

## 1 REPORTER'S RECORD

2 CAUSE NO. 2010-09675

3 JO ANN SCHERMERHORN, ET AL. ) IN THE DISTRICT COURT OF  
4 VS. ) HARRIS COUNTY, T E X A S  
5 CENTURYLINK, INC. )  
(F/K/A CENTURYTEL), ET AL. ) 113TH JUDICIAL DISTRICT  
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10 TRIAL ON THE MERITS

11 JULY 22, 2015  
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18 On the 22nd day of July, 2015, the following  
19 proceedings came on to be held in the above-titled and  
20 numbered cause before the Honorable Michael Landrum,  
21 Judge Presiding, held in Houston, Harris County, Texas.  
22

23 Proceedings reported by computerized stenotype  
24 machine.  
25

1 Ladies and gentlemen, thank you for your  
2 patience. We're now ready to go forward. You should  
3 have on your chair a copy of the court's charge to the  
4 jury. Per the rules, I'll read that with you now.

5 Following that, we'll hear the closing  
6 statements of the attorneys; and I'll admonish you once  
7 again to remember that what the lawyers say is not itself  
8 evidence. They are trying to explain to you how they  
9 view the evidence and hope you will, too.

10 (Charge of the Court read to the jury)

11 THE COURT: All right. That's the charge.  
12 With that, we'll begin closing statements with Mr. Fryar.

13 MR. FRYAR: Are we not taking a  
14 mid-morning break? I'd rather take it before I get  
15 started than get it in the middle.

16 THE COURT: Let me ask the jury.

17 Would you all like to take a restroom  
18 break at this time or are you ready to just go on?

19 Do you want to take a break?

20 All right. Let's take a ten-minute break.

21 (Brief recess)

22 THE COURT: Be seated, everyone.

23 Mr. Fryar.

24 MR. FRYAR: Thank you, Your Honor.

25 So everybody came in here with big smiles

1 this morning because it's the last day. Right?

2           Actually not. Today's the first day of  
3 this trial.

4           What's going to happen is: I'm going to  
5 talk this morning. The defendants will get a turn. I'll  
6 get to rebut what they said, talk you again this  
7 afternoon. When I shut up -- that's when the real trial  
8 begins. Okay?

9           What we've been doing up to now is not  
10 what this is all about. What it's all about -- the  
11 important part is what you 12 people are going to do in  
12 the jury room. What we've been doing -- what I've been  
13 trying my best to do for the last three weeks is to bring  
14 you what you need to go really try the issues in this  
15 case and decide the facts of the case.

16           It was important that you know the  
17 parties' positions; it was important that you see the  
18 testimony; it was important that you see the documents,  
19 the documents which you'll have with you in the jury  
20 room; it was important that you see the witnesses  
21 challenged so you can figure out which ones are  
22 believable and which ones are not. And that's what I've  
23 been trying to do because now the important part starts.

24           What we have been waiting for, what we  
25 have been fighting for for the last five years is what's

1 going to happen beginning this afternoon when the 12 of  
2 you go back and you take, you know, your 12 sets of eyes,  
3 your 12 sets of ears, your 12 brains and put it to work  
4 on the evidence in this case answering these questions  
5 which will determine whether my clients receive justice.

6           Okay. You are all expected to use your  
7 best memory, your logic, your common sense to figure out  
8 who's right and who's wrong on these factual matters.

9           I know it's a long charge, and we're going  
10 to talk about it. I'm going to give you a road map  
11 through it. But I just cannot tell you how important it  
12 is, what you're going to do, and how grateful I am and  
13 how grateful my clients are that you all are going to  
14 perform this service.

15           I know nobody volunteered. Right? Nobody  
16 volunteered. But you all have shown up, you've been on  
17 time, you've paid attention. Some of y'all have taken  
18 meticulous notes; and I know that when the real trial  
19 starts, my clients are in great hands and I'm so grateful  
20 that it's you guys.

21           Now, let's reflect on this trial a little  
22 bit. Like this long charge, this long trial has got lots  
23 of facts, you know, lots of moving parts, lots of things;  
24 but when you get right down to it, it's really very  
25 simple. Okay? It's really just two things.

1                   No. 1, did Robert Kubbernus defraud the  
2 ClearSky investors out of \$7 million? Okay. Yes.

3                   What did he do? He told them, "If you put  
4 the \$7 million into this limited partnership, you will be  
5 the owners of SkyPort."

6                   And what happened? They put the  
7 \$7 million into the limited partnership; and Robert  
8 Kubbernus, his company Balaton, became the owner of  
9 SkyPort. They got nothing for their money. That's  
10 fraud.

11                   Okay. Part 2, CenturyTel. CenturyTel  
12 didn't commit the fraud; but without their help, the  
13 fraud couldn't have happened. We're claiming that they  
14 materially aided the fraud and that they knew some  
15 important facts.

16                   I mean, this is the little chart that I  
17 drew up with Mr. Marshall where he agreed with each and  
18 every step. Okay? This is about what CenturyTel knew.

19                   CenturyTel knew in November of 2005 that  
20 Balaton didn't have the money and in order to do the deal  
21 would get that money from investors. Mr. Marshall said,  
22 yes, that was true. Didn't have the money had to get it  
23 from investors.

24                   Then from December to February, they  
25 negotiated a deal. That deal was purposely put together

1 so that Mr. Kubbernus could take it to investors. Right?

2 I mean, you've heard, "Oh, well," you  
3 know, "this syndication stuff doesn't mean anything."

4 Yeah, it does. We may go back through the documents.

5 But the term sheet that they came up with  
6 was the result of some real specific negotiations.

7 You heard this testimony and it's in the  
8 documents, that when Balaton came in, they said, "We're  
9 going to syndicate this. We're going to create a limited  
10 partnership." They were going to do two limited  
11 partnerships. One would be Watershed, and one would be  
12 what ultimately became ClearSky. And Watershed  
13 ultimately became ClearSky, too. But this was the  
14 agreement that Mr. Marshall signed.

15 When Balaton -- Kubbernus first proposed  
16 this, it didn't have any of this stuff about accredited  
17 investors. It just said "We want the absolute right to  
18 go set up a limited partnership and bring this deal to  
19 investors." Right?

20 And Mr. Marshall said he was against that.  
21 He sent an e-mail to the board saying "This is what they  
22 want. There are some brick-wall legal issues here." And  
23 they had a board meeting, and one of the issues that they  
24 addressed at the board meeting was syndication. This was  
25 not something that just appeared. This was something

1 they thought carefully about and negotiated. And  
2 ultimately SkyComm and the board members, including  
3 Mr. Ewing and Mr. Marshall, decided that they could live  
4 with the idea of syndication so long as they got some  
5 protection. And the protection was that they had to be  
6 accredited investors. "You can't sell it to just  
7 anybody. We don't want you to violate the securities  
8 laws. We want accredited investors."

9                   Then they get a final agreement, and the  
10 final agreement is set up purposely -- the final  
11 agreement is set up purposely to do what the term sheet  
12 said. Right? So instead of saying "Robert Kubbernus may  
13 syndicate this and bring in co-investors," what it says  
14 is it's between Balaton and the additional investors.  
15 Right? And it leaves a space for them.

16                   We don't know who they are yet. He's  
17 going to go get them. We're setting this up. We create  
18 this vehicle with the intent that he's going to add to  
19 it. And guess what? The "accredited investor"  
20 language -- that's in here. No. 4.13 is that he  
21 represents -- all the purchasers represent -- and this is  
22 important. It's not Robert Kubbernus representing that  
23 the additional purchasers are accredited investors; it's  
24 set up where the additional purchasers represent that  
25 they themselves are accredited investors.

1           So the intent all along is that he's got a  
2 document that he can take out to the investing public.  
3 And he created this limited partnership, and he makes  
4 this agreement part of the limited partnership agreement.  
5 It's listed as one of the agreements that is assigned to  
6 the limited partnership.

7           So the intent of every single person going  
8 in was this deal. It would be Balaton plus investors.  
9 And right at that point in time, in February of 2006,  
10 there isn't any question that Mr. Kubbernus really  
11 intended to do that. Okay? He really intended to go out  
12 and get investors, and he had set it up where he would be  
13 handsomely compensated but they would get the stock.

14           But then they hit a snag. Okay? The snag  
15 was: They realized in March that they were going to have  
16 to fill out FCC disclosures. That would take a lot of  
17 time, and every foreign investor would have to be -- you  
18 have to give their full identity. You have to tell the  
19 FCC who they are. The FBI's going to do a background  
20 check.

21           What's the problem? We don't know who  
22 these guys are yet. Most of them come in in September.  
23 Some of them come in as late as November. Mr. Kubbernus  
24 has not gone out yet to get the investors, so they can't  
25 wait until after he raises the money to start the FCC

1 process. They need to start the FCC process now.

2           So they change the deal. Right? The deal  
3 at this point becomes: They agree -- and Mr. Brogan  
4 Taylor testified it happened on a phone call where he was  
5 in the room, you know, as Robert Kubbernus's assistant.  
6 Mr. Marshall was on the call. Mr. Ewing was on the call.  
7 And they said, "We're going to do the deal where the  
8 transferee will be just Balaton."

9           And that's what they told the federal  
10 government, "Just Balaton. No investors." And once they  
11 told the federal government that, it had to be that way.  
12 Right? It had to be that way. They couldn't -- they'd  
13 either have to tell the federal government something  
14 different or they'd have to do the deal the way they  
15 described it. It couldn't go any other way.

16           The trouble is: They didn't tell the  
17 investors. Right?

18           Mr. Kubbernus goes out and he's raising  
19 money and he still has this document that says they're  
20 going to get stopped. He's still carrying this around.  
21 It's still part of the limited partnership agreement and,  
22 the investors are saying -- thinking -- they're thinking  
23 this is the deal. They're told that this is the deal,  
24 Balaton plus investors; but it's not. This is the deal.

25           CenturyTel knows that the deal was set up

1 one way and that it changed. They also know another  
2 important thing. They know that Mr. Kubbernus goes out  
3 and raises the money from investors. Okay? So they know  
4 two things: No. 1, there are investors who are paying  
5 for this stock. Okay? Mr. Kubbernus told them in the  
6 beginning, "I don't have it. I'm going to get it from  
7 other people." Those other people put up the money and  
8 he put the money in and he closed the deal and he got the  
9 133 million shares and CenturyTel knows the investors  
10 paid for those shares but they didn't get them. They  
11 didn't get anything.

12           In fact, it's written in the contract not  
13 only that there are no other contracts, you know -- if  
14 you don't add these people to the contract as additional  
15 investors, then the contract itself, that 4.6 that we  
16 keep looking at, says there isn't anybody else. You  
17 don't have an agreement with anybody else.

18           So, I mean, Mr. Kubbernus is there. He's  
19 signed an agreement with SkyComm that CenturyTel had to  
20 approve; and that agreement that he signed with SkyComm  
21 that CenturyTel approved says "Unless you add additional  
22 investors, there aren't any."

23           So CenturyTel knows two things: The  
24 investors paid for the stock. The investors didn't get  
25 the stock.

1                   What's it called when you use somebody  
2 else's -- you know, there -- that's just not proper.  
3 There is something wrong with that.

4                   Now, at that point, there is no -- what  
5 you've heard in this case is "There are a number of  
6 possibilities. It could possibly have been legit."  
7 Right? Maybe, but it sure smelled -- it sure looked  
8 improper. They were sure aware that this was not how the  
9 deal was set up, was not what was supposed to happen and  
10 the investors still came in and gave the money even  
11 though they're not getting anything.

12                   What do you do? You ask the right  
13 question. You do the due diligence that the lawyer said.  
14 You say, "Okay. This doesn't seem right. I'm aware that  
15 this doesn't seem right. I need to know is this okay  
16 with your investors." Right? "I need to know. Show me  
17 the contract. What do these people have? Are we lying  
18 to the FCC? Are you lying to your investors, or is this  
19 some strange thing where you won the lottery or what?"  
20 Okay?

21                   We've got to know, because if we go  
22 forward -- and this is the important thing about the law  
23 here as the judge has instructed you. If they go forward  
24 at that point and don't ask that question, they go  
25 forward at their own risk. Right? They go forward at

1 their own risk. They are facilitating a fraud if they  
2 are taking stolen money. Then they are responsible to  
3 the people who were defrauded. That's our case against  
4 CenturyTel.

