

1 **LATHAM & WATKINS LLP**  
Patrick E. Gibbs (CA Bar No. 183174)  
2 140 Scott Drive  
Menlo Park, California 94025  
3 Telephone: (650) 328-4600  
Facsimile: (650) 463-2600  
4 patrick.gibbs@lw.com

5 **LATHAM & WATKINS LLP**  
Daniel S. Schechter (CA Bar No. 171472)  
6 633 West Fifth Street, Suite 4000  
Los Angeles, California 90071-2007  
7 Telephone: (213) 485-1234  
Facsimile: (213) 891-8763  
8 daniel.schechter@lw.com

9 Proposed Special Counsel for Debtor and Debtor in  
Possession

10

11

12

**UNITED STATES BANKRUPTCY COURT**

13

**NORTHERN DISTRICT OF CALIFORNIA**

14

**OAKLAND DIVISION**

15

In re

Case No. 06-40547-RJN

16

**PREDIWAVE CORPORATION,**  
a California corporation

Chapter 11

17

Debtor.

**DECLARATION OF PATRICK E. GIBBS IN  
SUPPORT OF DEBTOR'S 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**

18

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

[No Hearing Required]

19

20

21

22

23

I, PATRICK E. GIBBS, declare as follows:

24

1. I am an attorney at law, duly licensed to practice before the courts of the

25

State of California, the State of Illinois, the United States District Court for the Northern District

26

of California, the United States District Court for the Central and Northern Districts of Illinois,

27

the Trial Bar of the United States District Court for the Northern District of Illinois, the Third

28

Circuit Court of Appeals and the Seventh Circuit Court of Appeals.

1                   2.       I am a partner in the firm of Latham & Watkins LLP (“Latham &  
2 Watkins”), which maintains offices at 140 Scott Drive, Menlo Park, CA 94025, (650) 328-4600,  
3 (650) 463-2600 facsimile.

4                   3.       I submit this Declaration in support of the Application to Retain, Employ  
5 and Compensate Latham & Watkins LLP as Special Litigation Counsel for The Debtor and  
6 Debtor in Possession Nunc Pro Tunc to the Petition Date (the “Application”)<sup>1</sup> in this chapter 11  
7 case, pursuant to section 327(e) of Title 11 of the United States Code (the “Bankruptcy Code”)  
8 and in compliance with sections 329 and 504 of the Bankruptcy Code, and rules 2014(a),  
9 2016(b) and 5002 of Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

10                  4.       Latham & Watkins’ attorneys expected to be most active in this case, the  
11 names and biographies of which are attached hereto as Exhibit A, have extensive experience in  
12 the area of commercial litigation. Latham & Watkins has served as principal litigation counsel  
13 for PrediWave Corporation (the “Debtor”) since the Summer of 2005, and has also provided  
14 general restructuring advice.

15                  5.       At my request, attorneys at Latham & Watkins have conducted, and  
16 continue to conduct, extensive research into its relations with the Debtor, its creditors, certain  
17 employees of the Office of the United States Trustee, attorneys and accountants of the foregoing,  
18 and other parties interested in this case. As part of this inquiry, Latham & Watkins obtained  
19 from the Debtor’s senior management more than 220 names of individuals or entities who may  
20 be parties in interest in this chapter 11 case (the “Potential Parties in Interest”).<sup>2</sup> Latham &  
21 Watkins then entered the names of the Potential Parties in Interest into a computer database  
22 containing the names of all clients of Latham & Watkins and conflict information concerning  
23 such clients. This inquiry revealed that certain of the Potential Parties in Interest are or may be  
24 current or former Latham & Watkins clients, including, as noted above, the Other Defendants (as

25 \_\_\_\_\_  
26 <sup>1</sup> Capitalized terms not defined in this Declaration shall have the meanings ascribed to them in the Application.

27 <sup>2</sup>The Potential Parties in Interest include those individuals or entities identified by the Debtor as the (a) largest trade  
28 (and other) creditors of the Debtor, (b) major shareholders of the Debtor, and (c) directors and officers of the Debtor.

