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10
11 **UNITED STATES BANKRUPTCY COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **OAKLAND DIVISION**

14 In re
15 PREDIWAVE CORPORATION,
16 a California corporation,
17 Debtor.

18 Fed. Tax I.D. No. 77-0494328
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Case No. 06-40547 (RJN)

Chapter 11

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AUTHORITY TO
ESTABLISH PROCEDURES FOR
INTERIM PAYMENT OF FEES AND
REIMBURSEMENT OF EXPENSES**

Hearing

Date: July 27, 2006

Time: 10:00 a.m.

Place Courtroom 220

1300 Clay Street

Oakland, CA 94612

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I.
INTRODUCTION

PrediWave Corporation, a California Corporation, the debtor and debtor in possession in the above captioned case ("PrediWave" or the "Debtor"), hereby submits this Memorandum of Points and Authorities in support of "Motion For Authority To Establish Procedures For Interim Payment Of Fees And Expenses" filed concurrently herewith.

II.
JURISDICTION

The Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

III.
BACKGROUND FACTS

A. General Background.

PrediWave is a technology company and maintains its headquarters in Fremont, California. The Debtor designs a content delivery system for use by broadband digital service providers such as cable and satellite television operators. This technology enables the delivery of video-on-demand ("VOD") over a one-way cable network without the infrastructure investments associated with upgrading to a two-way cable network. The Debtor's technology is covered by two United States patents; additional patent applications are pending in the United States, China, Taiwan and Japan. The Debtor's technology is particularly well-suited for certain countries, such as China, where the existing infrastructure consists of mostly one-way networks.

On April 14, 2006 (the "Petition Date"), PrediWave commenced this case by filing a voluntary petition for relief under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). Pursuant to Bankruptcy Code sections 1107(a) and 1108, PrediWave is operating its business and managing its affairs as a debtor and debtor in possession. The Official Committee of Creditors Holding Unsecured Claims (the "Committee") was appointed on May 3, 2006.

1 The Debtor filed this case in order to continue its business operations and preserve its
2 assets after the Santa Clara Superior Court entered a pre-judgment right to attach order and the
3 writ of attachment in the amount of \$117,000,000 against it (the "Attachment Lien") in the *New*
4 *World TMT Ltd v. PrediWave Corp. et. al.*, in the Santa Clara Superior Court (the "Santa Clara
5 Court"), case no. 04-CV020369 (the "Santa Clara Action"). On April 4, 2006, levying officers
6 began executing on the Attachment Lien against Debtor's bank accounts. Absent a bankruptcy
7 filing, the Debtor would have been forced to terminate immediately all of its employees and cease
8 entirely its business operations and its defense of the Santa Clara Action.¹

9 The Debtor currently has approximately \$76 million in cash on deposit in banks and
10 financial institutions located in California, and approximately \$500,000 in cash in two bank
11 accounts in Japan. The Debtor's assets consist of the foregoing cash deposits, cash equivalents,
12 security deposits, accounts receivable, prepaid expenses, leases, inventory, work in process,
13 equipment, computers and office equipment, intellectual property (including patents and pending
14 patent application), vehicles and other miscellaneous assets. The book value of these assets
15 (including the above-described cash) as of May 31, 2006 was approximately \$145 million. As of
16 May 31, 2006, the book value of the Debtor's liabilities totaled \$175 million, including
17 approximately \$162 million in current and future liabilities under long-term contracts. In
18 addition, prior to the Petition Date, New World filed suit against the Debtor seeking
19 approximately \$700 million in damages in the Santa Clara Action.

20 Only two months into the case, New World has obtained an order to examine the Debtor
21 pursuant to Bankruptcy Rule 2004 exam, and has filed a motion to appoint a chapter 11 trustee or
22 to convert this case and a motion to substantively consolidate the assets and liabilities of certain
23 alleged non-debtor affiliates with those of the Debtor. In addition to the Santa Clara Action
24 (which is no longer subject to the automatic stay and has been remanded to the Santa Clara
25

26 ¹ On April 20, 2006, this Court entered that certain Stipulated Order Dispensing with Requirement of
27 Undertaking for Immediate Release of Attachment and Directing Levying Officers to Immediately Release
28 Attachment (the "Attachment Release Order"). Among other things, this Court found, and ordered, the
Attachment Lien (as to the Debtor and its property) terminated as of the Petition Date upon the filing of the
case, and directed all levying officers to undertake all action necessary to effectuate the immediate release
of the Attachment Lien.