5                   CenturyTel has been saying all along,  
6 "Hey, we didn't know what the deal was with their  
7 investors." They didn't have to know what the deal was.  
8 Right?

9                   What they knew was that the investors put  
10 up the money and the investors got nothing. What they  
11 needed to know at that point was "Is that fraud, or is  
12 that" -- "what is the deal that would allow investors" --

13                   Why would anybody do that? Right? Why  
14 would anybody pay \$7 million and get nothing? They  
15 needed to do that. They needed to ask the question or  
16 they needed to walk away.

17                   They had a duty at that point to do  
18 something. And if they went forward with the deal, they  
19 did it on their own -- at their own risk.

20                   But guess what they decided to do? They  
21 decided that it was more important to get the deal done  
22 than it was to do the right thing. Okay? They decided,  
23 "Whatever Robert Kubbernus's deal is with his investors,  
24 that's his concern. We don't care." Okay? "It's not  
25 our business." And they went forward with the deal.

1                   Now, I have to prove that they were  
2 generally aware that something improper was going on.  
3 The question is: What's proper, and what's improper?

4                   The very first day of trial, I started  
5 with that issue. When there were 60 of you out here, I  
6 asked every single one of you "All right. If you're in a  
7 deal and you think you're going to be paid with stolen  
8 money -- you don't know for sure, but you suspect --  
9 what's the right thing to do?" All right? "What's the  
10 right thing to do?"

11                   Every single one of you said the right  
12 thing to do is either investigate or walk away. Right?  
13 Walk away.

14                   Not a single one of you said what  
15 Mr. Ewing said. Mr. Ewing said when I asked him --  
16 Mr. Ewing -- "When you learned he was paying you with  
17 someone else's money and that someone else was not going  
18 to get anything, why didn't you ask, "Is that okay with  
19 someone else?"

20                   And his answer was: "Look, again, our  
21 agreement was with Balaton and Mr. Kubbernus; and, you  
22 know, his dealings with his investors are really --  
23 that's his issue. That's his concern. It was really of  
24 no concern to us as long as the fact that the FCC  
25 approval was still valid. So that's it."

1                   Not a single one of you said, "Well, if I  
2 suspected I was being paid with stolen money, I would  
3 say, 'Well, that's between the thief and his victim.  
4 That's none of my concern.'"

5                   You know, the proper thing to do at that  
6 point is either to investigate and make sure before you  
7 do the deal or, if you don't want to do that, walk away,  
8 don't do the deal.

9                   All right. Let's talk a little bit about  
10 the defense in this case. Mr. Kubbernus's defense is  
11 this. Back when this happened, when the deal changed,  
12 one of his employees was aware that the deal changed,  
13 Brogan Taylor. Right? And he knew Brogan Taylor would  
14 be very concerned because his father had a million  
15 dollars in the deal. So he had to come up with a story  
16 which -- the evidence shows he only told that story to  
17 Brogan Taylor and his employees. And what was the story?

18                   All right. The story is, "Don't worry  
19 about your dad's money because we're going to hold it in  
20 trust." All right? Okay: We're holding it in trust.  
21 It's just like they were the real owners, but it's just  
22 in our name." Okay?

23                   And so in this trial, he said, "I'm going  
24 to go with that story."

25                   Well, what do we know about Mr. Kubbernus?

1 We know that his story changes depending on what's  
2 most -- what's best for him. You saw his story change on  
3 the stand. Right? You saw me get up and -- "You told  
4 CenturyTel about the investors."

5 "Yes, I did. Yes, I did."

6 Mr. Manley gets up, "Well, you didn't  
7 really tell us, did you?"

8 "Well, not really."

9 "What is your story today, Mr. Kubbernus?"

10 "I don't know. What day is it?" Right?

11 I mean, this guy changes his story.

12 If -- if this story is true, then that --  
13 which you're going to hear argument that this story is  
14 true. Right? Well, first of all, if this story is true,  
15 he still kind of did lie to the investors -- right --  
16 because he never told the investors he was going to hold  
17 their money in trust or their stock. He never told them  
18 that. He never got their permission. Right? He told  
19 them, "You're going to be the owners."

20 And what he's saying now is, "Well, I  
21 didn't really tell them; but it's just a little white  
22 lie. They weren't hurt by that because it's really  
23 theirs." Okay.

24 But if that's true, then he lied to the  
25 FCC. Right?

1                   You saw the document. The FCC says you've  
2 got to disclose everyone who may exercise --

3                   He lied to the FCC or lied to  
4 CenturyTel -- right -- because he told CenturyTel those  
5 investors don't get any property. Right? "I don't have  
6 an agreement. I don't have an agreement with the  
7 investors to transfer it later." So that would have been  
8 a lie.

9                   When a federal judge asked him directly  
10 "Is the reason that these people are not shareholders  
11 because they were never entitled because they didn't  
12 raise 10 million," he said, "Yes, sir." Lied then. Lied  
13 in his deposition. You know, lied to everyone on earth  
14 except for the one lie he's being sued for. Right? You  
15 know, he's not being sued for those other lies.

16                   So what do we know from the defense that's  
17 put forward by Mr. Kubbernus? We know he's a liar. He  
18 just thinks he gets to choose which lie to go with at the  
19 moment. He doesn't. There is no -- there just isn't any  
20 evidence that this was ever really held in trust. The  
21 evidence is to the contrary. There's that one trust  
22 agreement, which, again -- right -- this is an agreement  
23 that is to be signed by Robert Kubbernus with Robert  
24 Kubbernus like these other agreements we've seen. He  
25 says "It's in trust just because I say so, and here I've

1 got an agreement that I'm going to agree with myself it  
2 is just because I say so."

3                   But he didn't even sign that. Right there  
4 is nothing.

5                   Now, I'll give him this. He says he  
6 intended to make it right in the IPO. Right?

7                   He took the stock. He committed fraud.  
8 Right? He told them "It's going to be your stock," but  
9 it wasn't their stock. It was his stock. But he says he  
10 was going to make it right in the IPO. Once they went  
11 public, there would be lots of shares. He could give  
12 them shares, and he would smooth it over. Right?

13                   The IPO didn't happen. You don't get any  
14 points for trying to make it right when you don't  
15 actually make it right. You know, the IPO didn't happen.  
16 And he never told his shareholders -- he never told his  
17 investors, "Look, you only get your shares if the IPO's  
18 successful. If the market tanks and I decide to take  
19 this company back into bankruptcy and restructure and  
20 grow it and sell it," like he did, "you get nothing," you  
21 know, "I'll be the 58-percent shareholder with your  
22 shares."

23                   That's what happened.

24                   That defense just doesn't work.

25                   CenturyTel's defense -- CenturyTel's

1 defense is basically two prongs. Prong No. 1 is: Talk  
2 about absolutely everything except the case. Right? How  
3 much -- 90 percent of the time they have spent is proving  
4 up how much money they lost in 2003 and 2004, in 2005,  
5 how much --

6                   Okay. We get it, CenturyTel. You  
7 invested a ton of money. This was not a good investment  
8 for you. You wanted to sell it.

9                   I said the first day of trial in opening  
10 statement, "If it's their company and they want to sell  
11 it, they can sell it." Right? The only thing they can't  
12 do is take stolen money because then they're hurting  
13 someone else. They're hurting the ClearSky people if  
14 they take their money.

15                   They say, "We lost all this money." We  
16 understand. Where's their heart in this case? It's what  
17 they talk about the most, how much money they lost.  
18 That's what they care about.

19                   So obviously they wanted to get rid of the  
20 company. Obviously if they wanted to get rid of the  
21 company, having Mr. Kubbernus come along and say, "I'll  
22 take it, no questions asked," good deal. Okay?

23                   They bring up an expert to say they could  
24 have been much meaner to the company in bankruptcy. They  
25 could have done much worse things. Since when is that a

1 defense? Since when does the burglar get to say, "Yeah,  
2 I broke in and stole all their stuff; but I didn't kill  
3 anybody." You still took stolen money, CenturyTel. You  
4 still took stolen money that hurt the ClearSky investors.  
5 Okay?

6                   It just doesn't matter that they could  
7 have been meaner or nicer or what. They chose to sell to  
8 Robert Kubbernus. They chose to sell to Robert  
9 Kubbernus. They agreed to change the deal because that  
10 would allow them to close the deal.

11                   Once they chose to sell to Robert  
12 Kubbernus, that was what they were going to do. Right?  
13 And if they needed to change the deal, that was fine; and  
14 if that meant, "Hey, the investors are going to get  
15 nothing," well, that's Robert Kubbernus's problem.  
16 Right? "That's his problem," was their attitude.

17                   But that's not what's right, and that's  
18 also not what's legal.

19                   Prong 2 of their defense, hide behind the  
20 lawyers; and with this many lawyers, even a company as  
21 big as CenturyTel feels like it can hide behind the  
22 lawyers. What do I mean by that?

23                   Every -- Mr. Ewing had a strategy in how  
24 he handled the cross-examination. Every time he got  
25 backed into a corner, every time he got asked a hard

1 question, he would appeal to the lawyers. "Oh, the  
2 lawyers would have handled that. The lawyers did that.  
3 We asked the lawyers to do that. The lawyers blessed it.  
4 The lawyers said it was okay."

5                   And so then after Mr. -- you know, his  
6 testimony is gone, who does the defense -- who does  
7 CenturyTel bring as their star witness to convince you to  
8 bless the deal and say it was all okay? All right. A  
9 lawyer.

10                   In fact, they brought three lawyers in  
11 their case. That's all they brought, three lawyers, one  
12 of whom on videotape said she remembered nothing, one of  
13 whom testified live about the two bankruptcies and knew  
14 nothing about what happened between the two bankruptcies  
15 when the case happened and the third who said, "No. It  
16 was all okay. We did what we were supposed to do. We  
17 asked the questions we were supposed to ask," and,  
18 "CenturyTel didn't know that anyone was being hurt,"  
19 except that that lawyer, when he blessed this, gave his  
20 benediction -- he didn't know two real important things  
21 that we know. Right?

22                   He didn't know what the original deal was.  
23 He said he had never even seen the terms sheet until  
24 three days ago. He didn't know what the original intent  
25 was. He didn't know that the deal was set up purposely,

1 negotiated purposely to have Balaton plus investors. He  
2 said he didn't know that.

3 He was asked, "Why is that" -- you know,  
4 "additional investors in there?"

5 He goes, "Oh, well, that's not uncommon."

6 No. It's in there for a reason. Right?  
7 That's how the deal was set up. So he didn't know that  
8 the deal had changed. To him, it was always just  
9 Balaton.

10 And he also didn't know one real vital  
11 fact, and that was that the money was coming from  
12 investors.

13 I was blown away. He said he didn't know  
14 that Robert Kubbernus was ever successful in getting a  
15 single investor. He didn't know that the money came from  
16 investors. Mr. Najder didn't know that the money came  
17 from investors.

18 Now, I want you to understand if  
19 CenturyTel didn't know that the money was coming from  
20 investors, then they didn't do anything wrong -- okay --  
21 because what they did wrong was to take money knowing  
22 that the people who put up the money weren't getting  
23 anything.

24 If they didn't know that those people  
25 existed, then they wouldn't have done anything wrong; so

1 from Mr. Najder's perspective they didn't do anything  
2 wrong because they didn't know those people existed. But  
3 he's the only guy in the whole case that didn't know  
4 those people existed. I mean, I don't know if he was  
5 asleep at the switch or what; but, you know --

6           Talk about changing stories, in opening  
7 statement, I got up here and said, you know, "Mr. Ewing's  
8 pretrial testimony" -- "CenturyTel's position in this  
9 case has been 'We didn't know they were investors,' but  
10 I've got four binders full of evidence that shows that  
11 they did know they were investors. I'm going to prove to  
12 you that they did know they were investors." And what's  
13 the first thing that Mr. Manley says in his opening?  
14 "Yes, of course, CenturyTel knew there were investors;  
15 but we asked the right question -- 'Are those investors  
16 supposed to get the stock' -- and they told us 'No.'"  
17 Right? That's a total change of position.

18           Mr. Ewing fessed up to it. I said, "Now,  
19 wait a minute. In your deposition in December, you said  
20 you were only generally aware that he was raising money  
21 for some purpose. You didn't know there were any  
22 investors in this deal." He said, "Yeah, I said that."

23           "You said you didn't know the source of  
24 the funds in this -- you didn't know they came from  
25 investors."

