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9 Proposed Special Counsel for Debtor and Debtor in
Possession

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UNITED STATES BANKRUPTCY COURT

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NORTHERN DISTRICT OF CALIFORNIA

14

OAKLAND DIVISION

15

In re

Case No. 06-40547-RJN

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PREDI WAVE CORPORATION,
a California corporation

Chapter 11

17

Debtor.

**APPLICATION TO RETAIN, EMPLOY
AND COMPENSATE LATHAM &
WATKINS LLP AS SPECIAL LITIGATION
COUNSEL FOR THE DEBTOR AND
DEBTOR IN POSSESSION NUNC PRO
TUNC TO THE PETITION DATE**

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Fed. Tax I.D. No. 77-0494328

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[No Hearing Required]

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PrediWave Corporation (“PrediWave” or the “Debtor”) hereby applies to this
23 Court (the “Application”) for entry of an order pursuant to sections 327(e), 328, 329, 330, 503(b)
24 and 507 of Title 11 of the United States Code (the “Bankruptcy Code”), rules 2014, 2016 and
25 5002 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and the
26 Guidelines promulgated by the United States Trustee for Region 17 (the “Guidelines”)
27 authorizing the Debtor to retain, employ and compensate Latham & Watkins LLP (“Latham &
28

1 Watkins”) as special litigation counsel for the Debtor and Debtor in Possession, *nunc pro tunc* to
2 April 14, 2006, the date the Debtor commenced the instant chapter 11 case (the “Petition Date”),
3 and directing that copies of all notices, pleadings and other documents filed in this case and any
4 and all adversary proceedings be served upon Patrick E. Gibbs, as special litigation counsel for
5 the Debtor, at Latham & Watkins LLP, 140 Scott Drive, Menlo Park, CA 94025.

6 JURISDICTION

7 1. This Court has jurisdiction over this Application pursuant to 28 U.S.C.
8 §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

9 2. The statutory predicates for the relief requested herein are sections 327(e),
10 328, 329, 330, 503(b) and 507 of the Bankruptcy Code.

11 BACKGROUND

12 **A. Procedural Background**

13 3. On the Petition Date, the Debtor filed a voluntary petition for relief under
14 chapter 11 of the Bankruptcy Code.

15 4. The Debtor continues to operate its business and manage its properties as
16 debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

17 5. On April 17, 2006, the Debtor filed an application for entry of an order
18 authorizing the Debtor to retain, employ and compensate Latham & Watkins as bankruptcy
19 counsel and special litigation counsel for the Debtor and Debtor in Possession (the “Initial
20 Application”) [Docket No. 25]. Concurrently therewith, the Debtor served the Initial
21 Application on the Office of the United States Trustee in accordance with Bankruptcy Rules
22 2014 and 9034 and the Guidelines

23 6. On May 3, 2006, the United States Trustee (the “US Trustee”) appointed
24 an official committee of unsecured creditors (the “Committee”) in this Chapter 11 case [Docket
25 Nos. 83 and 85].

26 7. On May 5, 2006, the Debtor filed a motion for order authorizing Debtor’s
27 proposed counsel to file under seal fee applications relating to ongoing litigation (the “Fee Seal
28 Motion”) [Docket No. 86].

1 8. On May 15, 2006, the Debtor filed a supplement to the Initial Application
2 (the “Supplement”) [Docket No. 115].

3 9. On May 22, 2006, New World TMT Limited (“New World”) filed a
4 motion for appointment of trustee, or alternatively, appointment of an examiner, or alternatively,
5 to convert the case to chapter 7 (the “Trustee Motion”) [Docket No. 128]. A hearing on the
6 Trustee Motion has been scheduled for July 26, 2006.

7 10. At a hearing held on May 24, 2006, this Court denied the Initial
8 Application but indicated that it would be willing to entertain an application to retain Latham &
9 Watkins as special litigation counsel for the Debtor.

10 11. On May 25, 2006, New World filed an objection to the Fee Seal Motion
11 [Docket No. 134].

