Attorneys for the Debtors

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

<p>In re:</p> <p>PolarityTE, Inc., a Delaware corporation,</p> <p style="text-align: center;">Debtor</p>	<p>Case No. 23-bk-22358-KRA</p> <p>Case No. 23-bk-22360-KRA</p> <p>Case No. 23-bk-22361-KRA</p>
<p>In re:</p> <p>PolarityTE MD, Inc., a Nevada corporation,</p> <p style="text-align: center;">Debtor</p>	<p>Chapter 11</p> <p>Judge Kevin R. Anderson</p>
<p>In re:</p> <p>PolarityTE, Inc., a Nevada corporation,</p> <p style="text-align: center;">Debtor</p>	

**THE DEBTORS' RESPONSE TO DR. LOUGH'S OBJECTION
TO THE DEBTORS' SALE MOTION**



The above-captioned debtors and debtors-in-possession (the “Debtors”), by and through their undersigned counsel, hereby respond to Dr. Lough’s Objection (dkt. 94) to the Debtors’ Sale Motion (dkt. 88),¹ and they respectfully state:

RESPONSE

Dr. Lough and the Debtor PolarityTE, Inc. (“PTE”) are parties to a settlement agreement dated August 21, 2019 (the “Settlement Agreement”).² Among other things, the Settlement Agreement preserved Dr. Lough’s contractual right to receive “Participation Payments,” *i.e.*, a share of the profits earned by the Debtors from their businesses related to certain intellectual property (the “Patents”).³ The Debtors are not seeking to assume or assign the Settlement Agreement pursuant to section 365(a) of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”).

Among other things, the Debtors’ Sale Motion seeks this Court’s authorization to sell substantially all of their assets (including the Patents), and to assign most of their executory contracts (not including the Settlement Agreement), to Grander Acquisition LLC (the “Purchaser”).

Dr. Lough objects to the Debtors’ Sale Motion on three grounds. First, Dr. Lough alleges ambiguity with respect to whether or not the Debtors will assume and assign the Settlement

¹ Debtors’ “Motion Under 11 U.S.C. §§ 105, 363, and 365 Requesting Entry of an Order (A) Authorizing the Sale of Debtors’ Assets Free and Clear Of Liens, Claims, Encumbrances, and Interests to Winning Bidder; (B) Waiving the 14-Day Stay Otherwise Applicable Under Bankruptcy Rules 6004 and 6006; (C) Finding Adequate Assurance of Future Performance, Authorizing the Assumption and Assignment of Executory Contracts, and Setting Cure Amounts; and (D) Granting Related Relief,” dkt. 88 (the “Sale Motion”).

² A copy of the Settlement Agreement is attached as Exhibit “C” to Dr. Lough’s Objection, dkt. 94-3.

³ See Settlement Agreement (Ex. “C” to Dr. Lough’s Objection, dkt. 94-3), ¶ 2, incorporating parts of the 2017 Employment Agreement, ¶ 6(B). A copy of the 2017 Employment Agreement is attached as Exhibit “A” to Dr Lough’s Objection, dkt. 94-1. The 2017 Employment Agreement was otherwise terminated by the Settlement Agreement.

Agreement to the Purchaser under section 365(a) of the Bankruptcy Code. Consequently, Dr. Lough alleges that notice of the Sale Motion was inadequate.

But there is no ambiguity. As Dr. Lough correctly acknowledges, the Settlement Agreement was not listed on Schedule 1.1(a) to the Asset Purchase Agreement (the “APA”).⁴ And as he further correctly acknowledges, “Purchased Contracts are only those identified in Schedule 1.1(a) of the APA, and any non-listed contract is an ‘Excluded Contract.’”⁵ Clearly, Dr. Lough was timely on notice that the Settlement Agreement was not slated for assumption and assignment by the Debtors. Notice was adequate.

Second, Dr. Lough alleges that the Settlement Agreement gives him a “potentially recognizable ‘interest’” in the Patents.⁶ Consequently, he alleges that the proposed sale of the Patents to the Purchaser (free and clear of that interest) violates section 363(f) of the Bankruptcy Code. He is incorrect. He has no such interest.

Pursuant to an “Assignment of Patent Applications” dated November 22, 2016 (the “Assignment”), Dr. Lough assigned to PTE his “entire right, title and interest . . . in and to” the Patents. (A copy of the Assignment is attached as Exhibit “1” hereto.) In the Assignment, Dr. Lough covenanted that he intended the assignment to be “free and clear of any encumbrance” and “without condition or restriction.”⁷ Further, his November 10, 2016 Employment Agreement makes clear that Dr. Lough “irrevocably assigned” the Patents to PTE in exchange for the Participation Payments.⁸ That is, in 2016 Dr. Lough swapped his interest in the Patents for a

⁴ Dr. Lough’s Objection, dkt. 94, ¶¶ 32, 34, and 38, referring to the APA, dkt. 88, Exhibit “B”.