1 Court), the Debtor is prosecuting other litigation matters in Los Angeles involving New World.

2 Not only will the Debtor be required to marshal significant resources in connection with
3 the aforementioned litigation, but also, the Debtor will need to expend considerable time, effort
4 and money in addressing the overall course of its reorganization. Pre-petition, the Debtor's
5 technology was distributed in Asia -- PrediWave's most important market -- exclusively by New
6 World. This critical pre-petition relationship has been adversely affected by litigation and may be
7 beyond repair. If it is beyond repair, the Debtor will need to explore alternative distribution
8 channels as part of its chapter 11 case. In light of the comprehensive nature of any reorganization,
9 the desire to assuage any concerns regarding the post-petition operations and affairs of this Debtor
10 and the resignation of the Debtor's Chief Financial Officer shortly before the commencement of
11 this case, the Debtor sought to add to its reorganization and financial reporting capabilities by
12 seeking to retain XRoads Solutions Group, LLC ("XRoads") as its financial and restructuring
13 advisor. Through the application (which is currently before the Court), the Debtor seeks to retain
14 Dennis Simon of XRoads, to serve as its chief restructuring officer (the "CRO"), Dawn Ragan of
15 XRoads to serve as its chief financial officer, and XRoads to serve as the Debtor's general
16 financial and restructuring advisor, to help the Debtor maximize the value of its business and its
17 technology for the benefit of creditors and the estate.

18 **B. The Need for Interim Fee Procedures.**

19 Bankruptcy Code section 331 authorizes professionals to apply for compensation for
20 services rendered and reimbursement of expenses incurred once every 120 days after an order for
21 relief, or more often if the Court permits.

22 The Court has already approved the Debtor's application to employ Klee, Tuchin,
23 Bogdanoff & Stern LLP, as reorganization counsel, and Latham & Watkins LLP, as special
24 litigation counsel, and the Debtor will be submitting to the Court an application seeking authority
25 to employ XRoads, as its financial and restructuring advisor. In addition, this Court has approved
26 the Committee's application to employ Pachulski, Stang, Ziehl, Young, Jones & Weintraub, a
27 Professional Corporation, as its counsel. It is likely that the Debtor or its estate will file additional
28 applications seeking to employ other professionals at the expense of the Debtor's estate.

1 The Debtor believes, for several reasons, that it is necessary and appropriate to establish
2 an expedited procedure for paying and monitoring, on a monthly basis, the interim compensation
3 and reimbursement of expenses due to professionals employed at the expense of the Debtor's
4 estate. The professionals will be required to devote substantial time, effort, and expense relating
5 to services on behalf of the Debtor and Committee. The absence of a procedure by which the
6 Debtor and the estate may compensate and reimburse the professionals on a relatively current
7 basis would burden the professionals, unfairly compel the professionals to finance the Debtor's
8 chapter 11 case, and discourage other professionals from accepting or continuing employment in
9 this case. The proposed fee procedures will alleviate burdens on professionals by providing for
10 their payment on a relatively current basis, thereby also ensuring that professionals are not
11 compelled to finance the Debtor's chapter 11 case. Moreover, parties in interest will be better able
12 to monitor the administrative fees and expenses incurred by professionals in this case by
13 reviewing, on a monthly basis, the amounts requested for interim compensation and expense
14 reimbursement.

15 **C. The Requested Relief.**

16 1. Monthly Statements. Commencing in August 2006 and continuing each
17 month thereafter, each professional employed by or at the expense of the estate (each, a
18 "Professional" and collectively, the "Professionals") may prepare an abbreviated monthly fee
19 statement (the "Monthly Statement") relating to the services rendered and expenses incurred by
20 that Professional during the prior month. The Monthly Statement shall: (a) relate to the services
21 rendered and expenses incurred during the prior month (or, in the case of the first Monthly
22 Statement, the services rendered and expenses incurred from the Petition Date); (b) indicate the
23 total amount of compensation sought for such services (taking into account the 20% holdback for
24 fees); and (c) include exhibits indicating (i) the services rendered, the total time expended, the
25 names of the specific individuals who performed the services for which compensation is
26 requested, and the hourly billing rate for each such individual, (ii) the expenses incurred, and (iii)
27 a detailed listing of the time entries relating to all individuals who performed services, and a
28 detailed listing of all expenses incurred during the applicable period.

