

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

_____)	
In re)	Chapter 11
)	
MCI, INC., et al.,)	Case No. 02-13533 (AJG)
)	
Debtors.)	(Jointly Administered)
_____)	

**ORDER REGARDING MOTION OF MISSISSIPPI POWER CO. AND
SOUTHERN COMPANY SERVICES, INC. TO COMPEL CURE PAYMENT**

Upon consideration of the Motion of Mississippi Power Co. and Southern Company Services, Inc. to Compel Cure Payment (the “Cure Motion”) and the parties’ briefs and argument on the Cure Motion, and for the reasons stated in the Court’s December 6, 2005 decision, attached hereto as Exhibit A, on the Cure Motion, it is hereby

ORDERED that the uncontested portion of the Cure Motion is granted, in the amount of \$303,315.13 for costs of Southern Company Services, Inc. and Georgia Power Co. associated with maintenance of the fiber optic cable, and \$419,560.02 for costs associated with title research and acquisition of rights of way; and it is further

ORDERED that the Cure Motion is denied in all other respects.

Dated: December 20, 2005

s/ Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A

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AS REVIEWED AND MODIFIED BY
THE COURT ON 12/6/2005

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

In re

WORLD COM, INC., et al, Case No. 02-13533

Reorganized Debtors.

-----x

December 6, 2005
12:00 p.m.

United States Custom House
One Bowling Green
New York, New York 10004

DIGITALLY RECORDED PROCEEDINGS
E X C E R P T

12:00 WORLD COM, INC., ET AL
DECISION TO BE RENDERED

Motion filed by Mississippi Power Company and
Southern Company Services, Inc. to Compel
Cure Payments.

B E F O R E:

THE HONORABLE ARTHUR J. GONZALEZ
United States Bankruptcy Judge

DEBORAH HUNTSMAN, Court Reporter
198 Broadway, Suite 903
New York, New York 10038
(212) 608-9053 (917) 723-9898

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1 Proceedings

2 (Whereupon, the following is an
3 excerpt from 12/6/05 in re Enron Corp., et
4 al, Case No. 01-16034.)

5 JUDGE GONZALEZ: Please be seated.

6 With respect to the 12:00 matter,
7 this is a decision to be rendered in the
8 Mississippi Power Company and Southern
9 Company Services, Inc. Motion to Compel Cure
10 Payment.

11 I will read the decision into the
12 record. What I read from will be provided to
13 the transcriber for purposes of corrections,
14 as well as setting forth certain citations;
15 and upon review by the Court, the Court may
16 make modifications to the decision.

17 * * * *

18 Before this Court is a Motion to
19 Compel Cure Payment pursuant to 11 U.S.C.
20 Section 365(b) brought by Mississippi Power
21 Company ("MPC") and Southern Company
22 Services, Inc. ("SCS"), agent for Mississippi
23 Power Company and each of the other operating
24 companies of the Southern Company
25 (collectively "Southern"). This motion seeks

1 Proceedings

2 an order compelling the Reorganized Debtors,
3 MCI, Inc. ("MCI"), to satisfy its cure
4 obligations under 365(b) and Section 8.05 of
5 the Debtors' Modified Second Amended Joint
6 Plan of Reorganization ("Plan"). The Debtor
7 responds that it has no obligation to cure
8 MPC's indemnification demands and urges the
9 Court to reject MPC's motion.

10 MPC's claim for cure payment arises
11 out of the Agreement for the Provision of
12 Fiber Optic Facilities and Services
13 ("Agreement") between MCI's predecessor MCI
14 WorldCom Telecommunications, Inc.
15 ("WorldCom") and MPC. The Debtor agreed to
16 assume the obligations of the Agreement
17 pursuant to the terms of a Stipulation and
18 Order Resolving Limited Objection of
19 Mississippi Power Company to Debtors' Amended
20 Plan, entered by this Court on September 19,
21 2003. Docket No. 8996. MCI formally assumed
22 the Agreement on April 20, 2004, the
23 effective date ("Effective Date") of the
24 Plan. The Agreement laid out the rights and
25 responsibilities of MPC and WorldCom relating

1 Proceedings

2 to the construction and maintenance of a
3 fiber optic cable system along MPC's power
4 easements. In return for funding and
5 maintaining the fiber optic system for MPC,
6 WorldCom received a 50-year lease on the
7 system's spare capacity. Included within the
8 provisions of the Agreement was an indemnity
9 clause that under a certain set of conditions
10 obligated WorldCom to compensate MPC for any
11 costs, liabilities, penalties, and damages
12 incurred as a result of lawsuits relating to
13 the easements the fiber optic system was
14 constructed on.