1                   "Yeah, I said that; but, you know, I've  
2 read a lot of e-mails since then, read all the evidence  
3 that we put together; and I just had forgotten about  
4 that. That wasn't true. Yes, they had investors. We  
5 knew that."

6                   Actually he sort of slipped back and  
7 forth. He would every now and then say, "Well, we didn't  
8 know there were investors."

9                   And I would say, "Yes or no? Did you or  
10 did you not?"

11                   He would say, "Okay. Yeah, there were  
12 investors."

13                   He also said in his deposition, which he  
14 admitted to, that he had never met Mr. Pouliot before,  
15 didn't know who the biggest investor was in ClearSky, had  
16 never met him.

17                   And he changed that, too, because he saw  
18 all the e-mails we put in that said, you know, they were  
19 in the same... The picture. We've got a picture where  
20 they're an arm's length away from each other.

21                   And he says, "Okay. Yeah, yeah, yeah.  
22 We -- yes, true. I must have met him, but I didn't have  
23 dinner with him. I didn't talk to him at length. I  
24 didn't meet with him."

25                   Look, they knew who the investors were --

1 I mean, they knew that there were investors. It doesn't  
2 really matter if they know that it's called ClearSky. I  
3 mean, what they have to know is that somebody is getting  
4 fleeced. Right? Somebody is paying something and  
5 getting nothing.

6                   They knew that. And they also met --  
7 they've got documents that said ClearSky. They met with  
8 Mr. Pouliot. They knew exactly what Mr. Kubbernus was  
9 doing. So, you know, in the end, CenturyTel's lawyer  
10 admits they knew they had investors. CenturyTel's CFO,  
11 Mr. Ewing, admits they had investors. CenturyTel's  
12 appointed chairman of the board, Mr. Marshall, admits  
13 they had investors.

14                   Even Mr. Kubbernus said, "Yeah, I told  
15 them they -- that we had investors." Brogan Taylor says,  
16 "We had regular conference calls where we told them how  
17 many investors, how much money we raised."

18                   They knew about the investors. But they  
19 send somebody in here to defend them who claims he didn't  
20 know that. All right. His testimony is worthless. He  
21 should have been informed what we all know happened.

22                   All right. This charge is like this case.  
23 Right? It's long, it's tedious, it's repetitious, it's  
24 got a lot of stuff in it, but it also -- you get right  
25 down to it, it's pretty simple. It's only got a few, few



1 two ways to look at my clients. Right? There is each  
2 individual ClearSky investor bought limited partnership  
3 units, put money into the partnership based on false  
4 statements. That's -- and so each one of them has his  
5 own claim for the amount of money he put in.

6           There's also another way to look at it,  
7 which is all of them as a group, right, a limited  
8 partnership. All the limited partners together as a  
9 group, they bought -- tried to buy SkyComm stock. They  
10 paid for SkyComm stock, paid \$7 million in stock and --  
11 for the stock and for the expenses associated with the  
12 purchase and got nothing.

13           So what we've done here is we're asking a  
14 series of questions about the partnership as a group and  
15 we're asking then another series of questions about the  
16 individual investors. It seems like it's the same thing,  
17 and it kind of is, but it also kind of isn't.

18           And so let's look at the Instruction  
19 No. 2. The important thing on Instruction No. 2 is that  
20 you need to approach each series of questions separately,  
21 right, because you are going to be asked about, how much  
22 money did the investors lose?

23           You're going to be asked that about four,  
24 five, six times. And every single time, the answer is  
25 the same. Right? It's they lost \$7 million, that they

1 each lost their portion of the \$7 million.

2           And it's important that you follow this  
3 instruction that says, "Don't -- you know, don't lower  
4 the amount because you've answered it twice." If you've  
5 got two questions that are both -- where the right answer  
6 is 7 million, don't assume we're going to add those  
7 together. Okay?

8           And don't -- also don't worry that we're  
9 going to get more money than the law entitles. That is  
10 not going to happen. The judge is going to craft the  
11 judgment based on your answers. And the judge will, I  
12 guarantee you, not give us a penny more than we're due  
13 and not give us any more relief than we're due, but we do  
14 have to ask the questions this way.

15           And so let's go through them. All right.  
16 First of all, on instruction -- well, let's go with  
17 No. 1, Question No. 1.

18           All right. Question No. 1 is, did each  
19 party below commit a securities law violation? And  
20 you're referenced there to 4 through 7. So let's look at  
21 4 through 7. A securities law violation is committed if  
22 the person sold or offered to sell a security by means of  
23 an untrue statement or an omission to state a material  
24 fact, which would be -- which would make it otherwise  
25 misleading, and the plaintiff purchased the securities

1 from that person and the plaintiff suffered injury.

2           And a seller is defined as either a person  
3 who actually passes title to the security -- to the buyer  
4 or the person who acted -- who successfully solicits the  
5 purchase motivated in part by a desire for his own  
6 financial interest, and there are some other  
7 instructions.

8           Go back to the question now. Okay. So  
9 this question. This question is about the share -- the  
10 investors -- the ClearSky investors as a group. So did  
11 each party below commit a securities law violation  
12 against ClearSky Investments, LP? Answer yes or no.

13 Robert Kubbernus, yes.

14           Robert Kubbernus -- every single person  
15 said that they either talked directly to Robert Kubbernus  
16 or were given materials through a broker that came from  
17 Robert Kubbernus. Every single one was told an untrue  
18 statement, that ClearSky Limited Partnership would buy  
19 the stock.

20           And so here what we've got is -- the false  
21 statement in this case is actually -- I mean, this whole  
22 agreement -- this whole agreement -- I knew that was  
23 going to happen.

24           The whole security purchases agreement was  
25 set up as basically a false statement. Right? It says,

1 "There are going to be additional investors." Mr.  
2 Kubbernus said he didn't have any intention of adding  
3 anybody to this.

4                   CenturyTel -- I mean, or SkyComm and  
5 Kubbernus created this document and sent it out, kept  
6 using it after they no longer intended to do the deal  
7 this way.

8                   This document became part of the limited  
9 partnership agreement that every limited -- every  
10 ClearSky investor signed. Okay. So this document is  
11 untrue. It is -- or at least it leaves out a real  
12 important fact that ClearSky is not going to be added.

13                   So what you've got then is Mr. Kubbernus  
14 is making this untrue statement to the limited  
15 partnership and Mr. Kubbernus is taking the money. Now,  
16 is he -- you have to find that the limited partnership  
17 bought securities from Robert Kubbernus.

18                   And in order to do that, you need to look  
19 at that definition of seller because when -- the way the  
20 statute uses the language, when you buy a security from  
21 someone, you can either buy it from the guy that owns the  
22 stock, which would be SkyComm, but you also buy it from  
23 the guy that sells it to you. Right?

24                   If you go to a car dealership, you're  
25 buying your car from the dealership, but you also are

1 buying it from the salesman, right, the individual  
2 salesman? When you buy a house, you're buying it from  
3 the owners, but you're also buying it from the realtor.

4                   So in this case, Robert Kubbernus is the  
5 salesman. Robert Kubbernus is a seller. They purchased  
6 it from him. They also purchased the securities from  
7 SkyComm.

8                   Now, you're going to hear the argument  
9 they didn't actually purchase securities from SkyComm.  
10 Sure, they did. They paid the money. Right? They just  
11 didn't get the stock back. They bought it. They just  
12 didn't receive it.

13                   If you go to a car dealership and you pay  
14 \$10,000 for a new car and they don't deliver it, you  
15 still bought it. You just didn't get it.

16                   So SkyComm there is equal party to this  
17 false agreement as Kubbernus. Both of them signed it,  
18 Clarence Marshall -- I mean Roger Klotz on behalf of  
19 SkyComm and Robert Kubbernus on behalf of Balaton signed  
20 the false agreement, took the false agreement to the  
21 limited partnership, and that -- that's securities --  
22 that's a securities law violation, according to the  
23 judge's definition.

24                   Okay. Let's go to Question 2. Now,  
25 Question 2 is worded differently. And you need to pay

1 attention to the wording -- read these questions  
2 carefully because this one -- on the first one, I have to  
3 prove it to you. I have to prove to you that there was a  
4 securities law violation.

5 I've given you the evidence that I believe  
6 proves that. This one the defendants have to prove it.  
7 And they have to prove that ClearSky Investments, LP,  
8 knew at the time of the purchase of the untruth or  
9 omission by Robert Kubbernus that you found in answer to  
10 Question 1.

11 So if you found a securities law violation  
12 in Question 1, then you answer Question 2 and you have to  
13 say, did Mr. Kubbernus prove that ClearSky Limited  
14 Partnerships knew the truth? Right. In other words, did  
15 they know the truth? Did they know they weren't going to  
16 get any stock?

17 Now, that seems kind of funny because  
18 remember Robert Kubbernus is signing both sides. And  
19 Robert Kubbernus certainly knew they weren't going to get  
20 the stock. Right? But what Robert Kubbernus knew  
21 doesn't count because you look at this instruction.

22 If Robert Kubbernus acted against the best  
23 interest of the ClearSky Investments, LP, his knowledge  
24 is not attributable to ClearSky Investments. So ClearSky  
25 does not know what Robert Kubbernus knows. He can't use

1 that against them. He can't use that as a tool to  
2 defraud, saying he gave himself permission.

3           They will have to bring you evidence that  
4 there was somebody else at ClearSky Investments in the  
5 limited partnership that knew the truth, and they won't  
6 be able to do that.

7           The only -- the only one -- the only  
8 person who knew that ClearSky wasn't going to receive --  
9 wasn't -- that -- the only one that knew the name on the  
10 stock certificate was going to be Balaton was Brogan  
11 Taylor, right, who worked for Balaton, didn't work for  
12 the limited partnership.

13           He knew it, but he had been told, "It's  
14 being" -- the lie, right, "It's being held in trust." He  
15 believed he didn't have anything to worry about because  
16 it was being held in trust and they really did own, it  
17 was just in somebody else's name temporarily. It was a  
18 nominee. Okay. So nobody knew the truth at ClearSky  
19 other than Robert Kubbernus, and his knowledge doesn't  
20 count.

21           Question 3 -- so the answer is no to that.  
22 Question 3 asks the same question, but this time it's  
23 about SkyComm. And, again, Robert Kubbernus' knowledge  
24 doesn't count. You can't use -- the bad guy can't say,  
25 "Because I know what I'm doing, nobody can sue me."

1 Right?

2                   So the answer to that one is no.

3 Question 4. All right. Now, all of this again key off  
4 this first question. If you found that there was a  
5 securities law violation against the whole partnership,  
6 then you answer Question 4.

7                   And Question 4 is, did one or more parties  
8 listed below materially aid Robert Kubbernus in  
9 committing the securities law violation that you found in  
10 answer to Question 1?

11                   And it asks about CenturyTel, Stewart  
12 Ewing and Clarence Marshall. So now we're in the aiding  
13 and abetting that I was talking about a minute ago,  
14 materially aiding. And so we go back to the definitions.  
15 Right?

16                   And the Definition No. 8 is what I have to  
17 prove to show that CenturyTel or Ewing or Marshall  
18 materially aided. A party materially aided a securities  
19 law violation if it directly or indirectly -- they don't  
20 have to do it directly. It could be indirectly -- with  
21 either the intent to deceive or a reckless disregard of  
22 the truth and the law, materially assisted in committing  
23 the securities law violation.

24                   Okay. What is the securities law  
25 violation? The securities law violation is saying, "You

1 will own the stock if you pay me the money," taking the  
2 money and not intending to give the stock. Okay. It's a  
3 false statement. You're going to be the owner of the  
4 stock, but, in fact, I bought it for myself,  
5 Mr. Kubbernus.

6                   Okay. Did CenturyTel, did Mr. Ewing, did  
7 Mr. Marshall materially aid that? Well, without a doubt.  
8 I mean, it's not even a close call. If they had walked  
9 away, then we wouldn't have lost our money, right, if  
10 they had not done the deal?

11                   They had to close the deal. They had to  
12 agree to change the deal in March and they had to agree  
13 to close the deal and accept stolen money in November.  
14 And if they hadn't done that, there wouldn't be any  
15 fraud. Mr. Kubbernus wouldn't have had any way to take  
16 our money.