1 2. Service of Monthly Statement. Each Professional who submits a Monthly
2 Statement shall, on or before the 20th day of the relevant month: (a) file the Monthly Statement
3 with the Court; (b) serve a copy of the Monthly Statement on the Office of the United States
4 Trustee (the "U.S. Trustee"), counsel for the Debtor, counsel for the Official Committee of
5 Unsecured Creditors (the "Committee), and parties that have filed and served on the Debtor
6 requests for special notice (collectively, the "Core Parties"), and (c) file and serve upon all parties
7 entitled to notice in this case pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure
8 (the "Bankruptcy Rules") a notice setting forth the amount of compensation being requested
9 pursuant to the Monthly Statement (the "Notice of Monthly Statement"). The Notice of Monthly
10 Statement shall also provide that the Monthly Statement may be obtained upon written request
11 from the applicable Professional.

12 3. Objection Procedure. Any party in interest who objects to the payment of
13 compensation set forth in a Monthly Statement must, within ten (10) days after the Monthly
14 Statement is served, file a written objection with the Court and serve that objection on the Core
15 Parties and the Professional whose Monthly Statement is the subject of the objection. Unless the
16 Debtor or another party in interest files and serves an objection to the requested payment within
17 ten (10) days of service of the Monthly Statement, the Debtor shall be authorized to pay 100% of
18 the costs and 80% of the fees requested by each Professional in the ordinary course of its business
19 on an interim basis as set forth in the Monthly Statement. If an objection is filed, the Debtor shall
20 be authorized to pay 80% of any undisputed portion of the requested fees and 100% of the
21 undisputed costs, pending resolution of any objections (consensually or by order of the Court).
22 Upon resolution of any such objections, the Debtor shall pay the balance owed, subject to
23 holdbacks and any agreed to adjustments.

24 4. Bankruptcy Code Section 331 Interim Fee Application Procedure. Within
25 thirty (30) days after the end of each four-month period (the "Interim Fee Period"), commencing
26 with the period ended August 30, 2006, except as otherwise set forth in the order governing
27 employment of a particular Professional, each Professional that filed a Monthly Statement or
28 otherwise seeks interim compensation shall file with the Court and serve on the Core Parties an

1 interim fee application (the "Interim Application") pursuant to Bankruptcy Code section 331,
2 Bankruptcy Rule 2016, the Local Bankruptcy Rules, and the "Guidelines for Compensation and
3 Expense Reimbursement of Professionals and Trustees" (the "Guidelines") promulgated by this
4 Court pursuant to Local Bankruptcy Rule 9029-1. Pursuant to such Interim Applications,
5 Professionals may seek approval and payment of up to 100% of the compensation relating to
6 Professional fees and reimbursement of expenses incurred since the Petition Date or in the prior
7 four-month period, as the case may be, including any amounts withheld from monthly payments
8 pursuant to Monthly Statements.

9 Before the deadline for filing Interim Applications, counsel for the Debtor shall
10 obtain from the Court a date for a hearing on the Interim Applications at least forty-five (45) days
11 in advance and file and serve a notice of the intended hearing on the Interim Applications on the
12 Core Parties and all Professionals (or, if the Court would prefer, the hearing on the Interim
13 Application could be scheduled for the second omnibus hearing date occurring after the deadline
14 for filing the Interim Applications) and, not less than twenty (20) days prior to that hearing, file
15 with the Court and serve on the Core Parties, the Notice Parties and all Professionals a notice that
16 specifies the Interim Applications that have been filed, the total amount of compensation for
17 services and reimbursement of expenses sought in each such Interim Application, and the date
18 and time of the hearing on the Interim Applications.

19 Any party in interest may file and serve a written objection in accordance with the
20 applicable Federal Rules and Local Bankruptcy Rules. No party will be estopped from objecting
21 to an Interim Application on the ground that such party failed to object to any Monthly
22 Statement. If an objection to an Interim Application is sustained, or if the Court otherwise so
23 orders, the Professional shall disgorge to the Debtor the disallowed portion of any payment it
24 may have received.