12 **B. Factual Background**

13 12. The events leading up to the Petition Date are set forth in the Declaration
14 of Vincent Lin in Support of First Day Emergency Motions (the “Lin Declaration”)¹.

15 **C. Latham & Watkins’ Role**

16 13. On April 14, 2006, the Debtor’s Board of Directors voted to seek authority
17 in this Court to employ the law firm of Latham & Watkins as its special litigation counsel under
18 a general retainer at Latham & Watkins’ customary hourly rates and reimbursement policies. As
19 described below, Latham & Watkins has served as principal litigation counsel to the Debtor
20 since the Summer of 2005 and intends to continue in that role during the pendency of this case.

21 14. From and after June 2005, Latham & Watkins’ attorneys have represented
22 the Debtor in two (2) pending lawsuits. The first of these lawsuits (the “Los Angeles Action”)²
23 was brought by the Debtor against Jimmy Li and Fu Sze Shing for breach of fiduciary duty,
24 unfair competition, tortious interference with contract, tortious interference with prospective
25 business advantage and declaratory relief. The second lawsuit, New World TMT Ltd v.

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27 ¹ Capitalized terms used and not defined in this Application shall have the meanings ascribed to them in the Lin
28 Declaration.

1 PrediWave Corp. et. al. (Santa Clara Superior Court Case No. 104 CV020369) (the “Santa Clara
2 Action,” and together with the Los Angeles Action, the “Lawsuits”) was brought by New World
3 TMT Ltd. (“New World”), the holder of the Debtor’s preferred stock and a contract party with
4 Prediwave, against the Debtor, CyberLancet Corporation, CyberNova Corporation, TechStock
5 Corporation, WarpEra Corporation, Visionaire Technology Corporation, S.T.U.B.
6 SATertainment, Incorporated, Athena Database, Incorporated (“Athena”), Pine Global
7 Marketing Limited and Jianping “Tony” Qu, the Debtor’s chairman and majority stockholder
8 (collectively, the “Other Defendants”). The Debtor has filed cross-claims against New World in
9 the Santa Clara Action. Latham & Watkins has been representing the Debtor in the Lawsuits and
10 the Other Defendants in the Santa Clara Action. The Other Defendants have executed conflict
11 waiver letters that specifically provide that Latham & Watkins will not represent any of the
12 Other Defendants adversely to the Debtor and that expressly waive any conflict of interest that
13 might exist or arise in connection with Latham & Watkins’ representation of the Debtor in the
14 Lawsuits and related matters. These conflict waiver letters specify that Latham & Watkins will
15 take its principal direction from the Debtor (and not the Other Defendants) in the prosecution and
16 defense of the Lawsuits and related matters. The relationships between the Debtor and the Other
17 Defendants are set forth more fully in the Supplement.

18 15. In representing the Debtor in the Lawsuits, Latham & Watkins’ attorneys
19 have become familiar with the complex factual and legal issues that will have to be addressed in
20 the Lawsuits and related matters. The Debtor believes that the retention of Latham & Watkins,
21 with its knowledge of and experience with the Debtor, the Lawsuits, and the industry in which it
22 operates, will contribute to the efficient administration of the estate thereby minimizing the
23 expenses to the estate.

24 16. The Debtor will require Latham & Watkins to render legal services
25 relating to the Lawsuits, including assisting the Debtor’s general bankruptcy counsel with any
26 matters that arise in this chapter 11 case and that relate to or could impact the Lawsuits. It is
27 possible that the Debtor will request that Latham & Watkins represent it in other litigations or
28 matters that might arise during the pendency of this chapter 11 case. In that event, the Debtor

1 will (i) prepare and file a supplement to this retention application describing such other
2 litigations and matters and Latham & Watkins' proposed role in them and (ii) seek and obtain
3 approval of this Court for such retention.