17                   Okay. So the question is, did they do  
18 that with reckless disregard of the law and the facts?  
19 So No. 9 is the definition of reckless disregard. A  
20 party acted with reckless disregard of the truth or the  
21 law if it provided material assistance, which it did, in  
22 the commission of a securities law violation and was  
23 generally aware that its participation was part of an  
24 overall activity that was improper.

25                   So, you know, they're fond of saying, "We

1 didn't know the details." You don't have to know the  
2 details. You just have to know that there's impropriety,  
3 "Something about this smells and I know I'm a part of it  
4 and I'm at least generally aware that something smells,  
5 but I just don't care." Right?

6                   Now, the next sentence is also important.  
7 It says, "A mere failure to investigate is insufficient."  
8 It also doesn't say something important, which is that a  
9 failure to investigate is a defense. Right?

10                   It's not a defense for CenturyTel to get  
11 up here and say, "Yeah, we may have been generally aware,  
12 but we didn't investigate so we didn't know exactly what  
13 was going on."

14                   Now, I can't prove to you general  
15 awareness by saying, "They would have been aware if they  
16 investigated, but they didn't." Okay? That's not  
17 general awareness. They have to be generally aware.  
18 Then if they don't investigate, they do that at their own  
19 risk.

20                   I am not coming in here to tell you that  
21 they should have investigated before they did the deal.  
22 I am in here to tell you they knew darn well that the  
23 money was coming from investors and the investors were  
24 getting nothing, and at that point they had a duty to do  
25 something.

1           They could not go forward and close the  
2 deal and materially aid a securities law violation. If  
3 they did that, they did it at their own risk and they're  
4 responsible for their choice. Okay?

5           So that question is yes and yes and yes.  
6 Put that back up there. Okay. Materially aided.  
7 CenturyTel, yes, Stewart Ewing, yes, Clarence Marshall,  
8 yes.

9           All right. Question 5. All right. This  
10 is another one where they have the burden of proof. And  
11 this says, do you find that when SkyComm Technologies  
12 committed a securities law violation against ClearSky,  
13 Limited -- this is only if you answered yes as to  
14 SkyComm -- that you found -- that you found in Question 1  
15 the parties listed below were then control persons of  
16 SkyComm.

17           Okay. So with respect to Mr. Kubbernus'  
18 participation in the fraud on the limited partnership, I  
19 need to show that they materially aided. That was the  
20 last question.

21           With respect to SkyComm's part in the  
22 fraud, I need to show that they were in charge of  
23 SkyComm. Right? CenturyTel was in charge of SkyComm,  
24 that they had the ability to control SkyComm.

25           And there is a definition in here and it

1 is, you know, that it's -- they had the means, they --  
2 control means the possession, direct or indirect, of the  
3 power to direct or cause the direction of management or  
4 policies of a person, whether through the ownership of  
5 voting securities, contract or otherwise.

6           And a party is a control person. It's got  
7 two elements. One is that if they exercise control of  
8 the operation as the company in general and, second, if  
9 they had the power to control a specific transaction in  
10 question.

11           Now, here -- I mean, it's just -- there's  
12 no question that CenturyTel by contract had the right to  
13 control SkyComm. Right? They -- that was part of the  
14 deal in the debentures. We've talked about it all along.  
15 They got control of the board of directors. They were  
16 able to say, "Do this. Don't do that." Okay?

17           So the only question, did they have that  
18 power over the whole company? Of course. Did Mr. -- did  
19 Mr. Ewing and Mr. Marshall have power to direct the  
20 company? Yeah, of course they did. They were on the  
21 board of directors.

22           Okay. Now, did they -- did each of those  
23 three entities have influence over this particular  
24 transaction? Again, yes. I mean, there's just no  
25 question. They had to agree to change the deal. They

1 had to agree to close it.

2           CenturyTel had to approve the issuance of  
3 stock even though it wasn't a party to that agreement.  
4 And CenturyTel had to agree to change the debenture  
5 agreement. All right. So they are clearly, clearly  
6 control persons.

7           And so the answer there again is yes, yes,  
8 yes.

9           Now, Question 6. We're still -- this is  
10 still all on that first securities law violation. Do you  
11 find that the parties listed below did not know, or in  
12 the exercise of reasonable care could not have known, of  
13 the untruth found by you in answer to Question 1?

14           So this is one again where they have the  
15 burden of proof. The answer is no. And what it's asking  
16 you is, can they show you that they didn't know there  
17 were investors, that they didn't know that investors were  
18 getting nothing?

19           Can they show you both that they didn't  
20 know and that could not have found out if they used  
21 ordinary care, reasonable care, asked the question,  
22 demanded to see the document? They can't prove that. So  
23 the answer is no.

24           And the final question in this series is  
25 Question 7, how much did we lose? Okay. The partnership

1 as a whole lost 7 million bucks. That number has been  
2 undisputed the whole time. Partnership as a whole lost  
3 7 million bucks.

4           You're given -- you're given the formula  
5 here. The formula is the consideration the buyer paid  
6 for the security. Right? How much money did we pay? We  
7 paid \$7 million. And how much money -- and then you have  
8 to deduct if we got any of it back. Right?

9           If we sold the security, if we got  
10 dividends, if we got anything back, it comes off. It's a  
11 deduction. What did we get back? Nothing. All right.  
12 So it's what we paid, 7 million bucks.

13           Next question. Now, this is a different  
14 legal standard. And this one is whether Mr. Kubbernus,  
15 Mr. Pouliot violated fiduciary duty of loyalty to the  
16 limited partnership.

17           Now, let me just talk about Mr. Kubbernus  
18 first. Now, again, Mr. Kubbernus has the burden of  
19 proof. He has to prove that he complied with his  
20 fiduciary duty. And Instruction No. 11 tells us what  
21 that is, and, that is, if he's in control of the general  
22 partner, then he owes the limited partner -- the limited  
23 partners a duty of utmost good faith and loyalty not to  
24 use control over the partnership's property to advantage  
25 himself at the expense of the partnership.

1                   That's a tall order. And he's got --  
2 Mr. Kubbernus has got to prove he was in control of the  
3 general partner. He said that. I mean, everybody knows  
4 that. Right? And did he use his control over that  
5 partnership to benefit himself? Of course he did.

6                   He took their money and bought stock for  
7 himself. He's got to prove that that didn't happen. And  
8 the other thing -- you know, his whole theory is, "Well,  
9 I held it in trust, but then I took it back." Right? "I  
10 took it back later."

11                   I mean, even if you believe for some  
12 reason that he held it in trust and he took it back  
13 later, that's a breach of fiduciary duty. Right? You  
14 can't just take it back. He would have to come in here  
15 and prove that he did not benefit at the expense of the  
16 partnership.

17                   We'd need to know, how much did the -- how  
18 much did the partnership owe you? Okay. Where are your  
19 invoices? What did you do? Prove that you spent that  
20 money. How much was the stock worth when you took it?  
21 Okay. Prove that that was fair. No way he can do it.

22                   Now, go back to the question. Now, I bet  
23 you were surprised to see this because the only clue you  
24 would have that Adrien Pouliot would be added to this  
25 question was what I told you in the very beginning of my

1 opening statement, that CenturyTel has sued Adrien  
2 Pouliot.

3           Okay. CenturyTel has sued the largest  
4 victim in this fraud, claiming that it was all his fault.  
5 Now, they hadn't sued Mr. Kubbernus. And when I put Mr.  
6 Ewing on the stand and said, "You've been here with us.  
7 Right? You've watched this guy testify. You've seen the  
8 evidence. Do you know -- will you at least admit that  
9 Mr. Kubbernus committed fraud. I'm not asking you to  
10 admit that you were part of it. Will you admit that  
11 Mr. Kubbernus committed fraud?"

12           He said, "No." He wouldn't admit that.  
13 He didn't have any opinion.

14           CenturyTel, this company that was built on  
15 principles and integrity, this is a company standing in  
16 front of you suing the victim and defending the company.  
17 Okay. I've got the burden of proof on Mr. Pouliot.

18           First of all, there isn't any evidence  
19 that he controlled the limited partnership. He was on  
20 the board. He didn't have control of that company.  
21 Robert Kubbernus did.

22           Secondly, what did Mr. Pouliot do wrong?  
23 He was told that the limited partnership was getting very  
24 valuable stock. He believed it. He believed it so much  
25 he put \$3.8 million of his own money into the limited

1 partnership.

2                   Mr. Kubbernus never told him the truth.

3 Okay. How did Mr. Pouliot -- and they may come up here  
4 and say, "Well, they could have investigate. They could  
5 have investigated. We don't have to investigate, but the  
6 plaintiffs do." Right?

7                   That's their position. But this question  
8 the judge asked you didn't say anything about  
9 investigating. It says, did he benefit at the  
10 partnership's expense? No. He put money into the  
11 partnership and lost that money. So this is a big fat  
12 yes. He complied with whatever duty he had.

13                   Question 9, if you answer that  
14 Mr. Kubbernus did not comply with his fiduciary duty, if  
15 you answered no to the previous question, right, then you  
16 need to figure out whether CenturyTel, Ewing or Marshall  
17 aided and abetted the breach of fiduciary duty.

18                   It is a -- it is a similar standard, but  
19 it's slightly -- it's slightly differently worded. And  
20 this is questions -- this is 12 and 13, 12 being the one  
21 that's most critical.

22                   A party aided and abetted a breach of  
23 fiduciary duty of loyalty to ClearSky Limited Partnership  
24 if it knowingly participated in the breach and ClearSky  
25 suffered damages proximately caused by the breach.

1           The knowing participation in a breach of  
2 fiduciary duty requires the party, one, act with  
3 knowledge that a fiduciary's preaching its duty and, two,  
4 render substantial assistance in committing the breach.

5           Well, what did CenturyTel know?  
6 CenturyTel knew he was setting up an investment fund.  
7 CenturyTel knew. He told them, "We're going syndicate  
8 it. We're going to do a limited partnership. There will  
9 be investors."

10           CenturyTel knew that if Balaton was going  
11 to take the stock for itself and pay with its investors'  
12 money, that was going to breach some kind of duty to  
13 those investors. Certainly he was breaching his duty of  
14 loyalty to the investors, so they knew that.

15           Did they participate? Of course. Right?  
16 They agreed to change the deal to let him do and they  
17 agreed to close the deal knowing he was paying with  
18 somebody else's money. That's participation. So it's  
19 similar to the fraud question. It's got a slightly  
20 different definition, but the answer is the same.

21           Question 10, how much money did the  
22 partnership lose? Again, it's defined a little bit  
23 differently, but the math works out exactly the same.  
24 It's the value of the partnership assets that Robert  
25 Kubbernus diverted to himself for non-partnership

1 purposes. How much? \$7 million. Right? There's not  
2 another number in that answer. Okay.

3 Okay. Now we go to another question as a  
4 result of CenturyTel's suing the victim. Okay.

5 Question 11, if you answered no to Question 8 that  
6 Mr. Kubbernus did not comply with his fiduciary duties,  
7 then you have to apportion responsibility as between  
8 Mr. Kubbernus and Mr. Pouliot. Right?

9 Well, if you answer that Mr. Pouliot  
10 didn't comply with his fiduciary duties, then the answer  
11 is obvious. Right? But, you know, regardless, what did  
12 Mr. Pouliot do to steal that \$7 million? The only  
13 participation he had was to put up more than half of it  
14 and lose it. So, I mean, this is an obvious. Robert  
15 Kubbernus breached his fiduciary duties. He's a hundred  
16 percent responsible. The victim here is zero percent  
17 responsible.

18 All right. Now we get to a new series of  
19 questions. Now I'm going to ask you -- the Court's going  
20 to ask you to find -- to look at the fraud from each  
21 individual investor's perspective.

22 Okay. We're not -- this is going to go  
23 much faster because it's the same questions, but you're  
24 asked it for each individual investor. So, in other  
25 words, I'm not asking you here -- or the Court's not

1 asking you here, what wrong was committed against the  
2 whole partnership?

3                   We're asking, what wrong was committed  
4 against Peter Taylor? All right. Peter Taylor lost a  
5 million dollars. Is claim is not 7. It's 1. So let's  
6 go through this.

7                   So the first question is the same thing.  
8 Did Robert Kubbernus commit a securities law violation  
9 against the ClearSky investors listed below? We go back  
10 to 4 to 7, right, and it's the same thing.