25 In connection with the administration of this case, the Debtor or the Committee,
26 from time to time, may seek to employ attorneys, accountants, and other Professionals for a finite
27 period of time or for a limited purpose. In such instances, if any, the relevant Professionals,
28 subject to the Court's approval, may be employed on terms and conditions different from those

1 set forth herein, including, without limitation, on a retainer, an hourly basis, or a contingency fee
2 basis.

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4 **IV.**
ARGUMENT

5 **A. Legal Standard.**

6 Bankruptcy courts in the Ninth Circuit have broad discretion to establish and
7 supervise the procedures for payment of interim fees to professionals. In re Knudsen Corp., 84
8 B.R. 668, 670-71 (B.A.P. 9th Cir. 1988); see also In re Home Express, 213 B.R. 162, 165 (Bankr.
9 N.D. Cal. 1997) (noting that the Knudsen court had approved procedures whereby professionals
10 were paid on a monthly basis); In re County of Orange, 179 B.R. 195, 199 (Bankr. C.D. Cal.
11 1995) (applying Knudsen factors and authorizing monthly payment procedures for
12 professionals).

13 In Knudsen, the Bankruptcy Appellate Panel for the Ninth Circuit approved
14 payment procedures similar to those requested by this Motion, including provisions for the
15 payment of fees on a monthly basis, subject to the Court's subsequent review of fees and
16 expenses for reasonableness pursuant to quarterly interim fee applications. Knudsen, 84 B.R. at
17 672. The court recognized that:

18 [T]he problem, arising especially in large cases [is] that when counsel
19 must wait an extended period for payment, counsel is essentially
20 compelled to finance the reorganization. This result is improper and
21 may discourage qualified professionals from participating in
22 bankruptcy cases; a result that is clearly contrary to Congressional
23 interest.

24 Id.

25 In Knudsen, the Court set forth four factors that, if met, allow the Court to au-
26 theorize professionals employed by the debtor to be paid each month without prior court
27 approval, subject to subsequent court review. These factors are: (i) whether the case is an un-
28 usually large one in which large amounts of fees accrue each month; (ii) whether waiting an
extended period for payment would place undue hardship on counsel; (iii) whether the court is
satisfied that counsel can respond to any reassessment; and (iv) whether the fee payment
procedure is subject to a noticed hearing prior to any payment being made under such

1 procedures. Knudsen, 84 B.R. at 672; County of Orange, 179 B.R. at 199.

2 **B. Application of Legal Standard.**

3 The four Knudson factors are present here.

4 First, the Debtor's case is unusually large, with assets and liabilities each in excess
5 of \$150 million.

6 Second, because the Debtor is enhancing its reorganization and financial reporting
7 capabilities, vigorously defending itself in complex litigation matters in various forums, and
8 analyzing prospects for a comprehensive reorganization of its business, it is likely that a large
9 amount of professional fees will accrue each month, thereby placing an undue burden on the
10 Professionals if such Professionals were required to wait an extended period of time to receive
11 payment. Further, the absence of a procedure for the payment of fees on an interim basis more
12 frequently than quarterly, subject to final approval by the Court at regular intervals, could act to
13 dissuade well-qualified professionals from accepting employment to the detriment of the estate
14 and all parties in interest.

15 Third, the Professionals seeking to be retained in this matter are established firms
16 such that have the ability to disgorge any payments made, should such result be required.

17 Finally, the fourth requirement is satisfied because the requested procedures provide
18 that any amounts paid will be reviewed on an interim basis pursuant to the fee application
19 process after all interested parties have received notice and an opportunity to be heard on this
20 Motion and the procedures requested herein.

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V.

CONCLUSION

Based upon the foregoing, the four Knudsen criteria have been met in this case. In order to promote fair treatment and make valuable professional services accessible to the participants in this case without creating undue risk or hardship to the Professionals, the Court is asked to exercise its discretion and establish the interim fee procedures as requested herein.

Respectfully submitted,

/s/ Jonathan S. Shenson

DATED: July 7, 2006

JONATHAN S. SHENSON, a Member of
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