4 17. The Debtor selected Latham & Watkins because Latham & Watkins'
5 attorneys have extensive experience, knowledge and resources in the area of complex
6 commercial litigation, bankruptcy and debtors' and creditors' rights, and Latham & Watkins has
7 the ability to commit substantial resources to legal problems on an urgent basis.

8 18. In choosing Latham & Watkins as the best candidate for the Debtor's
9 special litigation counsel, the Debtor considered the firm's representation of the Debtor prior to
10 the filing of this chapter 11 case and its familiarity with the Debtor gained in connection
11 therewith. The Debtor believes that Latham & Watkins is well-qualified to represent it as special
12 litigation counsel in this chapter 11 case and requests that this Court approve such retention.

13 **D. Latham & Watkins Does Not Hold or Represent Adverse Interests**

14 19. Based upon the Declaration of Patrick E. Gibbs, filed concurrently
15 herewith (the "Gibbs Declaration"), the Debtor believes that except as set forth in paragraph 14
16 above and the Gibbs Declaration, Latham & Watkins' partners, associates and other attorneys (i)
17 have no connection with the Debtor, the Debtor's sole subsidiary (a non-debtor) or any of its
18 affiliates, any creditors of the Debtor, the United States Trustee, or any other party in interest in
19 the Debtor's chapter 11 case, and (ii) do not hold or represent any interest adverse to the Debtor
20 or to the estate with respect to the matters on which Latham & Watkins is to be employed.

21 20. As set forth in the Gibbs Declaration, Latham & Watkins represents, in
22 matters unrelated to the Lawsuits, certain parties (the "Unrelated Parties") who may assert claims
23 against or be subject to objections or litigation brought by the Debtor. Latham & Watkins does
24 not represent the Unrelated Parties or any other entity (other than the Other Defendants as
25 described herein and in the Gibbs Declaration) in connection with the Lawsuits.

26 **E. Latham & Watkins' Compensation**

27 21. The Debtor, the Other Defendants and Latham & Watkins have agreed
28 that from and after the Petition Date thirty percent (30%) of the fees and expenses of Latham &

1 Watkins in connection with the Santa Clara Action will be billed to the Debtor and the remaining
2 seventy percent (70%) will be billed to the Other Defendants. As the Debtor is the sole plaintiff
3 in the Los Angeles Action, Latham & Watkins will bill the Debtor for all of the fees and
4 expenses incurred in that litigation. Similarly, Latham & Watkins will bill the Debtor for all fees
5 and expenses that Latham & Watkins incurs in assisting the Debtor's general bankruptcy counsel
6 in matters arising in this chapter 11 case that relate to or could impact the Lawsuits. Latham &
7 Watkins charges for reimbursement of necessary and reasonable out-of-pocket expenses
8 according to its customary reimbursement policies. Those expenses are typically charged the
9 same to clients both in and outside of chapter 11 (Latham & Watkins does not include such
10 charges in its hourly rates). A schedule of current hourly rates for the attorneys and paralegals
11 expected to be the most active in this case is attached as Exhibit B to the Gibbs Declaration.
12 Latham & Watkins will bill the Debtor for fees charged in connection with the Lawsuits and
13 related matters at Latham & Watkins' customary hourly rates.² The Debtor submits that such
14 rates are reasonable and should be approved by the Court subject to (i) a determination of the
15 amounts to be paid to Latham & Watkins upon application for allowance and (ii) the allocation
16 described in the first sentence of this paragraph. Latham & Watkins also has informed the
17 Debtor that its prevailing rates may change from time to time consistent with its normal business
18 practices and that any such changes will be reflected in the first Latham & Watkins fee
19 application following the change. Notice of any change in fee structure will also be submitted to
20 the Debtor, the Committee, the United States Trustee, and this Court. Latham & Watkins may
21 seek interim compensation and reimbursement of expenses during this case as permitted by
22 section 331 of the Bankruptcy Code. However, no compensation will be paid by the Debtor to
23 Latham & Watkins except (i) upon application under sections 330 and 331 of the Bankruptcy
24 Code and approval by this Court after notice and hearing and (ii) as consistent with any interim
25 compensation order entered by this Court. Latham & Watkins intends to file its fee applications

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27 ² Prior to the Petition Date, Latham & Watkins employed a premium billing arrangement for services in connection
28 with the Lawsuits and related matters. From and after the Petition Date, Latham & Watkins will bill the Debtor at
Latham & Watkins' customary hourly rates for services in connection with the Lawsuits and related matters.