11                   Did he sell securities by means of an  
12 untrue statement? Yes, he did. He told them, "If you  
13 put your money -- if you buy the limited partnership  
14 interest, which is a security -- if you buy into the  
15 limited partnership, then we're going use your money to  
16 put stock in a limited partnership," and he didn't do  
17 that.

18                   He lied about that. He didn't intend to  
19 do that. Okay. They had already changed the deal. He  
20 told that to every one of these people. Every one of  
21 these people got the information memorandum, right, that  
22 said they're going to be the owners.

23                   Every one of them got the limited  
24 partnership agreement, signed the limited partnership  
25 agreement that said they would be owners, right, every

1 single one of them.

2                   And almost all of them talked directly to  
3 Robert Kubbernus so -- and the ones that didn't talk to  
4 Robert Kubbernus, some of the -- like the Mendel people,  
5 here they got the materials that Robert Kubbernus sent  
6 through Mendel.

7                   Mendel was a broker and he was delivering  
8 Robert Kubbernus' words and Robert Kubbernus' written  
9 materials that promised ownership to the plaintiffs. So  
10 this is -- we go back. Right? If it's -- you know, go  
11 back to the question.

12                   Really there hasn't been any evidence to  
13 say one is different. If it's yes to one, it's yes to  
14 everybody. You heard from Mr. Pouliot he was told this.  
15 He was -- he bought into the limited partnership based on  
16 an untrue statement. It's yes, yes, yes, yes, yes, yes,  
17 yes, yes, yes.

18                   All right. Then we go to Question 13.  
19 Now, this again, they've got the burden of proof.  
20 They're suing Mr. Pouliot and they're claiming, do you  
21 find when Robert Kubbernus committed securities law  
22 violation against the ClearSky investors that you found  
23 in answer to Question 12 that Mr. Pouliot was a control  
24 person of Robert Kubbernus?

25                   What? Mr. Pouliot controlled Robert

1 Kubbernus? I don't think so. Where is the evidence that  
2 he directed Mr. Kubbernus' business activities? Where is  
3 the evidence that Mr. Pouliot had anything to do with any  
4 of the sales to these other investors?

5                   They're asking you about these investors'  
6 purchases. Mr. Pouliot didn't even know those were going  
7 on.

8                   He had nothing to do with it, so that's a  
9 no.

10                   14, do you find that Adrien Pouliot -- you  
11 only answer 14 if you answered the last one yes -- all  
12 right -- that somehow Mr. Pouliot was responsible.

13                   No, I'm sorry. No, you do answer this if  
14 you answered 12. And you say: Do you find that Adrien  
15 Pouliot did not know or in the exercise of reasonable  
16 care could not have known of the untruth found by you in  
17 your answer to Question 12.

18                   Well, look, he didn't know the truth. But  
19 this was a guy who came down to Houston seven times, had  
20 extensive meetings with Mr. Kubbernus. He saw all the  
21 documents. Right? And Mr. Kubbernus said, "At closing,  
22 we are going to transfer it to you."

23                   Mr. Pouliot didn't know -- I mean, he did  
24 get a copy of the FCC application, but he was also told,  
25 "We are going to amend the FCC application at the right

1 time." He was not told that that was not done.

2 He used reasonable care. Right? Could he  
3 have done more? You can always do more. But he used  
4 reasonable care. He asked Robert Kubbernus, "Keep me  
5 informed." Kubbernus didn't. Kubbernus took his money  
6 and he did not know the truth.

7 Question 15: Do you find, as to each of  
8 the ClearSky investors listed below, that the ClearSky  
9 investors knew by the time of the purchase of the  
10 securities from Robert Kubbernus the untruth or omission?

11 Did they know the truth and throw their  
12 money away anyway? No, they didn't. They all testified  
13 we didn't know what was going -- we thought he was  
14 telling us the truth.

15 So those are all no.

16 Sixteen. Sixteen asks: Did CenturyTel  
17 materially aid Robert Kubbernus in committing the  
18 securities law violation against the other individuals?  
19 All right. All yes. It is the same thing. Right?  
20 We've already walked through this once.

21 They materially aided because they were  
22 generally aware that what Mr. Kubbernus was doing was  
23 improper. He was taking somebody else's money and buying  
24 stock for himself.

25 So this is the exact same question. It's

1 just asked for the individuals. It's all yes.

2           The next question asks about Stewart  
3 Ewing. Okay. Same analysis. Seventeen asks about  
4 Stewart Ewing. It's the same thing. He materially  
5 aided. He agreed to change the deal. He agreed to let  
6 it close.

7           Eighteen, Clarence Marshall. Same thing.  
8 You have already looked at this. Okay? This is just  
9 against the individuals and it's the same analysis.

10           All right. Then you get to the damages.  
11 And I know you're thinking how on earth are we supposed  
12 to remember all of that? And I'm going to tell you, you  
13 don't have to remember it. It's very easy.

14           Okay. In our exhibit books -- which you  
15 will get all the exhibit books -- our first volume,  
16 No. 7 -- we put the most important documents right up  
17 front. No. 7 has a list of the investors and how much  
18 they did.

19           And this -- the order of investors is  
20 exactly the same as in No. 7B, which is the ClearSky  
21 investors. It says ClearSky investors. It shows exactly  
22 how much each one of them put in. And all you have got  
23 to do is copy that over, if you believe -- if you find  
24 that securities fraud was committed against them.

25           Okay. Then we go to Question 20. And

1 this is again -- we're asking now did Mr. Kubbernus --  
2 actually, this is slightly different. This asks: Did  
3 Mr. Kubbernus commit fraud against the ClearSky  
4 investors?

5                   Okay. Fraud is similar to a securities  
6 law violation, but it requires a little more proof.

7 Okay? To show a securities law violation, you're not  
8 asked about, you know, what people intended or what they  
9 believed or whether they relied. The only question --  
10 the important fact in a securities law violation was, you  
11 know, was there an untruth in connection with the sale of  
12 securities.

13                   Okay. Fraud is a bit more involved. And  
14 so fraud starts on instruction No. 14. And it's 14, 15,  
15 16 and 17.

16                   And so you have got two ways you can  
17 commit fraud. You can commit fraud by making a false  
18 representation, a misrepresentation, or you can commit  
19 fraud by failing to disclose something that's important  
20 to disclose.

21                   So a fraud occurs when a party makes a  
22 material misrepresentation; the misrepresentation was  
23 made with knowledge of its falsity or recklessly, without  
24 any knowledge of the truth and as a positive assertion;  
25 the misrepresentation is made with the intention that it

1 should be acted on; and the other party relies on the  
2 misrepresentation and suffers injury.

3           A misrepresentation is a statement of fact  
4 or a promise of future performance made with an intent  
5 not to perform and also fraud occurs when a party fails  
6 to disclose an important fact, a material fact; and knows  
7 the other party is ignorant; and intends to induce that  
8 party to take some action; and that party suffers injury.

9           Okay. So it is the same concept, but it  
10 is -- I've got to do a little bit more explaining, right,  
11 because up to now, I've just been focused on the false  
12 fact. False fact is the same. Pay your money, you get  
13 ownership. Okay. But he knows that's not going to  
14 happen. He knows the truth is pay your money and I get  
15 ownership.

16           So Mr. Kubbernus makes a false statement.

17           Does he know it's false? Yes, he does.

18 He knows exactly what he intends to do.

19           Does he intend to induce my clients to do  
20 something? Yes, he does. He intends to induce them to  
21 put a total of \$7 million into the pot. Right?

22           And did they rely on the  
23 misrepresentation? They all testified they did. They  
24 said we wouldn't have invested if we had known that we  
25 weren't going to get anything. Right? And it's just

1 obvious. They didn't even have to testify. Your common  
2 sense tells you if you know you're not going to get  
3 anything, you're not going to put your money in.

4                   They were told you invest. You get  
5 something. That was false. They relied on it. They  
6 assumed they would get something. They got nothing.

7                   Okay. So that's fraud against  
8 Mr. Kubbernus.

9                   So we go to Question 21 and you're asked  
10 whether CenturyTel conspired with Mr. Kubbernus to commit  
11 that fraud. Okay. Similar concept to the materially  
12 aiding, but I've got to prove a little bit more. Okay?  
13 So we need to look at the definition on No. 18.

14                   Now, 18 says to be part of a conspiracy to  
15 commit fraud, two or more persons must have had knowledge  
16 of, agreed to, and intended a common objective or course  
17 of action to accomplish an unlawful purpose or a lawful  
18 purpose by an unlawful means, which resulted in damages.  
19 And one or more of the persons involved in the conspiracy  
20 must have performed some acts to further the conspiracy.

21                   Well, using that definition, was there an  
22 agreement between CenturyTel and Robert Kubbernus to  
23 perform a common objective? Yes, there was. It was  
24 called the sale of the company. Okay? They had an  
25 agreement to sell the company and an agreement to close

1 the deal.

2                   That was a lawful purpose, but there was  
3 an unlawful means. What was the unlawful means?

4 Stealing -- taking stolen money. Right?

5                   So CenturyTel had that agreement and they  
6 knew that the people that put up the money weren't going  
7 to get the stock. So yes, CenturyTel conspired, had an  
8 agreement with Mr. Kubbernus to accomplish a lawful  
9 purpose through an unlawful means. And therefore, they  
10 meet the definition of conspiracy as the judge has given  
11 it to you.

12                   Question 22 asks exactly the same question  
13 of Mr. Ewing. Well, you know, the guy that's doing the  
14 decision making here for CenturyTel is Mr. Ewing. So if  
15 CenturyTel was part of the conspiracy, Mr. Ewing was as  
16 well.

17                   And then 23 is Mr. Marshall. He's also  
18 appointed by CenturyTel. He's there in the midst of it.  
19 He's making the decisions. He also -- the answer is yes.

20                   Twenty-four, did Franklin Craig cause or  
21 contribute to causing the damages, if any, from the fraud  
22 you found in Question 20 by breaching a fiduciary duty to  
23 ClearSky investors Sequoia Aggressive Growth Fund and/or  
24 Semper Gestion. And to find a breach of fiduciary duty  
25 by Franklin Craig, you must find that he was the agent of

1 the parties listed below and that he breached his duties  
2 arising from the agency relationship.

3           And that agency relationship is defined in  
4 Question 19 that says an agency relationship arises when  
5 one party acts on behalf of another and it is a special  
6 relationship that gives rise to a fiduciary duty.

7           An agent breaches his fiduciary duty if he  
8 failed to make reasonable use of the confidence the  
9 investors placed in him, failed to act in utmost good  
10 faith and to exercise the most scrupulous honesty toward  
11 the investors, failed to fully and fairly disclose all  
12 important information to the investors concerning the  
13 transaction.

14           Well, okay. Why are we asking about  
15 Mr. Craig again? Sue the victim. Sue the victim.  
16 Defend the con man. So we have to answer a question  
17 about Mr. Craig.

18           All right. Mr. Craig. Mr. Craig was an  
19 investment adviser to these two funds. You saw him  
20 testify. He was the colorful one, you know. And what he  
21 did was he brought information to them from Robert  
22 Kubbernus and they made the decision to invest.

23           But there isn't any evidence that -- I  
24 mean, this is saying that he somehow is to blame for the  
25 fact that Robert Kubbernus lied to him. Right?

1 Mr. Craig didn't do anything wrong. He didn't know that  
2 these funds were going to get nothing when he recommended  
3 that investment. He didn't know that. He didn't testify  
4 that he knew that the funds weren't going to get the  
5 stock. He testified that he thought they were going to  
6 get the stock. And he would never have allowed them to  
7 invest if they didn't get the stock.

8                   So again, you know, they can hurl  
9 acquisitions, but the answer to this question is no.  
10 Mr. Craig didn't breach his fiduciary duty. He didn't  
11 cause any of the damages. What he did was simply -- I  
12 mean, he was just used. Right? He was -- we would be --  
13 I mean, they could -- they didn't, but they could make  
14 the same accusation against every other employee or, you  
15 know, everybody else in the case. You know, it's your  
16 own fault because you invested.

17                   No, it's not. It's Mr. Kubbernus' fault  
18 because he defrauded. Okay?

19                   Question 25, damages. Again, the way that  
20 the damages computation is stated is different, but the  
21 meaning and the numbers are exactly the same. It's the  
22 value of the consideration paid, how much they paid for  
23 the stock minus the value they received, nothing. They  
24 got nothing.