15 Under the terms of the Agreement,
16 MPC now seeks cure payments that may be
17 separated into four categories. The first
18 category comprises the costs to MPC for title
19 research and acquisition of rights-of-way in
20 connection with the fiber optic system
21 ("First Category"). The second category
22 comprises costs SCS and Georgia Power Company
23 incurred for the maintenance of the fiber
24 optic system ("Second Category"). The third
25 category relates to the indemnity clause in

1 Proceedings

2 the Agreement and includes all pre-Effective
3 Date legal fees, costs, penalties, and
4 expenses related to a number of lawsuits
5 recently filed against MPC alleging misuse of
6 easement, trespass, and unjust enrichment
7 ("Third Category"). The final category
8 incorporates the attorneys' fees related to
9 MPC's instant attempts to seek cure payments
10 from MCI ("Fourth Category"). MCI disputes
11 its liability as to both the Third Category
12 and Fourth Category, denying its obligation
13 to pay any costs incurred under the
14 indemnification clause. As MCI has not
15 disputed its liability for either the First
16 Category or Second Category, this Court finds
17 that MPC is entitled to cure payments
18 totaling \$722,875.15 as demanded in part.
19 The primary issue before this Court then is
20 the application of the indemnity clause
21 contained within the Agreement.

22 The parties agree that the law of
23 the State of Alabama is controlling here.
24 The parties further acknowledge that this
25 Court has subject matter jurisdiction

1 Proceedings

2 pursuant to 28 U.S.C. Sections 157 and 1334,
3 and that this is a core proceeding pursuant
4 to Section 157(b).

5 In its relevant part, the Agreement
6 provides

7 "Southern shall be responsible, at
8 MCI's expense, and with MCI's prior approval
9 if the cost is in excess of one thousand
10 dollars (\$1,000) per parcel, for the
11 acquisition of any easements, rights-of-way
12 or other rights that may be required in order
13 to permit (1) the installation, operation,
14 and maintenance of the Cable, (2) the use of
15 the Southern Interest by Southern, or (3) the
16 use of the MCI Interest by MCI. MCI shall be
17 responsible for determining whether the
18 acquisition of such easements, rights-of-way
19 or other rights are required; provided,
20 however, that if Southern notifies MCI that,
21 in Southern's judgment, any such easements,
22 rights-of-way or other rights should be
23 acquired, and MCI elects not to acquire such
24 right, MCI shall reimburse Southern for any
25 and all damages, judgments, settlements,

1 Proceedings

2 costs, expenses (including reasonable
3 attorneys' fees) and liabilities incurred by
4 Southern as the result of any claim, action
5 or lawsuit of any kind arising from the
6 failure to acquire such easement or
7 right-of-way right."

8 Agreement Art. 4.1(d), Docket No. 1953.

9 MPC states that, per the terms of
10 the Agreement, it notified MCI on October 26,
11 2000 ("conditional notice") that in its
12 judgment, "additional telecommunications
13 easements and rights should also be obtained
14 across properties on which MCI is using fiber
15 optic telecommunications lines." Affidavit
16 of Bernard Jacob, Exhibit A, Docket No.
17 14814. MPC further states that on June 20,
18 2001 ("indemnification notice"), it informed
19 MCI of a lawsuit filed against it relating to
20 easements and demanded indemnification for
21 legal costs pursuant to the Agreement. MPC
22 argues, therefore, that it is entitled under
23 the Agreement to cure payments from MCI
24 indemnifying all its legal costs related to
25 landowner suits prior to the Effective Date.

1 Proceedings

2 MCI responds that it has no obligation to
3 indemnify MPC under a number of alternative
4 theories: first, that MPC did not satisfy
5 the conditions of the indemnity clause;
6 second, that enforcement of the indemnity
7 clause is against public policy; third, that
8 the indemnification action is barred by the
9 statute of limitations; and finally, that
10 indemnification is sought for damages that
11 may not be indemnified.

