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Attorneys for the Liquidating Trustee

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

In re: PolarityTE, Inc., a Delaware corporation Debtor	Case No. 23-bk-22358-KRA Case No. 23-bk-22360-KRA Case No. 23-bk-22361-KRA
In re: PolarityTE, MD Inc., a Nevada corporation Debtor	Chapter 11 Judge Kevin R. Anderson
In re: PolarityTE, Inc., a Nevada corporation Debtor	**THIS FILING RELATES TO ALL DEBTORS**[1]

VERIFIED OBJECTION TO CLAIM NO. 2 OF DENVER LOUGH

John Curtis, as the Liquidating Trustee ("**Liquidating Trustee**") for the combined debtors PolarityTE, Inc. ("**PTE**"), PolarityTE, MD Inc. ("**PTE MD**"), and PolarityTE, Inc. ("**PTE NV**")

[1] The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are PolarityTE, Inc. (9524); PolarityTE MD, Inc. (1555); and PolarityTE, Inc. (6882). The location of the Debtors' service address is 1960 S. 4250 W., Salt Lake City, UT 84104.

(together, the "**Debtors**") hereby submits this verified objection (this "**Objection**") to the claim of Denver Lough and in support, respectfully state as follows:

JURISDICTION AND BASES FOR RELIEF

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Venue is proper in this District under 28 U.S.C. §§ 1408(1) and 1409.

3. The basis for the relief requested is sections 501 and 502 of title 11 of the United States Code (the "**Bankruptcy Code**") and rule 3007 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), and Local Rule 3007-1.

BACKGROUND AND RELEVANT FACTS

I. GENERAL BACKGROUND

4. The Debtors were a clinical stage biotechnology company that marketed and sold a product to treat complex wounds.

5. Due to U.S. Food and Drug Administration's ("**FDA**") guidance, the Debtors were unable to continue to sell their product without FDA approval which required expensive clinical trials.

6. Without sales revenue the Debtors were unable to continue to fund the clinical trials.

7. Rather than abandon the clinical trials and their promising product, on June 6, 2023 (the "**Petition Date**"), each Debtor filed a petition for relief under its Chapter 11 Case in the Bankruptcy Court.

8. Prior to the Petition Date, the Debtors have never been profitable. Attached as Exhibit B hereto is a summary prepared by the Liquidating Trustee based on Debtors' SEC filings showing Debtors' lack of profits.

9. After the Petition Date, the Debtors sought and obtained approval from the Bankruptcy Court to run a sale process for the sale of substantially all their assets. On July 31, 2023, the Court approved the sale of substantially all the Debtors' operating assets to Grander Acquisition LLC ("**Grander**" and the "**Grander Sale**") (ECF 107) for the price of $6,500,000.

10. Dr. Lough filed an objection to the Grander Sale (ECF 94). In approving the Grander Sale the Court overruled Dr. Lough's objection. *See* ECF 107, Section II, Paragraph A. The Grander Sale order also specifically excluded the Settlement Agreement (defined below) from the Acquired Assets acquired by Grander in the Grander Sale. *Id*. at Section I, Paragraph 19.

11. On January 27, 2025, the Court confirmed (the "**Confirmation Order**") (ECF 190) Debtors' liquidating plan of reorganization (the "**Plan**").

12. Under the Plan, any objection to claims may be prosecuted by the Liquidating Trustee and any objection to a claim must be brought within 180 days after the Effective Date. *See* Sections 6.2 and 6.6 of the Plan attached as Exhibit 1 to the Confirmation Order (ECF 190).

13. Section 8.1 of the Plan states that all executory contracts to which the Debtor is a party shall be deemed rejected except for any executive contract that has been assumed pursuant to a final order prior to the Effective Date or is the subject of a separate motion to assume under Section 362 of the Bankruptcy Code filed prior to the Effective Date. *Id*. at Section 8.1. Dr. Lough's Settlement Contract has not been assumed, either through a final order or a motion to assume prior to the Effective Date and is therefore rejected by operation of the Confirmation Order.

14. Under the Plan the Effective Date occurred on February 26, 2025, at which time John Curtis was appointed as the Liquidating Trustee. (*See Notice of Occurrence of Effective Date of Debtors' Plan of Liquidation Dated August 15, 2024 Under Chapter 11 of the Bankruptcy Code*, ECF 194).

II. BACKGROUND SPECIFIC TO CLAIM OBJECTION

15. Creditor Denver Lough was a former executive of Debtor PTE pursuant to an employment agreement dated in or around November 2016. In the following year Dr. Lough's employment agreement was renewed and replaced with an employment agreement dated November 10, 2017 (the "**Employment Agreement**"). The Employment Agreement is attached as Part 4 to Dr. Lough's Proof of Claim No. 2.