25                   So again, Exhibit 7B lists these out.

1 Those numbers are the damages numbers.

2                   No. 26. Okay. No. 26 asks you to  
3 apportion fault for those two funds as between the guy  
4 that committed the fraud and the guy that got defrauded.

5                   Okay. So Mr. Kubbernus is 100 percent  
6 responsible for the fraud he committed. Mr. Craig is  
7 0 percent responsible for the fraud that Mr. Kubbernus  
8 did. It makes sense.

9                   Twenty-seven. Did Mr. Kubbernus commit a  
10 securities law violation against the individual investors  
11 listed below?

12                   New group of investors. I haven't talked  
13 about them yet, but let me just get into -- and  
14 Mr. Craig -- most of these investors are Mr. Craig's  
15 clients. He talked about them. We also read for the  
16 other ones the depositions where they talked about him.

17                   Their claim is really very simple. Okay?  
18 It is not correct to say that they got nothing for their  
19 money. They got nothing of value. Right? But it's not  
20 that they got nothing for their money. What they got --  
21 it was that they were not told that they were dealing  
22 with a crook. Right?

23                   When they came in, they were told, look,  
24 you guys are round two. We have already had a successful  
25 round one. Look, we have got all these happy ClearSky

1 investors. They have invested. They got their shares.  
2 You guys come in. You're round two. You're going to pay  
3 more than the guys did in round one, but that's because  
4 we have done such a good job with the company.

5           Okay. The truth was Balaton stole the  
6 money from the investors in round one and now he wants  
7 you to give him your money. Right? Nobody would have  
8 invested had they been told the truth. What they got  
9 was -- we have look at this. You know, Mr. Cicack uses  
10 the documents that were passed out in the second round  
11 that show that ClearSky got stock. He wants to use that  
12 to show that somehow ClearSky did get stock. We know  
13 they didn't. But that's what the second group of  
14 investors were told.

15           If they had been told the truth, they  
16 would have stayed away and they would have kept their  
17 money.

18           So this is the group of investors who  
19 invested directly into SkyComm. And you will see -- you  
20 know, and it's the same question. Was a securities law  
21 violation committed against them? This is a slightly  
22 different securities law violation. This is that they  
23 were -- that an untrue statement of fact was made, that  
24 they were not told the whole truth.

25           Okay. And the untrue statement of fact is

1 we've got -- these ClearSky investors got their stock.  
2 They weren't told that the ClearSky investors were ripped  
3 off. That's a securities fraud violation.

4           Okay. Then you go to Question 28 and  
5 you're asked about the damages.

6           Okay. Now, once again -- now you're going  
7 to go to Exhibit 7C in the book. And you will see the  
8 top half of 7C are the SkyComm investors, which is this  
9 group. It has these numbers.

10           We were a little over-inclusive on this  
11 one. We got some investors at the top that aren't  
12 plaintiffs, but the ones that are plaintiffs start about  
13 in the middle and you can just line it up. It goes in  
14 the same order from Mr. Khurana on down through the  
15 Franklin Craig funds that he testified to.

16           Then we go to Question 29. This is -- the  
17 first one was securities law violation. This is fraud.  
18 It's the same thing. Right? Did he make a misleading --  
19 did he make misrepresentations? Did he -- of course he  
20 did. Did he omit facts that he had a duty to tell them?  
21 Yeah. Was it misleading when he didn't tell them that he  
22 ripped off round one and you come in and be round two?  
23 Very misleading.

24           Okay. And he knew they were ignorant. He  
25 knew there was no way they could find out the truth and

1 he took advantage of them. If he told them the truth,  
2 they never would have invested. That's fraud and that's  
3 yes as to those investors.

4                   Okay. Then you're asked the same  
5 questions on damages, 30. What did the fraud cost them?  
6 Right? What the fraud cost them was they wouldn't have  
7 invested. All right?

8                   Mr. Khurana invested \$50,089. If he had  
9 known the truth, he wouldn't have invested \$59,089.  
10 Since he didn't know the truth, what does he have in  
11 his -- if he had known the truth, what would he have in  
12 his pocket? \$50,000. He didn't know the truth. What  
13 does he have in his pocket? Nothing. All right.  
14 Nothing.

15                   So Mr. Khurana should get his money back  
16 and that's the damages we are asking you to award.

17                   Then we go to Question 31. This is the  
18 exact same theory with a slightly different group.

19                   Okay. Incidentally, you know, you'll see  
20 that even these are different groups of investors, there  
21 is a lot of overlap. The ClearSky investors who were  
22 defrauded into investing in ClearSky, many of those are  
23 the same people that -- they invested more money. Right?

24                   So you can say absolutely, boy, if we had  
25 known -- you know, if those guys had known they were

1 defrauded and got nothing, they would never put another  
2 penny in. You know, so -- that's the Franklin Craig  
3 fund.

4           So anyway, what we get down on 31 is the  
5 Lavell investors. These were the guys that put money --  
6 that invested in the IPO. They were supposed to get  
7 money directly in the IPO and they were not told what  
8 happened to ClearSky. There was no mention. They were  
9 told that the ClearSky people got their stock and that  
10 was a securities law violation. All yes.

11           Thirty-two, same deal. Second group on 7C  
12 tells you exactly how much they invested, exactly how  
13 much they lost. The numbers are right there for you when  
14 you answer these questions.

15           And you're asked the same question about  
16 the Lavell investors. Was it a securities law violation?  
17 Yeah. Was it also fraud? Yeah. Okay. Because they  
18 were relying on this. They wouldn't have invested had  
19 they known the truth.

20           And he intended to deceive them. He told  
21 them that ClearSky got their stock and they didn't.

22           All yes.

23           Same question on 34, same numbers. Okay?

24           So I mean, when you get down to it, there  
25 are really only about four or five moving pieces and then

1 all the rest of it follows.

2                   So I will -- the defendants will talk to  
3 you now. I will have an opportunity to come back and  
4 respond to what they say and then, as I said,  
5 the (inaudible) --

6                   THE COURT: Thank you, sir.

7                   Ladies and gentlemen, we'll take our lunch  
8 break at this time. Please be ready to be back here at  
9 20 minutes before 1:00 o'clock. Thank you.

10                   (Jury not present)

11                   THE COURT: May I see the jury charge  
12 lawyers? Everybody else is off to lunch.

13                   And this is off the record.

14                   (Brief recess)

15                   (Jury present)

16                   THE COURT: Please be seated, everyone.

17                   Mr. Cicack.

18                   MR. CICACK: May I proceed?

19                   THE COURT: Yes, sir.

20                   MR. CICACK: Good afternoon.

21                   THE JURY: Good afternoon.

22                   MR. CICACK: As you know, my name is  
23 Walter Cicack and I represent Robert Kubbernus.

24                   Can we get the screen, Your Honor?

25                   THE COURT: Yes, sir.

1 THE COURT: Be seated, everyone.

2 Mr. Fryar, you have the floor.

3 MR. FRYAR: Thank you.

4 All right. I just -- I have to start with  
5 where he called me a liar, you know. And I know he took  
6 it back, but really. He says I'm supposed to be held  
7 accountable for the misstatements that I made in  
8 opening -- I wrote them down -- first of all that  
9 CenturyTel called the shots. They did. That's been  
10 admitted.

11 They were given control of the company in  
12 their debentures. They had the chairman of the board.  
13 Yes, all the decisions were unanimous. Right? Everybody  
14 agreed. But that doesn't mean that they didn't have  
15 control.

16 And in particular on this deal, you've got  
17 dozens of e-mails between Mr. Kubbernus on the Balaton  
18 side negotiating -- working this deal that we're here in  
19 this lawsuit about. All of those e-mails are between  
20 CenturyTel's Marshall and CenturyTel's Ewing. The  
21 other -- the original shareholders on the board --  
22 they're not copied on those. There are a couple of where  
23 they get copied, but the vast majority -- the people who  
24 were driving the bus on this deal were CenturyTel's  
25 people. That was completely accurate and particularly

1 with respect to where it matters in this case.

2           And, you know, Mr. Manley also says, "Oh,  
3 the plaintiffs were on the board. The plaintiffs knew  
4 all about it." Remember, I had three boards with tons of  
5 plaintiffs. There are a group of plaintiffs who are  
6 original plaintiffs in this lawsuit. As the case is  
7 developed, they do not have claims. You are not being  
8 asked to answer any questions about them, and that is the  
9 original shareholders.

10           And the original shareholders were on the  
11 board, some of them. Okay? But the original  
12 shareholders didn't -- I mean, none of the ClearSky  
13 people, none of the people who lost money, none of the  
14 people that we are asking you to rule on today were on  
15 the board; and to suggest that the plaintiffs were on the  
16 board and the plaintiffs were in control and the  
17 plaintiffs knew -- that's just -- that's false.

18           The plaintiffs who are here asking for  
19 your decision had no contact with CenturyTel. And, I  
20 mean, they went out of their way. They asked every one  
21 of them, "Did you talk to CenturyTel? Did you talk to  
22 CenturyTel?" None of my people who invested money had  
23 any contact with CenturyTel, had no idea -- had no  
24 contact with CenturyTel. That's been undisputed.

25           Okay. He says that I was wrong about a

1 year and a half. Well, he took that statement out of  
2 context. What I said was that the teleport was built and  
3 they were capable of earning money. Before the teleport  
4 was built, there was nothing for them to do. The  
5 teleport was built in January of 2004. In July of 2005,  
6 they pulled the plug. That's a year half and a half --  
7 well, maybe year and a half and a few days.

8           What does that have to do with this case?  
9 Why is he bringing that up? He said that I told you  
10 there was lots of interest in this company, there was  
11 lots of interest -- well, you know what -- and that there  
12 were some signed agreements and there were written  
13 offers. That's true.

14           Now, once CenturyTel admitted that they  
15 knew about the investors in opening statement --  
16 remember, I told you and Mr. Ewing admitted that their  
17 position right up until Mr. Manley gave his opening  
18 statement was that they had no idea the money was coming  
19 from investors; and they changed that and said, "Oh, yes.  
20 We knew that." They admitted that they knew that, rather  
21 than try to try that case in the face of the evidence  
22 we've amassed.

23           Once they admitted that, the trial became  
24 much more focused. But in evidence in this first volume  
25 that you'll see are those written agreements. There was

1 lots of interest. You look at all those people that  
2 investigated the company. Some of them made offers. One  
3 of them had a written agreement. It's all in here. It  
4 has nothing to do with what your case is, but I didn't  
5 lie to you.

6           He said that CenturyTel put -- I told you  
7 CenturyTel had the company put into bankruptcy. I mean,  
8 one of the exhibits that came up in this was the letter  
9 where CenturyTel said, "You need to go into bankruptcy."  
10 I said bankruptcy was a good thing. I've acknowledged  
11 from the beginning. Yeah. The Intelsat problem -- the  
12 bankruptcy was a good thing. They got rid of some of  
13 these turkey contracts in the bankruptcy. We're not  
14 suing them for putting the company into bankruptcy.

15           What does that have to do with the case?  
16 What is he talking about?

17           Finally he said "Time was not of the  
18 essence because it took a long time." All right? That  
19 didn't even make sense. I asked Mr. Ewing on the stand  
20 if he was in a hurry, if time was of the essence. Yes,  
21 they were in a hurry. You saw the e-mail that he wrote  
22 in June of 2006 where he said "Let's tell the FCC that  
23 we've got to go faster, we've got to go faster."

24           Now, the fact that the FCC took months and  
25 months was beyond their control; but that doesn't change

1 the fact that what was appealing about Mr. Kubbernus to  
2 CenturyTel was that he was willing to swoop in and do  
3 this deal quickly. And they decided to go with him. And  
4 that's what the case is about.

5           Now, let me back up. Held in trust.  
6 That's the issue. In fact, now Mr. Manley is suggesting,  
7 well, maybe that really was the deal. It was supposed to  
8 be held in trust; and that's okay because if it was held  
9 in trust, then you weren't hurt.

10           Let me tell you the relevance of "held in  
11 trust." And we admitted that. We've been very open  
12 about it. If you believe that Robert Kubbernus has told  
13 you the truth and that this was -- that he was the  
14 trustee -- right -- that there was an actual trust, then  
15 he did lie in the documents, he did -- because he didn't  
16 disclose that. Right? He said that they would be  
17 purchased. But it was a white lie -- all right --  
18 because I can't tell you then that we got nothing for our  
19 money. We got something. It was less than we were  
20 promised, it was different from what we were promised;  
21 but I can't come in and tell you at that point, we got  
22 nothing. Okay? So I admit that.