12 This Court will first examine the
13 issue of the contractual conditions. As an
14 initial conclusion, this Court notes that the
15 plain language of the indemnity clause sets
16 out two conditions that must both be met
17 before it can operate. MPC must first have
18 notified MCI that it believed easements
19 should be acquired. After such notification,
20 the indemnity clause only becomes effective
21 if MCI then fails to acquire such easements.
22 In addition, although not required by the
23 language of the Agreement, the law implies
24 the additional requirement that MPC provide
25 MCI with notice of any indemnification

1 Proceedings

2 demand. The first step in this Court's
3 inquiry then is to analyze the notice MPC
4 provided to MCI.

5 Notice is frequently a precondition
6 to indemnification in contractual
7 arrangements. Moreover, it is regarded as so
8 integral to the performance of an
9 indemnification clause that it will be
10 implied by law even where the contract does
11 not expressly require it. Cochrane Roofing &
12 Metal Co. V. Callahan, 472 So.2d 1005 (Ala.
13 1985); 15 S. Williston, A Treatise on the Law
14 of Contracts, Section 48:1 (4th ed.). The
15 indemnification clause in the Agreement
16 contains a notice requirement, but it is
17 nonetheless slightly different in form from
18 typical indemnification clauses. This clause
19 contains the additional condition precedent
20 that MPC must recommend that MCI purchase
21 additional easements and MCI must not then
22 purchase those easements before MCI will be
23 liable to indemnify MPC for any legal costs
24 related to those easements identified. The
25 specific notice clause in the Agreement

1 Proceedings

2 applies to this condition precedent
3 ("conditional notice provision"), not to any
4 request for indemnification under the terms
5 of the Agreement. A notice requirement as to
6 demands for indemnification ("indemnification
7 notice provision") will therefore be implied,
8 but the issue before the Court solely
9 concerns the conditional notice provision.
10 Neither party denies that this notice
11 provision should be interpreted and applied
12 according to the law requiring a more typical
13 indemnification notice requirement, such as
14 those generally found in insurance contracts.
15 Accordingly, and because this Court finds
16 that the condition precedent and its notice
17 provision are inextricably linked and
18 functionally similar to the indemnification
19 clause, Alabama case law regarding notice
20 provisions for indemnification demands will
21 be applied to the conditional notice
22 provision at issue here.

23 The first part of the analysis
24 concerns the sufficiency of the notice. MCI
25 argues that the notice was insufficient

1 Proceedings

2 because it hedged MPC's recommendation that
3 additional easements should be purchased with
4 MPC's belief that the legal controversy that
5 prompted such recommendation would eventually
6 be resolved in MPC's favor. This Court
7 finds, however, that this notice was legally
8 sufficient under both the requirements of the
9 Agreement and Alabama case law. The notice
10 clearly stated MPC's judgment that MCI should
11 purchase additional easements. This
12 recommendation was neither hidden nor
13 ambiguous in its plain language. Further,
14 MPC did not breach its good faith obligation
15 to MCI by sharing its beliefs concerning the
16 eventual course the relevant litigation would
17 take. Rather, by providing MCI all relevant
18 information, MPC enabled MCI to make its own
19 informed decision and enjoy the benefits of
20 the contract. Hilley v. Allstate Ins. Co.,
21 562 So.2d 184, 190 (Ala. 1990)(a breach of
22 good faith is the improper interference with
23 enjoyment of the benefits of the contract).
24 The conditional notice then was sufficient.

25 The second part of the analysis

1 Proceedings

2 concerns the timeliness of the notice. MCI
3 argues that the notice was defective by
4 reason of its untimeliness and contends that
5 timely notice would have been given either
6 (1) at the time the cable was installed, or
7 (2) in the alternative, at some time before
8 the Mississippi Supreme Court rendered its
9 decision in McDonald v. Mississippi Power
10 Co., which decision prompted MPC to recommend
11 that MCI purchase additional easements. 732
12 So.2d 893 (Miss. 1999). MPC responds that
13 the conditional notice was offered after it
14 learned that additional easements were likely
15 necessary, was therefore timely, and
16 moreover, that any prior notification would
17 have been premature and violate its good
18 faith obligation to MCI.