16. In August of 2019, Dr. Lough and PTE entered into an agreement formally ending Dr. Lough's employment at PTE (the "**Settlement Agreement**"). Under the Settlement Agreement, the Employment Agreement was terminated upon the execution of the Settlement Agreement with Section 6(B), Section 12, Section 13, and Section 15(a)[2] of the Employment Agreement surviving the Settlement Agreement.

17. On July 22, 2023, Dr. Lough filed proof of claim No. 2 along with supporting documents including a narrative summary of his claim, the Employment Agreement, and the Settlement Agreement asserting a general unsecured claim in an unknown amount.

18. Relevant to this Objection and Dr. Lough's asserted claim, Section 6(B) of the Employment Agreement states, in summary, that as long as Dr. Lough is not in breach of the Employment Agreement, Dr. Lough is entitled to a quarterly payment of 5% of profits derived from commercial transactions associated with U.S. Patent Application No. 14/954,335 and PCT International Patent Application No. PCT/US2015/063114 (the "**Patents**"). *See* Section 6(B) to

[2] There is a discrepancy between the Employment Agreement and Settlement Agreement. The Settlement Agreement states "[Employment Agreement] is terminated effective immediately. …Section()…15(a) on indemnification shall survive such termination." Under the Employment Agreement, Section15(a) deals with the parties right to assign or delegate the rights or duties under the Employment Agreement and does not mention indemnification. It is more likely that the parties intended to reference Section 15(b) of the Employment Agreement which states that "[d]uring the term of this Agreement, the Parent (i) shall indemnify and hold harmless the Executive….and (ii) shall cover the Executive under the Parent's directors' and officers' liability insurance…"

Employment Agreement attached as Part 4 to Claim 2. The quarterly payment is defined as "Participation Payments" in the Employment Agreement.

19. Section 15(b) of the Employment Agreement states that "[d]uring the term of this [Employment Agreement], the [PTE] (i) shall indemnify and hold harmless [Dr. Lough] and his heirs and representatives to the maximum extent provided by the laws of the State of Delaware and by [PTE's] bylaws and (ii) shall cover the Executive under the Parent's directors' and officers' liability insurance on the same basis as it covers other senior executive officers and directors of the Parent." *Id*. at Section 15(b).

20. The crux of Dr. Lough's claim is based on Dr. Lough's allegations that he is entitled to "Participation Payments" as defined in Section 6(B) of the Employment Agreement, along with future indemnification under Section 15(b) of the Employment Agreement along with PTE's bylaws.

III. OBJECTION TO CLAIM

The Liquidating Trustee object to Dr. Lough's claim on the basis that his claim based on Participation Payments and indemnification is disallowed under 11 U.S.C. § 502(b)(1) as Dr. Lough's claim is not enforceable against the Debtors or property of the Debtors. The Liquidating Trustee further objects to Dr. Lough's claim on the basis that his claim for indemnification is disallowed under 11 U.S.C. § 502(e)(1)(B).

A. Legal Standards for Objecting Under 11 U.S.C. § 502(b)(1)

Section 501(a) of the Bankruptcy Code states that a "creditor . . . may file a proof of claim." 11 U.S.C. § 501(a). Federal Rule of Bankruptcy Procedure 3001 states that a proof of claim "shall conform substantially to the appropriate Official Form" and that a "proof of claim shall be executed by the creditor or the creditor's authorized agent. . . ." Fed. R. Bankr. P. 3001(a) and (b). A proof of claim executed and filed in accordance with the Federal Rules

constitutes "prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f).

11 U.S.C. § 502(b)(1) provides that a creditor's claim is allowed "except to the extent that . . . (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1).

11 U.S.C. § 502(e)(1)(B) provides, in relevant part, that: "the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution." 11 U.S.C. § 502(e)(1)(B).

Generally, procedures related to objections to claims are governed by Federal Rule of Bankruptcy Procedure 3007. The Court of Appeals for the Tenth Circuit has stated that creditors have the burden of proof regarding the allowance of their claims, and to meet this burden, the claim must be sufficiently substantiated. *See Caplan v. B-Line, LLC (In re Kirkland)*, 572 F.3d 838, 840 (10th Cir. 2009).