23           So the question is "Was it held in trust"  
24 or did he do what I say, which is to lie to you, and the  
25 trust is a fiction?

1           Now, the document that he's fond of  
2 showing you that they say was signed by Lavell -- Lavell  
3 was a company that was created by Mr. Kubbernus. It was  
4 a shell company created by Mr. Kubbernus for the purpose  
5 of combining with SkyPort and going -- and doing the IPO.

6           This document, Plaintiffs' Exhibit 160,  
7 which is the one that we've seen all the time that says  
8 that Balaton Group is the nominee. This was something  
9 that was done a year later. It was something that was  
10 never put into practice. Right? They never did this  
11 deal. And it was something that Kubbernus and his guy  
12 Brant were the ones that signed all of this.

13           Now, we know that in November of 2006,  
14 which is what is important, this was not the case. This  
15 does not reflect the reality.

16           Let's look at 406, the securities purchase  
17 agreement. Right?

18           This is the agreement between CenturyTel  
19 and Balaton -- right -- I'm sorry -- between SkyComm and  
20 Balaton that CenturyTel helped negotiate and had to  
21 approve. This was -- this is the agreement that  
22 Mr. Manley keeps saying "We obeyed this agreement."  
23 Right? This is what reflected the reality at the time.  
24 And guess what? The purchaser, Balaton, is not a nominee  
25 or an agent and is not -- doesn't have a contract with

1 anybody else.

2           That is the agreement that Mr. Kubbernus  
3 signed and that CenturyTel and SkyComm signed that said  
4 what the deal was.

5           The story about a trust was something that  
6 Mr. Kubbernus made up to tell Brogan Taylor so that  
7 Brogan Taylor would not get nervous about his father's  
8 investment. Mr. Kubbernus had at some point -- we don't  
9 know when -- that trust agreement written up, put it in a  
10 file just in case if he ever needed it to cover his  
11 tracks, it says May 2006. Who knows when it was actually  
12 written. He never used it. He never signed it. Okay?

13           The whole trust thing -- let me just tell  
14 you what happened. What happened is real simple. They  
15 had to -- they could not do the deal where it went to the  
16 investors because they didn't have time with the FCC. So  
17 they had to give the FCC some specific names. So they  
18 went with Balaton.

19           Once they did that, they had to close the  
20 deal with Balaton. That meant that the investors got  
21 nothing, weren't told that. They got nothing. Balaton  
22 was the actual owner. Wasn't a nominee. That contract  
23 says he's not a nominee.

24           Mr. Kubbernus intended to clean it up in  
25 the IPO. He took those shares. They weren't his. He

1 intended to clean it up in the IPO. Once they did the  
2 IPO, there would be plenty of shares, plenty of money, he  
3 would be able to go out and distribute those shares. No  
4 question.

5                   The IPO didn't happen, and he changed his  
6 mind -- right -- changed his mind, decided to keep the  
7 shares. How can he do that? Because they were his  
8 shares. Right? They were his shares, so he could just  
9 keep them.

10                   Now, I mean, it doesn't make it less a  
11 fraud. It's like a gambler goes and steals some money to  
12 gamble with, planning to pay it back out of his winnings;  
13 and then when he doesn't win, you know, he doesn't pay it  
14 back.

15                   Property can be held in trust. Okay? We  
16 talked about like custodial accounts for your kids for  
17 college money. Property can be held in trust. You can  
18 own a piece of property and somebody else have their name  
19 on it, but that is something that does not happen  
20 lightly -- right -- because if the property is in someone  
21 else's name, if it's your property, you're at risk that  
22 they could misuse that property; and so there is an  
23 agreement. You don't hold -- property doesn't become  
24 held in trust merely because the trustee says so. Right?

25                   When Mr. Kubbernus took that stock, he

1 doesn't have the power all by himself to say "It's in  
2 trust." The true owner, ClearSky, has to agree to that.

3           They didn't. They weren't even asked.  
4 They weren't even told. Okay?

5           I'll tell you how else I know that we're  
6 not -- that it was never held in trust. If it was held  
7 in trust and my clients were the real, real, real owners,  
8 we'd still be the real, real, real owners today. Right?  
9 If that was our stock, it would still be our stock  
10 because it would have stayed our stock. We would be the  
11 owners today, and we're not.

12           And let me tell you how we found that out.  
13 And I went over this both with Mr. Kubbernus and  
14 Mr. Pouliot. There was a bankruptcy hearing in the  
15 second bankruptcy. Mr. Kubbernus went in. And it was  
16 real important to him to get control of this company; and  
17 so he said, "I'm the 58-percent shareholder."  
18 Mr. Pouliot appeared; and Mr. Pouliot said, "Wait a  
19 minute. I'm supposed to have 135 million shares  
20 according to your records. I'm the biggest shareholder.  
21 I've got a competing plan. I want to object to your plan  
22 and put my plan in."

23           Now, Mr. Cicack told you that the judge  
24 rejected the plan and this lawsuit was the result of that  
25 rejected plan. He's right, but not for the reason that

1 he told you.

2           The judge did not reject the plan because  
3 it wasn't a good plan. The judge rejected the plan  
4 because he held that Mr. Pouliot wasn't a shareholder.  
5 Right? Mr. Kubbernus came in and testified, "I never  
6 gave them any shares. They were never a shareholder."  
7 He didn't say, "I'm holding it in trust." He said, "They  
8 never had anything." And the judge took him on -- we  
9 repeated this with Mr. Kubbernus -- took him on and said,  
10 "Look, are you saying they were never a shareholder, they  
11 never had any interest because they raised less than  
12 \$10 million?" And Mr. Kubbernus said "Yes."

13           So, you know -- Mr. Pouliot testified that  
14 his plan was way better, way fairer to the shareholders,  
15 way fairer to the creditors; and he also had money he was  
16 willing to put in, which Mr. Kubbernus did not. If it  
17 had been held in trust and we were the real owners,  
18 Mr. Pouliot would have taken over that company and people  
19 would not have been wiped out like they are. It wasn't  
20 held in trust.

21           Another thing: Not only is there a  
22 contract at closing that says it's not held in trust,  
23 there is an FCC application that says the only people who  
24 have any kind of ownership rights is Balaton.

25           Now, a year later when he's trying to

1 clean up the fraud that he's committed, he prepares a lot  
2 of papers that say that the ClearSky people are going to  
3 get their shares. And, you know, Mr. Cicack talked  
4 about, "Well, yeah. This was filed with the government,  
5 so it has to be right."

6                   Well, you know, Mr. Kubbernus doesn't have  
7 any problem filing false stuff with the government. He's  
8 already demonstrated that. But the point is: Those  
9 documents say that he intends to distribute that stock to  
10 ClearSky if the IPO goes through. I believe that. I  
11 don't think he didn't intend to distribute those shares  
12 if the IPO happened.

13                   But it didn't happen. Right? All those  
14 documents that Mr. Cicack talked about, all those e-mails  
15 that say "We know," "We know" -- not a one of those  
16 happened at the relevant time. These are all late 2008  
17 and 2009.

18                   This is Mr. Taylor, Brogan Taylor, who is  
19 repeating what his boss has told him to other people and  
20 says, "I thought it was held in trust." That doesn't  
21 make it held in trust. That's just what he was told.

22                   And he testified to you that's what he  
23 thought. He thought it because he was lied to by  
24 Mr. Kubbernus, and he found out after the bankruptcy  
25 hearing that it wasn't true. So they can't come in here

1 and say that Brogan Taylor proves that it was in trust.  
2 It doesn't. All it proves is that Brogan Taylor was lied  
3 to by the same guy that lied to everybody else.

4           So this trust thing is just not true. And  
5 on top of everything else -- the last -- and I've been  
6 meaning to apologize for this. I made you all suffer  
7 through two hours of a video deposition of Mr. Kubbernus.  
8 It was equally miserable taking that deposition. The  
9 reason why I did that was because I know who  
10 Mr. Kubbernus is and there was no telling what story he  
11 would tell and you needed to see the Robert Kubbernus  
12 that showed up that day and you needed to hear the story  
13 he told that day. And that story was not that there was  
14 anything held in trust.

15           In fact, he denied it. He said that the  
16 trust agreement was untrue. He said that those  
17 particular documents that Mr. Cicack put up there -- I  
18 asked him about those specific documents, and he said  
19 they were wrong. And I talked to him about it -- you  
20 know, I guess I was long-winded -- in the cross the other  
21 day. I went back over it with him, "You said this  
22 document was wrong. You said this was a mistake." He  
23 had to admit, "Yeah, that's what I said."

24           So, you know, the whole trust thing --  
25 what evidence is there that it's held in trust? What

1 evidence from back in 2006 -- do you have a signed trust  
2 agreement? Do you have anything that my clients agreed  
3 that it would be held in trust? Do you have anything  
4 that discloses to the world that it would be held in  
5 trust? Not a one of those documents from 2007 says it's  
6 held in trust. Right? All they say is that ClearSky is  
7 going to get the shares. Not a one says the word  
8 "trust."

9                   The closest you come is "nominee," not  
10 "trustee." But even we know even "nominee" is false.

11                   Mr. Kubbernus thinks that if he tells five  
12 different lies, he can pick which one works best for him  
13 today.

14                   That is not the way it works. The only  
15 evidence you have that this was held in trust is the word  
16 of Mr. Kubbernus, which you should not trust, if you want  
17 to use the word "trust." You can't trust anything that  
18 Mr. Kubbernus says.

19                   The other thing -- you know, on this whole  
20 deal about the foreclosure, that also never happened --  
21 right -- because he's saying, "Well, I took it back."  
22 How do you do that?

23                   Where -- let's look at Exhibit 190. Where  
24 is there any evidence that ClearSky owed Mr. Kubbernus or  
25 Balaton a penny? You've got nothing. Mr. Cicack said,

1 you know, at least four times in his closing, "Oh, they  
2 owed him so much money. They owed him so much money."  
3 Really? How much? Where's the evidence?

4                   He showed you this. This is a Brogan  
5 Taylor e-mail from the time period that I went over with  
6 him, and what this shows -- what this shows is -- and  
7 Brogan testified about this -- and it's also reflected  
8 here -- when they're going to adjust SkyPort's EBITDA.  
9 I'll explain that in a second. But the testimony you got  
10 on this was --

11                   Scroll up to so you can see --

12                   This is the bills.

13                   Go through a few pages of the bills here.

14                   The money that's being spent here is  
15 ClearSky's money, and it's being charged to SkyPort.

16 Right? This is not Balaton spending money and charging  
17 ClearSky. This is ClearSky spending money, and Balaton  
18 is charging SkyPort. This has absolutely nothing to do  
19 with any sort of foreclosure.

20                   Now, at the time he supposedly foreclosed,  
21 Brogan Taylor was the only guy working at Balaton.

22 Mr. Kubbernus was down here in Houston. Mr. Brogan

23 Taylor was running Balaton by himself up in Toronto.

24 There was no money to spend. Right? There was no money.

25 Right?

1           He said he ultimately quit because they  
2 couldn't make payroll in addition to finding out some  
3 stuff about what Mr. Kubbernus was doing that he  
4 disagreed with. But Brogan Taylor said, "Look, I was the  
5 guy who would have created the invoices and kept track of  
6 any money that ClearSky owed Balaton, and they didn't owe  
7 any money. And I was the guy who would have created the  
8 document if there was a foreclosure and, you know, made  
9 the changes in the books to reflect that we're now the  
10 owner. And I didn't do it."

11           It just didn't happen. Where is a piece  
12 of paper that says he foreclosed?

13           I'll tell you one more thing. The very  
14 first exhibit in our book is this limited partnership  
15 agreement. You can read it until you're blue in the  
16 face, and you will not find the word "foreclosure."  
17 There is absolutely nothing in that agreement that allows  
18 ClearSky Management Limited -- ClearSky Management, Inc.,  
19 which is the general partner to foreclose.

20           Balaton -- and there's absolutely nothing  
21 in there that allows Balaton to foreclose. He says, "I  
22 foreclosed under the limited partnership agreement."  
23 Which provision? They can't tell you. There isn't one.  
24 Okay? It just didn't happen. It is a lie. It is a lie  
25 they are telling because they figured that is the least

1 harmful lie. That is their best chance of getting out of  
2 here in the least trouble, is if you believe that. You  
3 can't believe it.