19 Timely notice is required by law
20 because the indemnitor must be able to
21 "investigate the claim and prepare his
22 defense." Cochrane Roofing, 472 So.2d at
23 1008; see also, Barry R. Ostrager & Thomas R.
24 Newman, Handbook on Insurance Coverage
25 Disputes, Section 4.02[a](10th ed. 2000)

1 Proceedings

2 ("The object of all these goals is to provide
3 the insurer with an opportunity to protect
4 its interests."). Untimely notice prevents
5 the indemnitor from doing so. Timely notice,
6 therefore, is that which does "not come so
7 late that the indemnitor is prejudiced in
8 preparing the defense" Stone Building
9 Co. v. Star Electrical Contractors, Inc., 796
10 So.2d 1076, 1091 (Ala. 2000) (quoting
11 Restatement (Second) of Judgments Section 57,
12 cmt.e). "Conversely, tardiness without
13 prejudice provides no defense." Id.
14 (emphasis in original)(following modern trend
15 in requiring proof of prejudice to escape
16 liability. 32 ALR 4th 141, 2 (2005)). This
17 inquiry is necessarily contextual and
18 fact-based, as "timely notice is a relative
19 term, that is, it depends on the facts and
20 circumstances of each case." Burkes
21 Mechanical, Inc. v. Ft. James-Pennington,
22 Inc., 908 So.2d 905, 911 (Ala. 2004). The
23 key inquiry under Alabama law then is whether
24 the facts and circumstances of the case
25 demonstrate that notice was so delayed as to

1 Proceedings

2 prejudice the defense by the indemnitor.

3 In general indemnification actions,
4 the "defense" referred to in the case law is
5 simply any defense to the action for which
6 the indemnitee claims indemnification.7 However, the indemnification clause at issue
8 here cannot be read so simply. The
9 functional role of the condition precedent in
10 the indemnification clause is not simply to
11 limit the conditions under which
12 indemnification may be demanded. Rather, the
13 condition precedent creates for MCI an
14 additional ground of defense, namely the
15 ability to preempt any action by purchasing
16 those easements that would give rise to a
17 claim. In this way, the condition precedent
18 represents a bargain between MPC and MCI that
19 grants MCI an additional defense to any
20 action for which it might be required to
21 indemnify MPC. In return for conditional
22 indemnification, MPC agreed to provide MCI,
23 through notice, with the information
24 necessary to exercise this preemptive
25 defense. It is simple to see how this

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bargain operates in terms of risk distribution. MPC, as a local entity that owns the easements at issue, has greater access to the information necessary to manage the risk of legal action on behalf of easement holders. MCI then bargained to assume MPC's risk in return for access to that information. In this way, MCI and MPC are then both better able to manage the risks related to the easements. The "defense" that is analyzed relative to the timeliness of the notice therefore includes this bargained-for defense of preemption. Simply, MPC's notice may not prejudice MCI's ability to preempt the claims for which MPC seeks indemnification.

Similarly, MPC may not prejudice MCI's defense in action for which indemnification is sought. The indemnitor may, if it chooses, intervene and assume the defense for the indemnitee in any such action. The indemnitee may, therefore, clearly not unreasonably prejudice this defense through untimely notice of a demand

1 Proceedings

2 for indemnification. Stone Building, 796
3 So.2d at 1090-1091. Equally clearly, the
4 conditional notice may not be so untimely as
5 to prejudice the defense the indemnitor might
6 offer to the matured claim. As the condition
7 precedent brings into effect the
8 indemnification clause, so too must the
9 notice for the condition precedent not
10 prejudice a defense offered as indemnitor.

11 This Court finds that the
12 conditional notice was untimely as to both
13 defenses. There are a number of key
14 contextual factors that militate for this
15 conclusion. First, at issue here is an
16 indemnification clause that was contractually
17 designed to operate only in limited
18 circumstances. The indemnification clause is
19 not general, but rather a bargained-for-risk-
20 shifting device that operates only upon the
21 completion of certain actions. Second, MPC
22 has no rights or obligations under the
23 indemnity clause, only the opportunity to be
24 indemnified if it provided information to MCI
25 that MCI did not act upon. If MPC failed to

1 Proceedings

2 take advantage of that opportunity, this
3 Court will not remedy that failure. Finally,
4 and most importantly, the prejudice that
5 arose from the delay is linked to MPC's own
6 actions in the intervening period. MPC had
7 already litigated and lost the primary issue
8 bearing on both defenses, whether the
9 easements used by MPC and MCI were
10 sufficient, before it sought indemnification
11 from MCI.