1 defined below) in the Santa Clara Action.<sup>3</sup> A list of these Potential Parties in Interest that are or  
2 may be current or former Latham & Watkins clients is set forth on Exhibit C hereto (the “Client  
3 Match List”). Through the information generated from the above-mentioned computer inquiry, it  
4 appears that any representation of the clients on the Client Match List concerned matters in  
5 which such clients were not adverse to the Debtor.

6           6.       Neither I, the firm of Latham & Watkins, nor any partner, associate or  
7 other attorney thereof, insofar as I have been able to ascertain, has any connection with the  
8 Debtor, any of the Debtor’s affiliates, any creditors of the Debtor, any bankruptcy judge of the  
9 Northern District of California, the United States Trustee for Region 17 or any other party in  
10 interest in the Debtor’s chapter 11 case, or their respective attorneys and accountants, except as  
11 set forth below, and except that I, the firm, its partners and associates (a) may have appeared in  
12 the past, and may appear in the future, in unrelated cases or proceedings under the Bankruptcy  
13 Code or otherwise where one or more of such parties in interest may have been, or may be,  
14 involved; and (b) may represent or may have represented certain creditors and/or interest holders  
15 of the Debtor (the “Unrelated Parties”) in matters unrelated to the Lawsuits as described below.

16           7.       Neither I, Latham & Watkins, nor any partner, associate or other attorney  
17 thereof, insofar as I have been able to ascertain, represents any interest adverse to that of the  
18 Debtor’s estate in the matters upon which the Debtor seeks to retain Latham & Watkins. Latham  
19 & Watkins is currently representing the Debtor as well as CyberLancet Corporation, CyberNova  
20 Corporation, TechStock Corporation, WarpEra Corporation, Visionaire Technology Corporation,  
21 S.T.U.B. SATertainment, Incorporated, Athena Database, Incorporated, Pine Global Marketing  
22 Limited and Jianping “Tony” Qu (collectively, the “Other Defendants”) in litigation brought  
23 against the Debtor and the Other Defendants by New World TMT Ltd. in the Santa Clara  
24 Superior Court (the “Santa Clara Action”, and together with a lawsuit filed by the Debtor in Los  
25 Angeles Superior Court in which Latham & Watkins is representing the Debtor, the “Lawsuits”).

---

26  
27 <sup>3</sup> Latham & Watkins does not represent any of the Other Defendants in any matters other than the Santa Clara  
28 Action.

1 I am informed that Mr. Qu is the Chief Executive Officer and a director of the Debtor, as well as  
2 the majority shareholder of the Debtor. I am informed and believe that the Other Defendants  
3 (with the exception of Mr. Qu) have the same equity holders as the Debtor, share the same  
4 management and have entered into agreements with the Debtor pursuant to which it provides  
5 administrative services to them. The Other Defendants have executed conflict waiver letters that  
6 specifically provide that Latham & Watkins will not represent any of the Other Defendants  
7 adversely to the Debtor and that expressly waive any conflict of interest that might exist or arise  
8 in connection with Latham & Watkins' representation of the Debtor in the Lawsuits and related  
9 matters. These conflict waiver letters specify that Latham & Watkins will take its principal  
10 direction from the Debtor (and not the Other Defendants) in the prosecution and defense of the  
11 Lawsuits and related matters. The relationships between the Debtor and the Other Defendants  
12 are set forth more fully in the Supplement.

13           8.       Neither I, Latham & Watkins, nor any partner, associate or other attorney  
14 thereof, insofar as I have been able to ascertain, is so connected with any bankruptcy judge of the  
15 Northern District of California, or the United States Trustee for Region 17 or any assistant  
16 United States Trustee or designee of the United States Trustee, as to render the appointment of  
17 Latham & Watkins as counsel for the Debtor inappropriate under Bankruptcy Rule 5002(b).