4                   Now, CenturyTel. You know, the defense in  
5 this case on behalf of CenturyTel is really quite strong.  
6 It is just a defense to a claim that nobody's bringing.  
7 They're acting like I'm suing them for not obeying the  
8 contract because they sold it to the wrong person. They  
9 keep telling you "They have to show you that we knowingly  
10 sold to the wrong person."

11                   Okay. First of all -- and Mr. Manley  
12 said, you know, that's what the charge asks, did we  
13 knowingly sell it to the wrong person.

14                   I read every one of these questions to  
15 you. There is not a single question in here that asks if  
16 they knowingly sold to the wrong person. In fact, the  
17 judge's instructions don't tell you you have to find they  
18 knowingly did anything. They have to be generally aware  
19 that something improper is going on for aiding and  
20 abetting.

21                   Mr. Manley got up here and said, "Look,  
22 it's the first question. We didn't lie to anybody. We  
23 didn't commit securities fraud." True. They didn't.  
24 They did not commit securities fraud. They're not being  
25 sued for securities fraud. Their name is not on this

1 question.

2                   So what? Okay. They're being sued for  
3 helping. Okay?

4                   Now, what Mr. Manley tells you is this.  
5 "The contract says you're going to sell to Balaton."  
6 Okay? "Nobody ever told us to add anyone else to the  
7 contract." True. "If we had been told to add people to  
8 the contract, there are all these things that would have  
9 needed to be done that weren't done." True. "So,  
10 therefore, we didn't do anything wrong when we didn't add  
11 them to the contract." That's the defense. I think I've  
12 fairly stated it. False. Okay?

13                   This is our case. This is the factual  
14 basis for our case. You saw me create this. You  
15 probably can't read it, but you saw me create it; and  
16 when I created it, I created it with Clarence Marshall  
17 and he agreed with each and every point.

18                   Why do you think no one asked them to add  
19 ClearSky to the contract? Why do you think they're  
20 sitting here saying "We obeyed the contract"? Because  
21 they agreed in March of 2006 with Mr. Kubbernus to change  
22 the deal.

23                   We're not -- you know, they're sitting  
24 here acting like, "Hey, we didn't know we were supposed  
25 to add somebody to the contract." No, no, no, no, no.

1 They knew that they weren't going to add anyone to the  
2 contract. They knew when they set up the deal, the plan  
3 was to add investors so that the investors would be  
4 co-owners. The documents are written that way. You've  
5 got two final agreements.

6           Mr. Manley keeps saying, "Hey, you know,  
7 that term sheet -- that doesn't count. That was  
8 superseded." Yes, it was; but it does count. It tells  
9 you what the deal was, what the intent was, what the  
10 parties agreed to; and then they put it in this  
11 agreement.

12           And the part of this agreement that has --  
13 you know, this agreement says "When you syndicate this  
14 deal, here's how it's going to be done." Right? The  
15 parties agreed to a specific structure. The specific  
16 structure is: Your limited partners are going to be  
17 added to this agreement. That's how it is to be done.  
18 Okay?

19           This agreement was to be with a fund the  
20 whole time. Mr. Manley can't --

21           Whoops.

22           Mr. Manley can't very well say that they  
23 just did the debenture purchase agreement as it was  
24 written because he didn't. They changed it. They had to  
25 change it to take the investors out.

1           So we're not saying that they goofed when  
2 they didn't add somebody to the contract that they should  
3 have added to the contract. We're saying they agreed  
4 with Mr. Kubbernus, in order to get this past the FCC,  
5 that no one would be added to the contract.

6           Nobody asked them to. Nobody expected  
7 them to. Right? They didn't sit -- they didn't keep  
8 asking questions. He acts like, "Oh, we asked all the  
9 time. Who do we add to the contract? Who's supposed" --  
10 they didn't ask those questions. You don't see any  
11 e-mails in this case where they're saying, "Oh, by the  
12 way, who is supposed to receive ownership of the stock?"

13           They didn't ask that question because they  
14 already knew the answer, because that decision was made  
15 in March. They changed how they were going to do the  
16 deal. They said in March, you know --

17           The lawyer -- Mr. Najder said, "Yeah, we  
18 knew March" -- or "February they weren't going to do  
19 Watershed. We're going to have -- housekeeping. We're  
20 going to change the deal." They knew it from the get-go.  
21 Right?

22           They created it one way. That wasn't  
23 going to work. They changed it. They changed the deal  
24 to just Balaton. Right? And the deal closes, and it's  
25 just Balaton.

1           And the reason is because that's exactly  
2 what they intended to do. Okay? That is exactly what  
3 they intended to do.

4           The problem is: You've still got these  
5 investors out there. The money is coming from the  
6 investors. The investors are going to get nothing.

7           Now, they say, "Nobody told us ClearSky.  
8 Nobody told us ClearSky." Well, actually there is a  
9 document that says "ClearSky"; but that's really  
10 unimportant. They didn't need to know that it was named  
11 ClearSky. They just needed to know that there were  
12 investors, there were investors who were putting up  
13 \$7 million of their hard-earned money who would get  
14 nothing. Okay?

15           They were promised ownership. The  
16 agreement that -- this agreement -- this agreement  
17 structure that would have made them owners is taken out,  
18 made a part of their limited partnership agreement; it is  
19 sold to them on that basis. They are promised that they  
20 will be owners; and, therefore, they get the money.

21           And when CenturyTel -- CenturyTel, all you  
22 need is to know two things to know that something is  
23 rotten. They need to know two things. They need to know  
24 that the deal is being paid for with somebody else's  
25 money, and they need to know that somebody else is not

1 going to get anything. Right? They need to know that  
2 Balaton is going to use somebody else's money for its  
3 sole benefit and that the parties have agreed and set it  
4 in stone and disclosed it to the federal government.

5           These investors aren't going to get  
6 anything. That is sort of a rotten --

7           How can that be? Right? You just have to  
8 ask, "How can that be?" How can that be? The right  
9 question to ask at that point is "How can that be?"

10           That doesn't make any sense. Yes, I know  
11 Balaton -- they keep saying, "The right question was  
12 who's supposed to get the stock?" No, it's not. They  
13 knew that. They didn't have to ask that question.

14           The right question is, "How can that be?"  
15 And they didn't ask that question.

16           Now, I'm not saying they committed fraud.  
17 I'm saying that they knew enough to figure out that a  
18 fraud was likely happening and they went ahead and did  
19 the deal anyway. If they hadn't agreed to change the  
20 deal and if they hadn't agreed to close the deal, the  
21 fraud wouldn't have succeeded, my clients wouldn't have  
22 lost their money. Right?

23           And so the legal position here -- the  
24 claim against CenturyTel for aiding a fraud is that they  
25 had a choice when they knew that someone was being

1 treated unfairly, improperly. You're taking someone's  
2 money, and they get nothing for it.

3           When they knew that or at least were  
4 generally aware of it, they had a choice. They could  
5 say, "We don't want to be a party to this unless we are  
6 real, real sure that it's legit." They could have done  
7 that. Okay? That would have been the right thing to do.  
8 But they instead chose to say, "I don't want to know.  
9 This is not my problem. This is your problem."

10           Another quote from Mr. Ewing: I asked him  
11 "Your position is that if Robert Kubbernus was out there  
12 doing what he actually did, telling people they were  
13 going to be owners, taking their money knowing that  
14 wasn't true, that was none of your concern? That was  
15 between him and his investors. Right?"

16           Answer: "Again, it's between him and his  
17 investors really."

18           I say: "Right. And your view of it is  
19 'that is not my problem.' Right?"

20           He says: "Yes."

21           Now, that's how they saw it. I mean,  
22 that's true. That is exactly how they saw it, "This is  
23 not my problem."

24           You know, you've heard the path to hell is  
25 paved with good intentions. I'm not saying they had bad

1 intentions. I'm not saying they thought they would  
2 profit. They had a business objective, which was to  
3 close this deal. They had made a decision -- they had  
4 invested a lot of time and money into doing this. They  
5 just wanted to get the deal done. They had made a  
6 decision.

7                   They may have thought that that decision  
8 was the best decision for the company. They may have  
9 thought that. They may have really thought that they  
10 were doing the right thing for the company. That doesn't  
11 excuse it. It is a choice they made to put Robert  
12 Kubbernus in a position where he can steal from another  
13 group. Okay? He can pay with stolen money.

14                   It just doesn't matter if you have every  
15 good intention in the world in doing a deal. If you take  
16 stolen money, you're still doing the wrong thing. Okay?  
17 And the standard here -- the standard is that they are  
18 generally aware that they are part of something -- I'm  
19 sorry -- that they are generally aware that their  
20 participation was part of an overall activity that was  
21 improper. That's all.

22                   Was there impropriety going on? Were they  
23 generally aware of that? Did they materially assist it?  
24 Yeah. And all they can do -- they can't argue with that.  
25 They don't argue with that. They try to defend against a

1 claim we're not bringing. Right? They try to say,  
2 "Well, no, no, no. You have to find more than generally  
3 aware of impropriety. You have to find that by gosh we  
4 knew what they were doing."

5           Remember I said I acknowledge a mere  
6 failure to investigate is not sufficient. If that's all  
7 there was in this case, we wouldn't be here. The judge  
8 would have already kicked us out.

9           "Mere failure" means nothing else. Right?  
10 But he's trying to twist this into saying, "If you don't  
11 investigate, then that saves you." No, no, no, no, no,  
12 no. If you're generally aware and then you don't  
13 investigate, you are materially assisting a fraud.  
14 You're materially aiding a fraud. And that answer, the  
15 answer to that question against CenturyTel and Mr. Ewing  
16 and Mr. Marshall is "Yes." It cannot be anything other  
17 than "Yes."

18           All right. The statement -- let's talk  
19 about Mr. Pouliot for a minute. Mr. Pouliot did not  
20 admit that he knew what was going on. He said just the  
21 opposite. And he had 3.8 million reasons, okay, to be  
22 paying attention and to be asking the questions.

23           He read these agreements. He knew how the  
24 deal was set up. Balaton -- I mean, he was told, "We are  
25 going to amend the FCC application. You are going to own

1 this stock." Right? And that was a lie.

2           He didn't have -- they named him on the  
3 board of the limited partnership. It was an honor. He  
4 never went to a meeting. Right? You read it. He never  
5 went to a meeting. He never signed a document. He was  
6 never given any information.

7           Those 2006 financial statements that he  
8 wouldn't approve because he didn't know what was in them,  
9 he didn't get those until the end of 2008. Right? So he  
10 didn't do anything wrong. He didn't have any contact  
11 with the other investors and he did nothing wrong.

12           They're suing him -- they are suing him  
13 and they are not suing Kubbernus. That's the part that I  
14 can't understand. If you're going to sue everybody,  
15 fine. But you want to know whose team CenturyTel is on.  
16 Think about it.

17           If they were as innocent as they pretend  
18 to be, if they had nothing to hide, what would any normal  
19 person or organization do when faced with a case like  
20 this?

21           I'm sorry, sir. I'm -- I'm sorry,  
22 CenturyTel. I have to tell you, you just accepted \$7  
23 million of stolen money. Some people lost \$7 million  
24 because you closed this deal.

25           A truly innocent person would say, "Oh, my

1 gosh. I mean, that's horrible. I of course had nothing  
2 to do with it. I'm really sorry. But, you know,  
3 Kubbernus lied to me. We're victims of the fraud, too.  
4 If you were defrauded, we want to help you go after  
5 Kubbernus to get your money."

6           They would at least sue Kubbernus if  
7 they're going to sue Mr. Pouliot. But they have been  
8 cheek and jowl with this guy for five years and  
9 throughout this trial defending against us as a team.

10           And when I asked Mr. Ewing, "Do you now  
11 admit that there was a fraud that even occurred," he  
12 wouldn't do it. He won't admit there's a fraud because  
13 he's afraid if he admits there's a fraud, then it's just  
14 going to be so obvious that they assisted. It is  
15 obvious. They did assist him.

16           Thank you very much for your attention and  
17 time today. Go start the real trial.

18           THE COURT: Ladies and gentlemen, that  
19 concludes the presentation of the lawyers. The case is  
20 now going to be placed in your hands. Please remember  
21 the instructions that I have given you not to discuss the  
22 case or deliberate unless all of you are present in the  
23 room together.

24           The scheduling of your deliberations is in  
25 your hands, which is to say if you choose to call it a