B. <u>Dr. Lough Does Not Have a Claim for Participation Payments Because the Debtors Were Never Profitable.</u>

The Debtors have never been profitable. *See* Exhibit B. Section 6(B) of the Employment Agreement states that Dr. Lough is entitled to "Participation Payments" from commercial transactions associated with the Patents. *See* Section 6(B) of the Employment Agreement. The Participation Payments shall equal "…(A) [five (5%) percent] multiplied by (B) the Participation Income for the most recently completed quarter." *Id.* Participation Income is defined as "…the Profits of Parent and its Affiliates (as reported and in accordance with US GAAP) received for

each calendar quarter minus Deductible Purchaser Expenses." *Id*. The Debtors have never been profitable and have never posted a quarter in which the Participation Income was larger than $0.00. So, in this case, Dr. Lough would be entitled to Participation Payments of 5% multiplied by zero which equals zero.

C. Dr. Lough's Claim for Indemnification Should be Denied Under 11 U.S.C. § 502(e)(1)(B).

Pursuant to Bankruptcy Code section 502(e)(1)(B), a court shall disallow any claim for reimbursement or contribution of an entity that is co-liable with the debtor, to the extent such claim is contingent at the time of allowance or disallowance. *See* 11 U.S.C. § 502(e)(1)(B). Thus, the Bankruptcy Code mandates disallowance of any claim where three criteria are met: (1) the claim must be one for reimbursement or contribution; (2) the entity asserting the claim must be liable with the debtor on the claim of a creditor; and (3) the claim must be contingent at the time its allowance or disallowance is determined. *See In re Hemingway Transport, Inc.*, 993 F.2d 915, 923 (1st Cir. 1993); *In re Georgia Tubing Corp.*, 1995 U.S. Dist. LEXIS 10120, *11 (S.D.N.Y. July 20, 2995); *In re Allegheny Int'l, Inc.*, 126 B.R. 919, 921 (W.D. Pa. 1991); *In re Provincetown-Boston Airlines, Inc.*, 72 B.R. 307, 309 (Bankr. M.D. Fla. 1987). The statute has two purposes. One is to ensure that where other parties may be co-liable with a debtor on the same underlying causes of action, the bankruptcy estate will not be obligated to make two payments for the liability thereon. The second is to address the burden on chapter 11 cases posed by contingent indemnification and contribution claims. *In re Charter Co.*, 862 F.2d 1500, 1502-3 (11th Cir. 1989) (asserting that estate should not be burdened by estimated claims contingent in nature and should accord fair treatment to creditors by paying ascertainable claims as quickly as possible); *In re Drexel Burnham Lambert Group, Inc.*, 146 B.R. 92, 97 (S.D.N.Y. 1992) (noting difficulty of administering and distributing the debtor's estate while ongoing contingent claims of the type

covered by section 502(e)(1)(B) still exist); *In re Wedtech Corp.*, 85 B.R. 285, 290 (Bankr. S.D.N.Y. 1988) (indicating that the purpose of disallowing contingent indemnification and contribution claims is precisely because they are so contingent). Dr. Lough's claim for indemnification satisfies each of the requirements of section 502(e)(1)(B) and, accordingly, his claim must be disallowed.

1. Dr. Lough's Claim Is "For Reimbursement."

Many courts have concluded that "the concept of reimbursement includes indemnification." *See In re Vectrix Bus. Solutions, Inc.*, 2005 Bankr. LEXIS 1712, *9 (Bankr. N.D. Tex. Sept. 1, 2005); *In re GCO Servs., LLC*, 324 B.R. 459, 465 (Bankr. S.D.N.Y. 2002); *see e.g., In re Wedtech*, 85 B.R. at 289 (finding that officers seeking indemnification arising from lawsuits in which they were named defendants did not contradict the reimbursement nature of their claims).

Thus, it is well-established that claims for indemnity are covered by section 502(e)(1)(B) where the claimant is co-liable with the debtor on the underlying claim. *See In re Charter*, 862 F.2d at 1502-3 (affirming the bankruptcy court's decision disallowing under section 502(e)(1)(B) proofs of claim filed by generators of toxic substances seeking reimbursement, contribution or indemnity from the debtor, who was involved in disposal of the substances); *In re Pettibone Corp.*, 110 B.R.. 837, 848 (Bankr. N.D. Ill. 1990) (disallowing claim for indemnification by manufacturer of brake system with respect to potential liability from products liability suit); *In re A & H Inc.*, 122 B.R. 84 (Bankr. W.D. Wis. 1990) (disallowing under section 502(e)(1)(B) claim filed by truck rental company against debtor lessee for indemnification with respect to rental company's potential liability resulting from lessee's truck accident); *In re Provincetown-Boston Airlines, Inc.*, 72 B.R. 307 (Bankr. M.D.Fla. 1987) (disallowing under section 502(e)(1)(B) claim filed by underwriter against debtor for indemnification or contribution with respect to underwriter's potential liability resulting from public offering of debtor's common stock).