12 In McDonald, MPC litigated with a
13 separate sublessee, Interstate Fibernet, Inc.
14 ("IFN"), the scope of the easements it used
15 with IFN. The Mississippi Supreme Court in
16 McDonald held that as a matter of law MPC was
17 not necessarily entitled to sublease the
18 spare capacity of the system to IFN, that
19 whether or not the easements were violated
20 was a question of fact, and therefore
21 remanded the case back to the trial court for
22 a factual determination of the issue. MPC
23 argues that as notice was offered shortly
24 after this judgment, there was no prejudicial
25 delay. This is, however, an unconvincingly

1 Proceedings

2 narrow characterization. As MPC notes, this
3 fiber optic system was distinct from the one
4 it had installed with MCI. However, the
5 fiber optic system and easements at issue in
6 McDonald were in all legally relevant ways
7 identical to those shared by MPC and MCI.
8 The language of the easements was the same.
9 The broad facts of installation and sublease
10 of spare capacity were the same. The only
11 difference was the identity of the sublessee,
12 a matter not relevant to the Supreme Court's
13 determination of the issue. Therefore, the
14 decision in McDonald that MPC was not as a
15 matter of law entitled to sublease spare
16 capacity is controlling precedent in any suit
17 against MPC and MCI. Although the McDonald
18 decision is not fully dispositive of any
19 actions against MPC and MCI, the prejudice to
20 MCI that resulted from MPC's delay of notice
21 until after the decision in McDonald is
22 nonetheless clear.

23 As to the first defense, the option
24 of precluding any claims by purchasing those
25 easements, MPC's litigation prejudiced MCI's

1 Proceedings

2 use of this defense by forcing MCI to offer
3 significantly more for these easements than
4 would have been the case before McDonald was
5 litigated and decided. This is substantial
6 and definite prejudice. The scope of the
7 easements was no longer questionable, but now
8 more definite than not to the detriment of
9 MCI. The value of those easements,
10 particularly their settlement value, was now
11 significantly higher given the increased
12 certainty as a result of the judgment in
13 McDonald. MPC's delay in notifying MCI until
14 after the litigation was concluded when it
15 was in control of that litigation then is
16 clearly prejudicial to MCI's ability to
17 preempt actions on those easements and the
18 notice untimely. MPC was aware during the
19 course of the litigation that there was a
20 real risk that the settlement value of the
21 easements would increase as a result of the
22 litigation, even if it believed the
23 probability of an adverse judgment was low.
24 MPC cannot therefore argue that the delay was
25 not prejudicial when it was engaged in

1 Proceedings

2 litigation to resolve the legal uncertainty
3 regarding the easements during the delay to
4 the detriment of MCI's ability to defend
5 itself.

6 MPC argues that any such prejudice
7 related to the value of the easements cannot
8 be recognized. MPC argues that claims on the
9 issue of easement violation were possible the
10 moment the fiber optic system was installed
11 and used, and that therefore, any delay after
12 installation would have necessarily been
13 prejudicial according to this reasoning.
14 This argument, however, is inapposite. If it
15 is assumed that MPC is correct, and that no
16 delay can be recognized as prejudicial simply
17 because any delay after installation was
18 prejudicial, then this Court would have to
19 recognize that the indemnification clause no
20 longer operated after installation. Any
21 other conclusion would be inequitable to MCI.
22 This Court does not consider MPC's argument
23 accurate, however, because this Court must
24 strive to interpret the contract so as to
25 give effect to its provisions. This Court

1 Proceedings

2 concludes therefore, that the parties
3 incorporated the post-construction costs of
4 settlement into the contract and that the
5 condition precedent related to any change in
6 circumstances beyond the mere fact of
7 construction. MPC's litigation of the issue
8 in McDonald is just such a change in
9 circumstances.

10 Similarly, MCI's ability to defend
11 MPC in any litigation on the easement issue
12 was clearly prejudiced by the delay in notice
13 until after the McDonald decision. The key
14 issue of the scope of the easement as a
15 matter of law, which MCI would have raised in
16 such litigation, had by then already been
17 decided against MPC, harming MCI's capacity
18 to defend its interests. While it is true
19 that MPC's delay would not necessarily be
20 prejudicial where any decision stripped MCI
21 of a possible defense, it is equally true
22 that the same cannot be said where the
23 decision involved MPC as a litigant and the
24 issue at stake bore equally on MCI as it did
25 on the actual litigants. This situation is

1 Proceedings

2 analogous to the typical indemnification

3 dispute in which the indemnitee seeks

4 indemnification after resolution of the

5 litigation. See, e.g., Cochrane Roofing, 472

6 So.2d at 1005; West Bend Co. v. Chiaphua

7 Industries, Inc., 112 F.Supp.2d 816 (E.D.

8 Wis. 2000). In those, more typical disputes,

9 prejudice is found when the evidence the

10 indemnitor would have used in its defense is

11 unavailable by reason of the delay in notice.

