

David W. Newman (USB #15901)
Assistant United States Trustee
Melinda P. Willden (USB #8533)
UNITED STATES DEPARTMENT OF JUSTICE
Office of the United States Trustee
Washington Federal Bank Building
405 South Main Street, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 524-5734
Facsimile: (801) 524-5628
E-mail: David.W.Newman@usdoj.gov
Melinda.Willden@usdoj.gov

Attorneys for Patrick S. Layng
United States Trustee, Region 19

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH**

In re:	Bankruptcy Case No. 23-22358
PolarityTE, Inc., a Delaware corporation;	Bankruptcy Case No. 23-22360
PolarityTE, MD, Inc., a Nevada corporation;	Bankruptcy Case No. 23-22361
PolarityTE, Inc., a Nevada corporation, Debtors	Chapter 11 Hon. Kevin R. Anderson

**THE UNITED STATES TRUSTEE’S LIMITED OBJECTION TO THE FIRST
INTERIM APPLICATION OF DORSEY & WHITNEY LLP, SPECIAL COUNSEL
FOR THE DEBTORS (DKT. #127)**

The United States Trustee files this limited objection (“Objection”) to the First Interim Application of Dorsey & Whitney LLP, Special Counsel for the Debtors (“Fee Application”) to the extent that the Fee Application seeks Court approval to pay fees associated with pre-petition work.



STATEMENT OF RELEVANT FACTS

1. On June 6, 2023, the Debtor¹ filed a Voluntary Petition for relief under Chapter 11 (“Petition Date”).
2. On June 6, 2023, the Debtor filed a Motion for Entry of an Order Authorizing Retention, Employment, and Compensation of Certain Professionals Used by the Debtors in the Ordinary Course of Business (the “Ordinary Course Motion”). *See* Dkt. #9.
3. The Ordinary Course Motion requested that the law firm Dorsey & Whitney LLP (“Dorsey”) be approved as an ordinary course professional.
4. On June 9, 2023, the U.S. Trustee filed a limited objection to the Ordinary Course Motion, requesting that Dorsey apply to be employed as special counsel pursuant to 11 U.S.C. § 327(e). The Debtor and Dorsey did not object to this request.
5. On June 16, 2023, the Court entered an order regarding the Ordinary Course Motion, in which it eliminated Dorsey from the list of ordinary course professionals. *See* Dkt. #47.
6. On August 7, 2023, Dorsey filed the Declaration of David Marx in Support of Application to Employ Dorsey & Whitney LLP as Special Counsel to the Debtors (“Declaration”). *See* Dkt. #109.
7. The Declaration stated: “On or about May 25, 2023, Dorsey received a retainer of \$50,000 for services to be performed for the Debtors pre-petition. As of the date of

¹ The U.S. Trustee will refer to the jointly administered cases identified in the caption as the Debtor.

filing, Dorsey was owed approximately \$42,679.33 for services provided to the Debtors pre-petition. Dorsey will seek authorization to apply the retainer to its outstanding pre-petition services in its first fee application to this Court.”

8. On August 18, 2023, the Court entered an order approving the employment of Dorsey as special counsel to the Debtor as of the Petition Date. *See* Dkt. 116.
9. On November 14, 2023, Dorsey filed the Fee Application seeking the Court’s authorization to apply \$42,679.33 of the prepetition retainer of \$50,000 (“Retainer”) to services performed prepetition.
10. The Fee Application also requests Court approval of \$107,175.00 in fees and \$11,266.45 in expenses for work done postpetition.
11. The Debtor has not yet filed a chapter 11 plan (“Plan”) in this case.

ARGUMENT

I. THE PLAN WILL DETERMINE THE PAYMENT OF PREPETITION CLAIMS

As of the Petition Date, Dorsey held a claim of \$42,679.33 for services performed for the Debtor prepetition. Charges for prepetition legal services are a claim in a bankruptcy case.² Rather than asking for the Court to approve fees for work done prepetition, the Fee Application asks the Court to authorize Dorsey to apply a portion of the Retainer to its prepetition claim. In other words, Dorsey seeks to have its prepetition claim paid outside of the Plan (that has not yet been filed).