18           9.       Because of the size of the Debtor's corporate organization, contacts and  
19 relationships between Latham & Watkins (on the one hand) and the Debtor and/or its creditors  
20 (on the other hand) have taken place in past years and will likely take place in the future.  
21 Latham & Watkins submits that any such contacts or relationships do not create any conflicts  
22 with respect to Latham & Watkins' representation of the Debtor as special litigation counsel. In  
23 particular, to the best of my information and belief, Latham & Watkins has represented, currently  
24 represents, or may in the future represent in matters unrelated to the Debtor, certain of the  
25 entities or affiliates of the entities summarized in the Client Match List. Certain of the entities on  
26 the Client Match List are identified solely because one of their affiliates might be a client of  
27 Latham & Watkins. In addition, Latham & Watkins has not represented any of the entities on  
28 the Client Match List with respect to matters related to the Debtor except as disclosed in



1 connection with the preparation of the Debtor's petition for relief under chapter 11 of the  
2 Bankruptcy Code and supporting documentation. The engagement letter between the Debtor and  
3 Latham & Watkins will be substantially in the form attached to this Declaration as Exhibit D.

4           15. Latham & Watkins has billed and collected approximately \$11.3 million  
5 for services and expenses (the "Pre-petition Payment") during the one-year period immediately  
6 preceding the Petition Date (i) primarily with respect to general litigation matters and (ii)  
7 secondarily with respect to general bankruptcy matters (not including the Retainer identified  
8 below). Except as expressly described in this declaration, in accordance with sections 329 and  
9 504 of the Bankruptcy Code and Bankruptcy Rule 2016, neither I nor Latham & Watkins has  
10 entered into any agreements, express or implied, with any other party in interest, including the  
11 Debtor, any creditor, or any attorney for such party in interest in this case (i) for the purpose of  
12 sharing or fixing fees or other compensation to be paid to any such party in interest or its  
13 attorneys for services rendered in connection therewith, (ii) for payment of such compensation  
14 from the assets of the estate in excess of the compensation allowed by this Court pursuant to the  
15 applicable provisions of the Bankruptcy Code, or (iii) for payment of compensation in  
16 connection with this case other than in accordance with the applicable provisions of the  
17 Bankruptcy Code; provided however, that as noted elsewhere, Latham & Watkins does and will  
18 continue to represent the Other Defendants in the Lawsuits and will continue to receive payment  
19 of fees and reimbursement of expenses from the Other Defendants for such representation.

20           16. As of the date of the filing of the Debtor's chapter 11 petition, Latham &  
21 Watkins' Retainer in connection with its representation of the Debtor was approximately  
22 \$91,000. The Debtor made the following payments to Latham & Watkins during the 90-day  
23 period immediately preceding the Petition Date: (i) a payment of \$1,210,410.42 on January 17,  
24 2006; (ii) a payment of \$1,157,683.90 on January 27, 2006; (iii) a payment of \$2,021,977.63 on  
25 March 6, 2006; and (iv) a payment of \$2,602,977.07 on March 23, 2006.

26           17. In addition to the pre-petition fees and expenses paid by the Debtor, the  
27 Other Defendants have paid Latham & Watkins for services in connection with the Santa Clara  
28 Action and have also provided Latham & Watkins with a litigation retainer. These payments

1 were made by wire transfer from Athena. The first payment was made on April 7, 2006 in the  
2 amount of \$3,817,745.97, of which \$2,000,000 was a retainer for the Lawsuits. The second  
3 payment was made on May 9, 2006 in the amount of \$1,400,000, and this payment was made for  
4 the purpose of bringing the retainer back up to \$2,000,000. The Other Defendants are not  
5 debtors in any chapter 11 case and will continue to pay Latham & Watkins consistent with their  
6 ordinary course practices for services rendered to them by Latham & Watkins