12 Similarly here, the prejudice is found

13 because MCI is unable to defend the MPC on a

14 primary issue in any future litigation

15 because of the prior litigation. Just as the

16 indemnitor in the typical dispute has no

17 access to crucial evidence, MCI here has no

18 access to a primary issue. In both

19 situations, the indemnitor is unable to

20 present an effective defense. MPC cannot now

21 claim that MCI should indemnify it for any

22 legal costs arising out of litigation that it

23 participated in and lost when MPC denied MCI

24 the opportunity to defend its interests in

25 that litigation or pursue contemporaneous and

1 Proceedings

2 parallel litigation.

3 These conclusions are supported by
4 risk-sharing analysis of the indemnification
5 provision. As previously stated, the
6 indemnification provision was an implicit
7 bargain in which MCI agreed to shoulder
8 additional risk if MPC provided it
9 information to which MPC had better access,
10 and which would enable MCI to better manage
11 that risk, as well as its own. By the time
12 MPC provided that information to MCI,
13 however, MCI had fewer options to manage that
14 risk. From that simple perspective, MPC
15 failed to perform the function it had
16 bargained with MCI to fulfill. More
17 crucially, MPC chose to pursue the litigation
18 in McDonald without informing MCI or seeking
19 MCI's assistance. MPC gave MCI no
20 opportunity to manage the risk that this
21 litigation would have an adverse effect on
22 the interests they shared. MPC therefore
23 alone shouldered that risk and cannot now
24 claim that MCI should have to bear it. The
25 indemnification clause at issue here was a

1 Proceedings

2 clear mechanism through which the parties
3 could effectively manage the risks they
4 faced. MPC not only failed to enable MCI to
5 manage those risks. It added to them without
6 informing MCI of the possible consequences of
7 its actions or allowing MCI to choose for
8 itself how it wished to follow MPC's lead.
9 MPC simply cannot now shift the risk to MCI.

10 MPC raises one final argument to
11 avoid the judgment that its notice was
12 untimely. MPC argues that it would have
13 violated its obligation of good faith had it
14 informed MCI prior to the McDonald decision
15 that MCI should purchase additional easements
16 because MPC did not, in fact, believe this
17 was necessary, as it did not believe that it
18 would lose the McDonald action. This Court
19 need not resolve the nature of MPC's
20 good-faith obligations except to the extent
21 necessary to note that MPC's primary
22 good-faith obligation was to provide MCI with
23 information from which MCI could draw its own
24 independent conclusions.

25 This Court finds, therefore, that

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Proceedings

MCI has raised a valid defense to MPC's claim for indemnification. Accordingly, MCI is not obligated to cure any legal costs arising out of the pre-Effective Date litigation. Similarly, as MPC's claims for legal costs related to this cure payment motion are based upon the indemnification clause, MCI is not obligated to cure those costs.

Based upon the foregoing, the Plaintiff's Motion to Compel Cure Payment is granted as to the First Category and Second Category, and denied as to the Third Category and Fourth Category.

The Debtor is to settle an order consistent with the Court's opinion.

* * * *

I will take a five-minute recess and then return for the next matter.

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C E R T I F I C A T E
STATE OF NEW YORK)
 : SS:
COUNTY OF NEW YORK)

I, DEBORAH HUNTSMAN, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That the within is a true and accurate transcript of the Digitally Recorded Proceedings recorded on the 6th day of December, 2005.

I further certify that I am not related by blood or marriage to any of the parties and that I am not interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of December, 2005.

DEBORAH HUNTSMAN

AS REVIEWED AND MODIFIED BY THE COURT ON 12/6/2005

**DIGITALLY RECORDED CD RECEIVED ON 12/7/2005 AT 4:00 P.M. FOR TRANSCRIPTION

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\$722,875.15 [1] - 6:18		26 [1] - 8:10		ability [5] - 15:15,	11:19, 12:9, 14:23
0		26th [1] - 2:9		16:15, 20:16, 21:4,	Alex [1] - 2:6
01-16034 [1] - 3:4		28 [1] - 7:2		22:10	alleging [1] - 6:5
02-13533 [1] - 1:6		3		able [2] - 13:20,	allowing [1] - 25:7
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