1 in this case under seal in accordance with the procedures set forth in the Fee Seal Motion, if
2 approved.

3 22. As set forth in the Gibbs Declaration, Latham & Watkins has billed and
4 collected in the aggregate approximately \$11.3 million for time and expenses during the one-year
5 period immediately preceding the Petition Date (i) primarily in connection with Latham &
6 Watkins' representation of the Debtor in the Lawsuits and (ii) secondarily in connection with
7 general restructuring advice, including the preparation of the Debtor's petition for relief under
8 chapter 11 of the Bankruptcy Code and supporting documentation (the "Pre-petition Payments").
9 Prior to the commencement of this chapter 11 case, Latham & Watkins received a retainer from
10 the Debtor for post-petition services (the "Retainer") and, as of the Petition Date, the Retainer
11 was approximately \$91,000. The Debtor's funds are the source of the Pre-petition Payments and
12 the Retainer. Unless the Court orders otherwise, the Retainer will be held by Latham & Watkins
13 and disbursed only in accordance with applicable law and the rules of the Court regarding
14 professional compensation; provided that, as set forth in the Supplement, in connection with any
15 of its monthly, interim or final fee applications, Latham & Watkins will first apply to payment of
16 its fees and expenses any unused portion of the Retainer, until the Retainer is reduced to zero. In
17 the event that a trustee is appointed in this chapter 11 case, Latham & Watkins will turn over to
18 such trustee any unused portion of the Retainer.

19 23. The Debtor made the following payments to Latham & Watkins during the
20 90-day period immediately preceding the Petition Date: (i) a payment of \$1,210,410.42 on
21 January 17, 2006; (ii) a payment of \$1,157,683.90 on January 27, 2006; (iii) a payment of
22 \$2,021,977.63 on March 6, 2006; and (iv) a payment of \$2,602,977.07 on March 23, 2006.

23 24. In addition to the pre-petition fees and expenses paid by the Debtor, the
24 Other Defendants have paid Latham & Watkins for services in connection with the Santa Clara
25 Action and have also provided Latham & Watkins with a litigation retainer. These payments
26 were made by wire transfer from Athena. The first payment was made on April 7, 2006 in the
27 amount of \$3,817,745.97, of which \$2,000,000 was a retainer for the Lawsuits. The second
28 payment was made on May 9, 2006 in the amount of \$1,400,000, and this payment was made for

1 the purpose of bringing the retainer back up to \$2,000,000. The Other Defendants are not
2 debtors in any chapter 11 case and will continue to pay Latham & Watkins consistent with their
3 ordinary course practices for services rendered to them by Latham & Watkins.

4 **RELIEF REQUESTED AND BASIS FOR RELIEF**

5 25. The Debtor believes that the employment of Latham & Watkins is in the
6 best interests of the Debtor and its estate and desires to employ Latham & Watkins with
7 compensation and reimbursement of expenses to be paid as an administrative expense in such
8 amounts as may be allowed by this Court pursuant to sections 330, 331, 503(b) and 507(a)(1) of
9 the Bankruptcy Code and such other terms as set forth in a fee application filed by Latham &
10 Watkins. Were the Debtor required to retain attorneys other than Latham & Watkins in
11 connection with the defense and prosecution of the Lawsuits, the Debtor, its estate, and all
12 parties in interest would be unduly prejudiced by the time and expense necessarily attendant to
13 such attorneys' familiarization with the intricacies of the Debtor's business in general and
14 various factual and legal issues that will have to be addressed in the Lawsuits and any related
15 litigation.

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