Accordingly, it is clear that Dr. Lough's Claim is "for reimbursement" and that the first prong of section 502(e)(1)(B) has been satisfied.

2. Dr. Lough Would Be Co-liable With the Debtor On Any Indemnity Claim.

Where an executive officer is "co-liable" with a debtor to a third-party creditor, claims for reimbursement by such executive must be disallowed because there is no need to pay twice (by paying both creditors) for the same potential liability. *See* 11 U.S.C. § 502(e)(1)(B); 3 COLLIER ON BANKRUPTCY ¶ 502.06[2][b]. The concept of "co-liability" is broad enough to encompass any type of liability shared with the debtor, whatever its basis. *See Allegheny*, 126 B.R. at 922-23; *Provincetown-Boston*, 72 B.R. at 309-10.

As a rule, whether entities are co-liable is determined based on the substantive law of the applicable underlying cause of action. *See, e.g., Hemingway*, 993 F.2d at 923 (finding claimants co-liable based on assignment of joint and several liability pursuant to state action taken under the Comprehensive Environmental Response Compensation and Liability Act.) For example, in *Wedtech*, the court found the claimants (a director and an officer) could be co-liable with the debtor as participants in concealing the debtor's financial condition in violation of the Securities and Exchange Act. *See* 85 B.R. at 290-91.

Dr. Lough's Claim is somewhat unique because there is no active lawsuit or claim that has been asserted against Dr. Lough that would trigger the claimed indemnity clause set forth in his Employment Agreement. The relevant case law usually resolves around directors and officers seeking a claim of indemnification from a debtor for past or ongoing litigation.

In any event, any claim that would trigger Dr. Lough's alleged indemnification clause would necessarily require that Dr. Lough and one of the Debtors be co-liable. As the alleged indemnification clause is contained in his terminated Employment Agreement, the indemnification

would necessarily relate to the Debtors and therefore the second prong of section 502(e)(1)(B) would be satisfied.

3. Dr. Lough's Claim Is "Contingent."

In order to disallow a claim for reimbursement, such claim must be "contingent" as of the time of allowance or disallowance of such claim. *See* 11 U.S.C. §502(e)(1)(B). As an initial matter, Dr. Lough's Claim is contingent because it seeks indemnification from the Debtors for possible future expenses—the amounts of which are unknown and unknowable and the incurrence of which is speculative. *See, e.g., In re GCO Servs.*, LLC, 324 B.R. 459, 466 (Bankr. S.D.N.Y. 2005); *In re Drexel Burnham Lambert Group*, 146 B.R. 98, 102 (Bankr. S.D.N.Y. 1992); *Kaung v. Cole National Corp.*, 884 A.2d 500, 509 (Del. 2005) (whether corporate officer has a right to indemnification is a decision that must necessarily await the outcome of the investigation or litigation); *see, e.g., In re Charter Co.*, 862 F.2d 1500, (11th Cir. 1989) (any rights to indemnification are entirely dependent on the outcome of the underlying litigation); *In re Zenith Laboratories, Inc.*, 104 B.R. 659, 666 (D. N.J. 1989) (where corporation is not unconditionally required to reimburse its officers and directors and no action has been initiated in the debtor's name against the directors, any indemnification claims remain contingent liabilities); *Wedtech*, 85 B.R. at 289 (where underlying liability of directors is undetermined, indemnification claims are contingent).

As mentioned above, Dr. Lough's indemnification claim is textbook "contingent" as no litigation or threatened litigation of claim for indemnification has occurred. As Dr. Lough's indemnification claim is purely contingent, the third prong of section 502(e)(1)(B) has been

satisfied.

IV. NOTICE

The Liquidating Trustee provided an advanced courtesy copy of this Objection more than 30 days prior to the scheduled hearing to (a) the Office of the United States Trustee for the District of Utah; (b) all ECF notice parties in the Chapter 11 Case; and (c) Dr. Lough via his attorney of record. In light of the nature of the relief requested in this Objection, the Liquidating Trustee respectfully submits that no further notice is necessary and the notice satisfies Bankruptcy Rule 3007(a).

No prior motion or pleading for the relief sought in this Objection has been made to this Court or any other court in connection with this Chapter 11 Case.