² Priority is given to attorney fees awarded under 11 U.S.C. § 330(a). *See* 11 U.S.C. § 503(b)(2). However, section 330(a)(1) allows a Court to award fees only to attorneys who have been “employed under section 327.” The Court approved Dorsey’s employment under Section 327 as of the Petition Date, and therefore approving fees for work done prepetition is not appropriate under the Bankruptcy Code.

A Plan “shall ... provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest.” 11 U.S.C. § 1123(a)(4). If the Court were to approve special treatment for a creditor outside of the Plan, then the Debtor may risk filing to meet the requirements of Section 1123, which could affect the confirmability of the Plan.

The better approach is to deny Dorsey’s request for authorization to pay its prepetition claim from the Retainer, as Dorsey can file a claim and be treated as a creditor of the bankruptcy estate. This has been done in other cases. *See In re Potter*, 2009 WL 2922850, at *1 (Bankr. D.N.M. June 12, 2009) (“Special Counsel acknowledges that he has filed a proof of claim in the Debtor’s bankruptcy proceeding based on unpaid attorneys’ fees in the amount of \$30,993.82 that Mr. Potter incurred pre-petition. The fact that he is a creditor does not disqualify him from being retained as special counsel under 11 U.S.C. § 327(e).”); *see also In re EBW Laser, Inc.*, 333 B.R. 351, 359 (Bankr. M.D.N.C. 2005) (stating that a claim for prepetition fees will not, as a general matter, disqualify special counsel under Section 327(e)).

II. CONCLUSION

The U.S. Trustee has conferred with counsel for Dorsey and believes that Dorsey is willing to file a claim in this case rather than pursue permission to be paid for a prepetition claim outside of the Plan.

Wherefore, the U.S. Trustee objects to Dorsey’s Fee Application insofar as it requests approval to pay its prepetition claim.

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Date: December 4, 2023

UNITED STATES TRUSTEE
Patrick S. Layng

By: /s/Melinda P. Willden
MELINDA P. WILLDEN
Attorney for the United States Trustee

CERTIFICATE OF SERVICE BY ELECTRONIC NOTICE (CM/ECF)

I hereby certify that on December 4, 2023, I electronically filed the foregoing document with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF users.

- **J. Thomas Beckett** tbeckett@parsonsbehle.com, ecf@parsonsbehle.com;brothschild@parsonsbehle.com
- **Darren B. Neilson** dneilson@parsonsbehle.com
- **Brian M. Rothschild** brothschild@parsonsbehle.com, ecf@parsonsbehle.com;docket@parsonsbehle.com
- **United States Trustee** USTPRegion19.SK.ECF@usdoj.gov
- **Melinda Willden** melinda.willden@usdoj.gov, Lindsey.Huston@usdoj.gov;James.Gee@usdoj.gov;Rinehart.Peshell@usdoj.gov;Rachelle.D.Armstrong@usdoj.gov;Brittany.Eichorn@usdoj.gov

CERTIFICATE OF SERVICE BY MAIL OR OTHER MEANS

I hereby certify that on December 4, 2023, I uploaded a copy of the foregoing document to BMC Group, Inc., an approved bankruptcy notice provider, and directed that it be sent by first class mail to the parties listed below. Pursuant to the BMC Group, Inc.'s terms of service, documents uploaded for service will be mailed out within one business day of being uploaded.

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NONE

Mail Service to all Parties in Interest: First-class mail, postage pre-paid, addressed to all parties who do not receive electronic service as set forth herein listed on the Official Court Mailing Matrix dated December 4, 2023 attached hereto:

NONE

Date: December 4, 2023

/s/ Melinda P. Willden
Melinda P. Willden