⁵ Dr. Lough’s objection, dkt. 94, ¶ 32.

⁶ Dr. Lough’s objection, dkt. 94, ¶ 46.

⁷ See Assignment, Exhibit “1” hereto, pp. 1-2.

⁸ See 2016 Employment Agreement, third “Whereas” clause and § 6(B). A copy of the 2016 Employment Agreement is attached as Exhibit “B” to Dr. Lough’s Objection, dkt. 94-2.

contractual right to receive a share of profits, if any, derived from the Patents. Thereafter, he held no interest whatsoever in the Patents.

Even if Dr. Lough did retain some residual “interest” in the Patents, the Debtors’ proposed sale to the Purchaser (free and clear of that interest) is specifically allowed by section 363(f)(5) of the Bankruptcy Code: If PTE breached its obligation under the Settlement Agreement to make Participation Payments to Dr. Lough, and if Dr. Lough successfully prosecuted a case against PTE for that breach, then he would be awarded a monetary judgment (or, in this chapter 11 case, an unsecured claim). He would *not* be awarded title to the Patents. That is, he would be “compelled . . . to accept a money satisfaction.” That satisfies section 363(f)(5).

Ultimately, either (i) section 363(f) is not implicated here (because Dr. Lough assigned away all his interests in the Patents), or (ii) the transfer of the Patents (free and clear of any residual interest) is allowed by section 363(f)(5). In either case, Dr. Lough may have an unsecured claim against PTE’s estate, but he will have no continuing, post-closing interest in the Patents.

Third, Dr. Lough alleges that one of the Purchaser’s insiders, Michael Brauser, was previously an insider of a predecessor of the Debtors.⁹ He further alleges that Mr. Brauser and/or the Debtors are acting in bad faith. But Dr. Lough has not shown (i) any special treatment for Mr. Brauser because of his status, (ii) any ill-effect on the Debtors, their estates, or their creditors, or (iii) any perversion of the bankruptcy process. And Dr. Lough has not specifically alleged *any* acts of bad faith—other than that the Debtors have decided, in their business judgment, to transfer the Patents to the Purchaser but not to assume and assign the Settlement Agreement. *See Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985) (debtor may

⁹ The Debtors disclosed their relationships with Mr. Browser in the Sale Motion, dkt. 88, p. 6.

exercise business judgment; consequences may be harsh). The Debtors' decision may not be what Dr. Lough wanted, but that does not establish bad faith.

This Court should overrule Dr. Lough's objection and grant the Sale Motion.

Dated July 24, 2023

PARSONS BEHLE & LATIMER

/s/ J. Thomas Beckett
J. Thomas Beckett
Brian M. Rothschild
Darren Neilson

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2023, I caused a true and correct copy of the foregoing **THE DEBTORS' RESPONSE TO DR. LOUGH'S OBJECTION TO THE DEBTORS' SALE MOTION** to be served by filing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

- Purchaser:

Gary.Freedman@nelsonmullins.com;
Sarah.Castillo@nelsonmullins.com;
Francis.Santelices@nelsonmullins.com;
Rachel.Sternlieb@nelsonmullins.com;
Eostrow@foley.com;
Ellen-Ostrow4512@ecf.pacerpro.com;
Rgledhill@foley.com;
Skamaya@foley.com;
Docketflow@foley.com; and
Acardenas@foley.com.

- United States Trustee:

USTPRegion19.SK.ECF@usdoj.gov;
Melinda.Willden@usdoj.gov;
Lindsey.Huston@usdoj.gov;
James.Gee@usdoj.gov;
Rinehart.Peshell@usdoj.gov;
Rachelle.D.Armstrong@usdoj.gov; and
Brittany.Eichorn@usdoj.gov.

- Dr. Denver Lough:

Jwa@clydesnow.com; and
Ltroester@clydesnow.com

- DJB Gas Services, Inc.:

Emonson@rqn.com

/s/ J. Thomas Beckett _____

Electronic Version v1.1
 Stylesheet Version v1.2

EPAS ID: PAT4154397

SUBMISSION TYPE:	NEW ASSIGNMENT
NATURE OF CONVEYANCE:	ASSIGNMENT
CONVEYING PARTY DATA	
Name	Execution Date
DR DENVER M. LOUGH	11/22/2016
RECEIVING PARTY DATA	
Name:	POLARITYTE, INC.
Street Address:	106 S. GILMOR STREET
City:	BALTIMORE
State/Country:	MARYLAND
Postal Code:	21223
PROPERTY NUMBERS Total: 2	
Property Type	Number
Application Number:	14954335
PCT Number:	US2015063114
CORRESPONDENCE DATA	
Fax Number:	
<i>Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent using a fax number, if provided; if that is unsuccessful, it will be sent via US Mail.</i>	
Phone:	2023318777
Email:	mucdocketing@cahnsamuels.com
Correspondent Name:	MAURICE U. CAHN
Address Line 1:	10017TH ST., NW
Address Line 2:	STE. 401
Address Line 4:	WASHINGTON, D.C. 20036
ATTORNEY DOCKET NUMBER:	1044.0002
NAME OF SUBMITTER:	MAURICE U. CAHN
SIGNATURE:	/muc/
DATE SIGNED:	11/22/2016
Total Attachments: 2	
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source=Assignment1044_C_corp_CovRevExecuted#page2.tif	