V. CONCLUSION

WHEREFORE, for the reasons set forth herein, the Liquidating Trustee respectfully request that the Court disallow the claim of Denver Lough.

DATED March 26, 2025.

PARSONS BEHLE & LATIMER

/ 

Attorneys for the Liquidating Trustee

VERIFICATION

I have read the factual assertions in the foregoing Objection and declare under the penalty of perjury pursuant to 28 U.S.C § 1746 that they are true and correct to the best of my knowledge.

Dated March 31, 2025.

/s/ John Curtis
John H. Curtis
Liquidating Trustee of PolarityTE, Inc.

CERTIFICATE OF SERVICE BY ELECTRONIC NOTICE (CM/ECF)

I hereby certify that on March 31, 2025, I electronically filed the foregoing ***VERIFIED OBJECTION TO CLAIM NO. 2 OF DENVER LOUGH*** 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.

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CERTIFICATE OF SERVICE BY MAIL OR OTHER MEANS

I hereby certify that on March 31, 2025, I caused to be served a true and correct copy of the foregoing ***VERIFIED OBJECTION TO CLAIM NO. 2 OF DENVER LOUGH*** as follows:

Mail Service: First-class U.S. mail, postage pre-paid, addressed to:

None.

Mail Service to All Parties in Interest: First-class U.S. mail, postage pre-paid, addressed to all parties who did not receive electronic service as set for the herein listed on the Official Court Mailing Matrix.

None.

/s/ Darren Neilson
Darren Neilson

EXHIBIT A

Debtors' Proposed Order

Order Prepared and Submitted by:
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Attorneys for the Debtors

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

In re: PolarityTE, Inc., a Delaware corporation Debtor	Case No. 23-bk-22358-KRA Case No. 23-bk-22360-KRA Case No. 23-bk-22361-KRA
In re: PolarityTE, MD Inc., a Nevada corporation Debtor	Chapter 11 Judge Kevin R. Anderson
In re: PolarityTE, Inc., a Nevada corporation Debtor	**THIS FILING RELATES TO ALL DEBTORS**[3]

ORDER DISALLOWING CLAIM OF DENVER LOUGH

[3] The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are PolarityTE, Inc. (9524); PolarityTE MD, Inc. (1555); and PolarityTE, Inc. (6882). The location of the Debtors' service address is 1960 S. 4250 W., Salt Lake City, UT 84104.

Upon the Verified Objection (the "**Objection**")[4] filed by John Curtis as the Liquidating Trustee of the above-captioned debtors in possession (the "**Debtors**") seeking entry of an order disallowing the claim of Denver Lough, and the Court, having reviewed the Objection, and having heard the statements of counsel in support of the relief requested in the Objection at the hearing before the Court (the "**Hearing**"), and upon the record of the proceedings before this Court, and the Court finding that it has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334, that this is a core matter under 28 U.S.C. § 157(b)(2), that notice of the Objection and the scheduled hearing were sufficient under the circumstances and proper under Rule 3007(a), and that no further notice need be given for the relief sought herein; and the legal and evidentiary bases set forth in the Objection establish just cause for the relief granted herein,

THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Objection is GRANTED.

2. Claim No. 2 filed by Denver Lough is disallowed.

3. The Liquidating Trustee is authorized and empowered to expunge the claim of Denver Lough.

4. This Order shall be immediately effective upon its entry.

5. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

[END OF DOCUMENT]

[4] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Objection.

EXHIBIT B

Summary of Debtors' Losses

POLARITYTE, INC. AND SUBSIDIARIES

Summary of Income (Loss) from SEC Filings

Numbers in thousands	*Form 10-K* *Year Ended* **12/31/2015**	*Form 10-K* *Year Ended* **12/31/2016**	*Form 10-K* *Year Ended* **12/31/2017**	*Form 10-K* *Year Ended* **10/31/2018**	*Form 10-K* *Two Months Ended* **12/31/2018**	*Form 10-K* *Year Ended* **12/31/2019**	*Form 10-K* *Year Ended* **12/31/2020**	*Form 10-K* *Year Ended* **12/31/2021**	*Form 10-K* *Year Ended* **12/31/2022**	*Chapter 11 Petition* **6/6/2023**
Operating Loss	**($3,926)**	**($4,099)**	**($130,612)**	**($69,432)**	**($18,530)**	**($93,393)**	**($45,940)**	**($33,686)**	**($22,373)**	
Net Loss	**($3,806)**	**($4,640)**	**($130,829)**	**($65,441)**	**($18,418)**	**($92,493)**	**($42,854)**	**($30,187)**	**($7,833)**	