7           18. The Debtor, the Other Defendants and Latham & Watkins have agreed  
8 that from and after the Petition Date thirty percent (30%) of the fees and expenses of Latham &  
9 Watkins in connection with the Santa Clara Action will be billed to the Debtor and the remaining  
10 seventy percent (70%) will be billed to the Other Defendants. As the Debtor is the sole plaintiff  
11 in the Los Angeles Action, Latham & Watkins will bill the Debtor for all of the fees and  
12 expenses incurred in that litigation. Similarly, Latham & Watkins will bill the Debtor for all fees  
13 and expenses that Latham & Watkins incurs in assisting the Debtor's general bankruptcy counsel  
14 in matters arising in this chapter 11 case that relate to or could impact the Lawsuits. Latham &  
15 Watkins charges for reimbursement of necessary and reasonable out-of-pocket expenses  
16 according to its customary reimbursement policies. Those expenses are typically charged the  
17 same to clients both in and outside of chapter 11 (Latham & Watkins does not include such  
18 charges in its hourly rates). Latham & Watkins intends to apply for compensation for its services  
19 as special litigation counsel in the manner reflected above and to seek reimbursement of  
20 necessary and reasonable out-of-pocket expenses according to its customary reimbursement  
21 policies<sup>4</sup>, in accordance with the applicable provisions of the Bankruptcy Code, the Bankruptcy  
22 Rules, and any applicable Guidelines of the United States Trustee for Region 17. Latham &

---

23  
24 <sup>4</sup> The current reimbursement policy is as follows: photocopying (\$0.17 per page); fax charges (\$1.25 per page for  
25 outgoing documents only); scanning documents to electronic databases (\$0.25 per page); computerized legal  
26 research charges (90% of the third-party vendor rate or 1.25 times our volume-discounted cost depending on  
27 vendor); long-distance telephone charges (AT&T standard rates); courier and air freight charges (1.10 times our  
28 volume-discounted cost); messenger charges (at third-party vendor rate); travel expenses (transportation, plus  
meal and lodging charges); secretarial overtime, meal and transportation costs (for night or weekend work only);  
data processing services (\$60.00 per hour); postage costs, at cost; supply costs (for large volume only); and other  
reasonable costs and expenses.

1 Watkins does not build its out-of-pocket expenses into overhead or hourly billing rates. A  
2 schedule of current hourly rates for the attorneys and paralegal expected to be the most active in  
3 this case is attached as Exhibit B hereto. Latham & Watkins will bill the Debtor for fees charged  
4 in connection with the Lawsuits and related matters at Latham & Watkins' customary hourly  
5 rates.<sup>5</sup> Latham & Watkins submits that such rates are reasonable and should be approved by the  
6 Court subject to (i) a determination of the amounts to be paid to Latham & Watkins upon  
7 application for allowance and (ii) the allocation described in the first sentence of this paragraph.  
8 Latham & Watkins has informed the Debtor that its prevailing rates may change from time to  
9 time consistent with its normal business practices and that any such changes will be reflected in  
10 the first Latham & Watkins fee application following the change. Notice of any change in fee  
11 structure will also be submitted to counsel for the official committee of unsecured creditors in  
12 this case, the United States Trustee for Region 17 and this Court. Latham & Watkins may seek  
13 interim compensation and reimbursement of expenses during this case as permitted by section  
14 331 of the Bankruptcy Code. However, Latham & Watkins acknowledges and agrees that no  
15 compensation will be paid by the Debtor to Latham & Watkins except (i) upon application under  
16 sections 330 and 331 of the Bankruptcy Code and approval by this Court after notice and hearing  
17 and (ii) as consistent with any interim compensation order entered by this Court. Latham &  
18 Watkins intends to file its fee applications in this case under seal in accordance with the  
19 procedures set forth in the Fee Seal Motion, if approved.

20 I declare under penalty of perjury under the laws of the United States that, to the  
21 best of my knowledge, the foregoing is true and correct.

22 Executed this 7<sup>th</sup> day of June, 2006 at Menlo Park, California.

23

24

25

/s/ Patrick E. Gibbs  
Patrick E. Gibbs

26

27

28

<sup>5</sup> Prior to the Petition Date, Latham & Watkins employed a premium billing arrangement for services in connection 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.