ASSIGNMENT OF PATENT APPLICATIONS

FOR GOOD AND VALUABLE CONSIDERATION,

I, the undersigned hereby agrees to assign for good and valuable consideration, receipt of which is hereby expressly acknowledged, and do hereby sell, assign and transfer unto:

PolarityTE, Inc. a having an address of 106 S. Gilmore Street, Baltimore, Maryland 21223

a corporation organized under the laws of the state of Nevada as Assignee, and its successors, assigns and legal representatives, the entire right, title and interest, for all countries in and to certain inventions relating to

Methods for Development and Use of Minimally Polarized Functions Cell Micro-Aggregate Units in Tissue Applications Using LGR4, LGR5 and LGR6 Expressing Epithelial Stem Cells

described in an application for Letters Patent of the United States, identified as Attorney Docket No. 1044.0002, at CAHN & SAMUELS, LLP, 1100 17th Street N.W., Suite 401, Washington, DC 20036-4650 and filed on November 30, 2015, as Application Serial No. 14/954,335 and its international cognate PCT/US2015/063114 filed December 1, 2015 Attorney Docket No. 1044.0002PCT, and the invention(s) and improvement(s) set forth therein, and any and all continuations, continuations-in-part, divisionals, and renewals of and substitutes for said application for said Letters Patent, and all the rights and privileges under any and all Letters Patent that may be granted therefor in any country, and any reissues, or reexaminations, or extensions of said Letters Patent. I request that any and all Letters Patent for said inventions be issued to said Assignee, its successors, assigns and legal representatives, or to such nominees as it may designate.

The undersigned understands and intends that the assignment to the Assignee, PolarityTE, Inc., be without condition or restriction. The undersigned further notes that the assignment is made in connection with a proposed transaction whereby Majesco Acquisition Corp. ("MergerSub"), a Nevada corporation and wholly-owned subsidiary of Majesco Entertainment Company, a Delaware corporation ("Parent"), will merge with PolarityTE, Inc., and that the following conditions will be met prior to the closing of the merger with MergerSub: (i) the Parent obtaining approval from its shareholders for the merger transaction and the associated issuance of shares of the Parent's common stock; (ii) the purchase of certain laboratory and other equipment for use in the business of and the development of the technology of PolarityTE, Inc.; (iii) the leasing of new commercial space for use in the business of PolarityTE, Inc. for testing, laboratory work, and other operational space; (iv) the negotiation and execution by the Parent of executive employment agreements with certain key employees of PolarityTE, Inc.; and (v) the raising of additional capital to be used by PolarityTE, Inc. in the development of the Patent and the related intellectual property and for corporate and general working capital purposes.

I agree that, when requested, I will, without charge to said Assignee but at its expense, sign all papers, take all rightful oaths, and do all acts which may be necessary, desirable or convenient for

securing and maintaining patents for said inventions in any and all countries and for vesting title thereto in said Assignee, its successors, assigns and legal representatives or nominees.

I authorize and empower the said Assignee, its successors, assigns and legal representatives or nominees, to invoke and claim for any application for patent or other form of protection for said inventions filed by it or them, the benefit of the right of priority provided by the International Convention for the Protection of Industrial Property, as amended, or by any convention which may be substituted for it, and to invoke and claim such right of priority without further written or oral authorization from me.

I hereby consent that a copy of this assignment shall be deemed a full legal and formal equivalent of any assignment, consent to file or like document which may be required in any country for any purpose and more particularly in proof of the right of the said Assignee or nominee to claim the aforesaid benefit of the right of priority provided by the International convention which may henceforth be substituted for it.

I covenant with said Assignee, its successors, assigns and legal representatives, that the rights and property herein conveyed are free and clear of any encumbrance, and that I have full right to convey the same as herein expressed.

IN WITNESS WHEREOF, I have hereunto signed my name on the day and year set forth below.



Inventor's Signature

11/22/2016

DATE

Dr. Denver M. Lough

Inventor's Printed Name

Acknowledgement of Assignment

IN WITNESS WHEREOF, PolarityTE, Inc. has hereunto signed through its representative on the day and year set forth below to acknowledge receipt of the assignment from Dr. Denver M. Lough.



Assignee's Representative's Signature

Name: Denver M. Lough

Title: President

11/22/2016

DATE